



Practice Alert¹

***BHAKTIBHAI-PATEL v. GARLAND* AND JUDICIAL REVIEW OF REASONABLE FEAR AND WITHHOLDING-ONLY PROCEEDINGS**

May 2, 2022

On April 27, 2022, a panel of the Second Circuit issued a decision that, if permitted to stand, cuts off judicial review for individuals with fear-based claims who are subject to final removal orders under the reinstatement statute, 8 U.S.C. § 1231(a)(5). In *Bhaktibhai-Patel v. Garland*, No. 19-2565, __ F.4th __, 2022 WL 1230819 (2d Cir. 2022), the court dismissed a petition seeking review of a negative reasonable fear determination for lack of jurisdiction, finding the petitioner’s claims were not part of a final order and that the petition was not timely filed.²

This alert addresses the court’s decision, suggests strategies for litigating existing and future petitions for review in these cases, and encourages attorneys litigating these cases to contact the ACLU Immigrants’ Rights Project and/or National Immigration Litigation Alliance.

1. What did the Second Circuit hold in *Bhaktibhai-Patel*?

In *Bhaktibhai-Patel*, the Second Circuit considered a petition for review of an immigration judge (IJ) decision affirming an asylum officer’s negative reasonable fear determination, filed within 30 days of the IJ’s decision. Mr. Bhaktibhai-Patel had expressed a fear of persecution and torture after the Department of Homeland Security issued a reinstatement order against him.

Contrary to the positions of Mr. Bhaktibhai-Patel and the U.S. Department of Justice, the panel found that its jurisdiction was barred by 8 U.S.C. §§ 1252(b)(9) and 1252(b)(1). Section 1252(b)(9) provides that judicial review “arising from any action taken or proceedings brought to remove [a noncitizen] . . . shall be available only in judicial review of a *final* order under [8 U.S.C. § 1252].” *id.* at *6 (emphasis added). Section 1252(b)(1) states that a “petition for review must be filed not later than 30 days after the date of the final order of removal.”

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² Although the case does address administrative orders of removal under 8 U.S.C. § 1228(b), because the reasonable fear process is the same with respect to those orders and reinstatement orders, the court’s analysis with respect to jurisdiction also may apply to § 1228(b) orders. Out of an abundance of caution, this practice alert suggests that practitioners apply the same precautions in seeking review of § 1228(b) orders as reinstatement orders.

Relying on *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), the panel found that an IJ’s reasonable fear decision was *not* a final order of removal under Section 1252(b)(9). The panel reasoned that *Nasrallah* recognized a distinction between judicial review of final removal orders and judicial review of withholding and CAT protection claims. *Bhaktibhai-Patel*, 2022 WL 1230819, at *5-7.

The panel then held that a reinstatement order becomes final when the noncitizen declines to contest the notice of intent to reinstate (Form I-871) or, if the noncitizen contests the charges, when the supervisory immigration officer reviews and signs the reinstatement order. *Id.* at *7-9. Accordingly, because Mr. Bhaktibhai-Patel filed the petition more than 30 days after the reinstatement order became final, the panel held that Section 1252(b)(1) barred review. *Id.* at *9.

The panel further held that this complete lack of judicial review did not violate the Suspension Clause or the Due Process Clause. *Id.* at *10-13. The panel found that the Suspension Clause “plays no role in challenges to withholding-only decisions because” they do not involve “‘seek[ing] release’ from custody or ‘contest[ing] the lawfulness of . . . restraint.’” *Id.* at *11 (quoting *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969-70 (2020)). The panel found that “[i]llegal reentrants . . . lack colorable due process claims in the context of withholding-only decisions,” even as to mandatory forms of relief, because (1) they lack a protected liberty or property interest in either remaining in the United States or obtaining withholding of removal or protection under the Convention Against Torture, (2) regardless, the existing procedures without judicial review are sufficient, and, (3) at least as to Mr. Bhaktibhai-Patel, he had not effected an entry into the United States because he was “‘detained shortly after unlawful entry.’” *Id.* at *11-13 (quoting *Thuraissigiam*, 140 S. Ct. at 1982).

The decision contains two additional troubling suggestions. First, based on the panel’s reading of 8 U.S.C. § 1101(a)(47)(B), it questioned whether reinstatement orders are “final orders of removal” within the meaning of 8 U.S.C. § 1252 and, thus, whether they are properly subject to any judicial review. *Id.* at *9-10. Second, the panel suggested that reinstatement is a mandatory, not discretionary, action. *Id.* at *10. Importantly, because the propriety of circuit court jurisdiction and nature of reinstatement orders were not raised or briefed in the case, the panel’s discussions of these two issues are dicta and should not be treated as binding precedent, even within the Second Circuit.

2. How does *Bhaktibhai-Patel* impact cases in the Second Circuit?

An en banc rehearing petition in *Bhaktibhai-Patel* is planned. Going forward, however, attorneys in the Second Circuit are advised to file petitions for review of reinstatement orders and § 1228(b) orders within 30 days of the order itself. It is advisable to also file a second petition for review at the conclusion of reasonable fear or withholding-only proceedings.

In existing cases, if the court or opposing counsel raise *Bhaktibhai-Patel*, attorneys should make the court aware that an en banc rehearing petition is planned and move to hold petitions in abeyance pending a determination on that petition and/or any petition for writ of certiorari. If counsel must litigate the jurisdictional issue, counsel should argue that *Bhaktibhai-Patel* was wrongly decided. Please reach out to the ACLU and NILA for assistance with those arguments.

If a petition for review is dismissed based on *Bhaktibhai-Patel*, attorneys are encouraged to file a motion to extend the rehearing deadline pending the outcome of the en banc petition in *Bhaktibhai-Patel* and/or any petition for writ of certiorari. If the court declines to extend the rehearing deadline, counsel are advised to contact the ACLU and NILA and to seek en banc rehearing.

3. Does *Bhaktibhai-Patel* impact cases outside of the Second Circuit?

Unless *Bhaktibhai-Patel* is overturned en banc or by the Supreme Court, it is binding in within the Second Circuit, but it is *not* binding precedent in any other circuit.

However, the decision may have negative implications in other circuits, including in circuits that previously have held that a petition for review need not be filed until the conclusion of reasonable fear or withholding-only proceedings. Notably, the Second Circuit raised the issue of jurisdiction sua sponte and asserted that its holding was required by *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), and *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021). As such, it is possible that other courts may follow suit.

In an abundance of caution, practitioners in all circuits should file petitions for review of reinstatement or § 1228(b) orders within 30 days of the date of the order itself, rather than waiting until the conclusion of reasonable fear or withholding only proceedings.

4. What assistance is available in cases impacted by *Bhaktibhai-Patel*?

The jurisdictional issues addressed in *Bhaktibhai-Patel* are complex, and attorneys and pro se petitioners litigating these cases are encouraged to contact the ACLU and NILA to brainstorm strategies on a case-by-case basis.

In any petition for review of a reinstatement order or § 1228(b) administrative removal order, particularly those challenging the denial of reasonable fear, withholding, or CAT protection, please contact the authors of this practice advisory if:

- A court requests supplemental briefing on jurisdiction over such petitions;
- A court questions jurisdiction over such petitions at oral argument; or
- Opposing counsel raises the issue discussed in this practice alert in briefing.

The ACLU and NILA may be contacted by email at the following email addresses:

- ACLU Immigrants' Rights Project
Cody Wofsy: cwofsy@aclu.org
- National Immigration Litigation Alliance:
Trina Realmuto: trina@immigrationlitigation.org
Kristin Macleod-Ball: kristin@immigrationlitigation.org