National Immigration Litigation Alliance
Immigrant justice through the courts

Practice Advisory[1]

Wilkinson v. Garland: Implications for Judicial Review of Petitions for Review

March 28, 2024

Introduction

On March 19, 2024, the Supreme Court issued its opinion in *Wilkinson v. Garland*, No. 22-666, 601 U.S. __, 2024 WL 1160995 (2024). The decision holds that the application of the statutory hardship standard for cancellation of removal, found in 8 U.S.C. § 1229b(b)(1)(D), to established facts presents a mixed question of law and fact which a federal court of appeals has jurisdiction to review under 8 U.S.C. § 1252(a)(2)(D). The decision does not break new ground, but instead applies the Court's precedent in *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020), to review of the cancellation hardship standard. Significantly, however, the decision abrogates decisions from six courts of appeals.

This practice advisory explains the Court's holding and rationale, discusses its implications for petitions for review raising similar issues in other contexts, and suggests steps that a noncitizen whose case is impacted by the decision may take. Accompanying this advisory in Word format are a template motion to recall the mandate and a template motion to reissue.

1. What was the issue before the Court in *Wilkinson v. Garland*?

The issue before the Court in *Wilkinson* was whether a hardship determination by an immigration judge that has been adopted or affirmed by the Board of Immigration Appeals (BIA) is a mixed question of law and fact that is reviewable under 8 U.S.C. § 1252(a)(2)(D) by a court of appeals on petition for review. Specifically, the Court considered whether courts can review a determination that an undisputed set of facts does not rise to the "exceptional and extremely unusual" standard for hardship for cancellation of removal. 8 U.S.C. § 1229b(b)(1)(D).

In the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, Congress barred courts from reviewing "any judgment regarding the granting of relief under [the cancellation of removal statute]," as well as with

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respect to adjustment of status, voluntary departure, and waivers under 8 U.S.C. §§ 1182(h) and (i). *See* 8 U.S.C. § 1252(a)(2)(B)(i).[2]

Subsequently, however, in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302, Congress restored judicial review over "constitutional claims and questions of law" raised in a petition for review of a final order of removal, even where review is otherwise barred by jurisdiction-stripping provisions like § 1252(a)(2)(B)(i).[3]

Thus, the *Wilkinson* Court had to decide whether the application of the "exceptional and extremely unusual" hardship standard required to establish eligibility for cancellation to a given set of facts was a "question[] of law" covered by § 1252(a)(2)(D). *Wilkinson*, 2024 WL 1160995 at *3.

2. What was the holding of the Court?

The Court held that an immigration judge's or the BIA's application of the cancellation hardship standard to a given set of facts is a mixed question of law and fact, and thus, is reviewable as a "question[] of law" under 8 U.S.C. § 1252(a)(2)(D). Justice Jackson filed an opinion concurring

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[2] 8 U.S.C. § 1252(a)(2)(B) reads:

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

[3] 8 U.S.C. § 1252(a)(2)(D) reads:

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

in the judgement. Chief Justice Roberts filed a dissenting opinion. Justice Alito also filed a dissention opinion in which Chief Justice Roberts and Justice Thomas joined.

3. What prior precedent did the Court rely on?

In reaching its holding, the Court relied primarily on its prior decision in *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020), and secondarily on its prior decision in *Patel v. Garland*, 596 U.S. 328 (2022).

In *Guerrero-Lasprilla*, the Court held that 8 U.S.C. § 1252(a)(2)(D), which preserves review over "constitutional claims or questions of law" in petitions for review of a removal order, encompasses review of mixed questions of law and fact, including the application of law to "undisputed or established facts." 589 U.S. at 227. At issue in that case was the application of the "equitable tolling due diligence standard" to undisputed facts. *Id.* at 226. The *Wilkinson* Court repeatedly confirmed that the issue presented to it—the application of the "exceptional and extremely unusual hardship" to a given set of underlying facts (such as an agency finding that someone was credible, the seriousness of a medical condition, and financial support)—was no different than the issue presented in *Guerrero-Lasprilla* with respect to § 1252(a)(2)(D), and, therefore, *Guerrero-Lasprilla* compelled the Court's reviewability finding. *Wilkinson*, 2024 WL 1160995 at *3, 7, 9.

