

Motions to reopen asylum cases reviewable by appellate court

By Max Nuyen

In *Kucana v. Holder*. (January 20, 2010), the U.S. Supreme Court settled a split among the appellate circuits as to whether a motion to reopen an asylum petition is reviewable by an appellate court. The Court determined because there is no statutory basis which bars appellate courts from reviewing motions to reopen asylum petitions, the courts may fulfill their traditional functions of reviewing such claims.

The case arose because Agron Kucana had filed an asylum claim that had been denied because of his failure to attend the hearing. Several years later, he filed a motion to reopen his asylum claim on account of the change in conditions in his home country. Kucana claimed he was entitled to a new hearing because the conditions in his country had gotten worse and he had new evidence to support his asylum claim.

The immigration judge denied his motion. The Board of Immigration Appeals also denied review. Kucana appealed to the 7th Circuit Court of Appeals, which found it had been stripped of jurisdiction for review of asylum cases by the enactment of §1252(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) which amended the Immigration and Nationality Act.

The IIRIRA contained statutory language which prohibited appellate courts from reviewing certain immigration decisions. According to the 7th Circuit decision, the regulations relating to the IIRIRA further restricted the reviewability of asylum cases. For this reason, the 7th Circuit ruled it was prohibited from reviewing Kucana's motion to reopen his asylum petition.

The legal question presented was whether the jurisdiction stripping provisions contained in the IIRIRA only related to the enumerated factors present in the statute itself, or do they also relate to the regulations which interpreted the statutes? On this question, the Supreme Court ruled that unless a statute specifically states a type of case is non-reviewable, it is reviewable by an appellate court. The promulgation of regulations which purported to strip a court of its review powers has no affect.

Appellate courts have traditionally reviewed motions to reopen. Nothing in the IIRIRA changes this. Congress, when it enacted the IIRIRA, did not specifically address whether or not appellate courts may review motions to reopen on asylum matters. For this reason, a regulation which serves to strip an appellate court of such review powers is not consistent with the Congressional intent of the statute.

The Supreme Court remanded the case to the 7th Circuit to determine whether Kucana's motion to reopen should be granted.