The Court also relied on *Patel v. Garland*, which set forth the "clear rule[]" that "questions of fact underlying denials of discretionary relief are unreviewable under both § 1252(a)(2)(B)(i) and § 1252(a)(2)(D)." *Wilkinson*, 2024 WL 1160995 at *6 (citing *Patel*, 596 U.S. at 343, 347). In *Patel*, an immigration judge found that Patel's claim of inadvertent mistake in checking a box for U.S. citizenship on a state driver's license application was not credible and, thus, concluded that he was statutorily ineligible for adjustment of status for having made a false claim to U.S. citizenship. 596 U.S. at 333. The Supreme Court concluded that the adjustment denial was predicated on the agency's factual findings regarding Patel's credibility and, as such, that § 1252(a)(2)(B)(i) precluded review of these factual findings. *Id.* at 331. Moreover, "because 'questions of fact' are indisputably not 'questions of law,'" *Wilkinson*, 2024 WL 1160995 at *7, the *Patel* Court found that § 1252(a)(2)(D) did not restore jurisdiction. 596 U.S. at 333.

The *Wilkinson* Court noted that, under *Patel*, a dispute over the agency's determinations as to underlying facts would be unreviewable. 2024 WL 1160995 at *8. In contrast to *Patel*, however, Mr. Wilkinson did not dispute the immigration judge's finding of facts; rather, he challenged only the application of the hardship standard to these facts, thus raising a mixed question of law and fact.

4. What was the Court's rationale in *Wilkinson*?

In finding that "the application of the exceptional and extremely unusual hardship standard to a given set of facts is reviewable as a question of law under § 1252(a)(2)(D)," the Supreme Court affirmed that "questions of law" include mixed question of law and fact. 2024 WL 1160995, at

*5. Thus, the Court's prior decision in *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020), dictated the result in this case. *Id.* at *9. *See supra* Question 5.

The Court began by finding that § 1252(a)(2)(D) covers mixed questions. *Id.* at 9. Noting that mixed questions "are not all alike," since some involve more factual work than others, the Court rejected the government's argument that "a primarily factual mixed question is a question of fact." *Id*. at *8 (quoting *U. S. Bank N. A. v. Village at Lakeridge, LLC*, 583 U.S. 387, 395-396 (2018)). The Court explained that even mixed questions that "require[] a court to immerse itself in facts does not transform the question into one of fact," and so mixed questions are reviewable under § 1252(a)(2)(D), although the Court noted in dicta that fact-heavy mixed questions could "suggest[] a more deferential standard of review." *Id*. at *8.

The Court also rejected the government's arguments that the statutory hardship standard is "not a legal standard at all," reasoning that there was no basis to treat it any differently from the court-created due diligence standard at issue in *Guerrero-Lasprilla*. *Id*. at 8. In addition, the Court rejected the government's argument that "a 1928 [Supreme Court] case . . . and the statutory history of the hardship requirement preclude review." *Id*. It found the 1928 case, which concerned tax relief involving "an exceptional hardship determination," had "no relevance" because, unlike 8 U.S.C. § 1229b(b), the tax statute did not require a detailed factual record or application of agency precedent and the Court did not evaluate it "against the background of a jurisdiction-restoring provision like § 1252(a)(2)(D)." *Id*. at *9. The Court also rejected the statutory history argument, since Congress eliminated express discretionary language used in the statute governing suspension of deportation (a precursor form of relief to cancellation) when crafting the cancellation statute. *Id*. To the contrary, the Court found that Congress' elimination of discretion-conferring language in the predecessor statute in fact favored reviewability. *Id*.

5. What is the impact of *Wilkinson* on immigration petitions for review?

First, *Wilkinson* ensures that individuals who are found statutorily ineligible for cancellation of removal based on a determination that the given facts of the case do not demonstrate sufficient hardship to meet the statutory standard can seek review via a petition for review. The courts of appeals will have jurisdiction to address the application of the hardship standard to given facts. Note, however, that *Wilkinson* did not address, nor did it preserve review over, a challenge to factual findings or an IJ or BIA decision to deny cancellation purely in the exercise of discretion. *See Wilkinson*, 2024 WL 1160995, at *6, *9 n.4.

More broadly, *Wilkinson* reaffirms the proposition, set forth in *Guerrero-Lasprilla*, that the courts of appeals have jurisdiction to review *all* mixed questions of law, regardless of whether the mixed question requires a primarily factual or primarily legal inquiry, even where some other provision, such as 8 U.S.C. § 1252(a)(2)(C) (conviction bar), 8 U.S.C. § 1252(a)(2)(B) (discretionary bar), or 8 U.S.C. § 1231(a)(5) (collateral review bar), limits or eliminates judicial review. Thus, practitioners may wish to argue that federal courts have jurisdiction to review application of other legal standards to established or undisputed facts, even where courts have previously found they lack jurisdiction.

For example, at least one circuit court characterized the question of whether an asylum applicant has demonstrated changed circumstances for purposes of avoiding the one-year bar to asylum under 8 U.S.C. § 1158(a)(3) as a mixed question and, therefore, reviewable under 8 U.S.C. § 1252(a)(2)(D). *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (finding jurisdiction). However, *Wilkinson* calls into question nine contrary circuit court decisions that found no jurisdiction to review this issue.[4] Other questions which arguably may be impacted by *Wilkinson* include:

- Whether an offense qualifies as a particularly serious crime pursuant to 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii);
- Whether, under undisputed facts, a noncitizen is entitled to reopening to apply for asylum based on changed country conditions under 8 U.S.C. § 1229a(c)(7)(C)(ii);
- Whether an organization and its activities fall within the scope and meaning of the statutory terrorism bar at 8 U.S.C. § 1182(a)(3)(B); or
- Whether, under established facts, a noncitizen satisfies the continuous presence requirement for purposes of cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1)(A).

Note that the above list is neither dispositive nor exhaustive.

Importantly, the Supreme Court did **not** determine what standard of review applies to review of mixed questions of law and fact under 8 U.S.C. § 1252(a)(2)(D). Generally, a federal court reviews issues of law de novo. *Highmark, Inc. v. Allcare Health Management System Inc.,* 572 U.S. 559, 563 (2014) ("Traditionally, decisions on questions of law are reviewable de novo") (internal quotation marks omitted)). To the extent that the Court in *Wilkinson* indicated that, at least in cases involving review of "primarily factual" mixed questions, "review is deferential," that statement was arguably dicta as the standard of review was not the issue presented to the Court. 2024 WL 1160995, at *8, 9. Moreover, the Court did not specify what "deferential" standard of review could apply. Further, because the standard of review issue is not raised nor resolved in *Wilkinson*, practitioners should argue that the *de novo* standard of review, which applies to questions of law more broadly, continues to apply to mixed questions of law and fact. Indeed, many mixed questions in immigration cases are "primarily legal," not "primarily factual."

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[4] *See Gomis v. Holder*, 571 F.3d 353, 358-59 (4th Cir. 2009); *Jarbough v. Att'y Gen.*, 483 F.3d 184, 188-90 (3d Cir. 2007); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 747-48 (6th Cir. 2006); *Chen v. U.S. Dep't of Just*., 434 F.3d 144, 154-55 (2d Cir. 2006); *Mehilli v. Gonzales*, 433 F.3d 86, 92-94 (1st Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Chacon-Botero v. U.S. Att'y Gen*., 427 F.3d 954, 956-57 (11th Cir. 2005) (per curiam); *Vasile v. Gonzales*, 417 F.3d 766, 768-69 (7th Cir. 2005).

6. What circuit court decisions does Wilkinson overturn?

The Supreme Court's decision overrules the prior holdings of six circuit courts. *Wilkinson*, 2024 WL 1160995, at *5 n.2. These courts ruled that they lacked jurisdiction to review hardship determinations under 8 U.S.C. § 1252(a)(2)(B)(i):

- *Hernandez-Morales v. Att'y Gen.*, 977 F.3d 247, 249 (3d Cir. 2020)
- *Castillo-Gutierrez v. Garland*, 43 F.4th 477, 481 (5th Cir. 2022) (per curiam)
- *Gonzalez-Rivas v. Garland*, 53 F.4th 1129, 1132 (8th Cir. 2022)
- *Aguilar-Osorio v. Garland*, 991 F.3d 997, 999 (9th Cir. 2021) (per curiam)
- *Galeano-Romero v. Barr*, 968 F.3d 1176, 1183-84 (10th Cir. 2020)
- *Flores-Alonso v. U.S. Att'y Gen.*, 36 F.4th 1095, 1100 (11th Cir. 2022) (per curiam).

In contrast, three circuit courts previously held, as affirmed by the Supreme Court in *Wilkinson*, that hardship issues are reviewable as mixed questions of law and fact. *See Wilkinson*, 2024 WL 1160995, at *5 n.2 (citing *Gonzalez Galvan v. Garland*, 6 F.4th 552, 555 (4th Cir. 2021); *Singh v. Rosen*, 984 F.3d 1142, 1150 (6th Cir. 2021); *Arreola-Ochoa v. Garland*, 34 F.4th 603, 610 (7th Cir. 2022)).

7. How can *Wilkinson* be raised in a case with a pending petition for review?

There are two possible ways to raise *Wilkinson* in a pending petition for review. If briefing is ongoing, the petitioner can address the decision in the opening or reply brief. If briefing or argument is completed but a decision has not yet issued, the petitioner can file a letter of no more than 350 words with the circuit clerk pursuant to Federal Rule of Appellate Procedure 28(j), citing the opinion as supplemental authority.

8. How can *Wilkinson* be raised in case in which a court of appeals already dismissed a petition for review or where the noncitizen did not file a petition for review?

If a court of appeals already has dismissed a petition for review based on lack of jurisdiction to review the BIA's determination that the petitioner was not statutorily eligible for cancellation due to the failure to demonstrate "exceptional and extremely unusual hardship" to a qualifying relative, it may be possible to bring the petition for review back before the court.

If the court of appeals denied a petition for review on this basis but the mandate has not yet issued, the petitioner may file a motion for panel and/or en banc rehearing in light of *Wilkinson*, arguing that the panel's decision conflicts with new Supreme Court authority. *See* Fed. R. App. P. 40, 35; *see also* Fed. R. App. P. 41.

If the court of appeals has denied a petition for review on this basis and time to seek certiorari has not yet expired, the petitioner may wish to file a petition for a writ of certiorari with the Supreme Court asking that the Court grant the petition, vacate the decision, and remand the case to the court of appeals to review the agency's hardship determination. *See* Sup. Ct. R. 16.1

If the court of appeals denied a petition for review on this basis and has issued the mandate, the petitioner may file a motion to recall the mandate in light of *Wilkinson*, arguing that that the panel's decision conflicts with new Supreme Court authority and that the petitioner's claims were entitled to review under 8 U.S.C. § 1252(a)(2)(D). *See* Fed. R. App. P. 27, 41. The motion should indicate that the petitioner is filing as soon as practicable after the *Wilkinson* decision. *See* accompanying **template motion to recall the mandate** posted on the practice advisory page of NILA's website.

Finally, in addition or if the noncitizen did not file a petition for review, a noncitizen can ask the BIA to reissue its decision finding that the noncitizen failed to establish hardship. The motion to reissue would simply ask the agency to reissue the decision with a new date to allow for judicial review. It could be filed as a compound motion if there is another viable basis for reopening or reconsideration. See accompanying **template motion to reissue** posted on the practice advisory page of NILA's website.