
Circuit Sees Exception to Immigration Review Bar

BY MARK HAMBLETT

RESTRICTIONS on judicial review of an immigration officer's decision to grant lawful permanent status to an alien do not preclude review of whether a decision was made at all, the U.S. Court of Appeals for the Second Circuit has ruled.

Saying a lower court had the authority to determine whether, in fact, an officer granted the petition for permanent status to Dominican Republic native Felipa Sharkey, the court said there was an exception to a jurisdiction-stripping provision imposed by Congress.

In *Sharkey v. Quarantillo*, 06-1397-cv. Judges Roger Miner, Pierre Leval and Rosemary Pooler reinstated Ms. Sharkey's case, raising the possibility she might remain in the United States. Judge Pooler wrote for the court.

Ms. Sharkey's case reached the courts after an immigration officer made what was later termed an error by immigration officials.

Ms. Sharkey entered the United States without inspection in 1994 and, the following year, married U.S.

citizen Anthony Sharkey, who then filed on her behalf an Immigration and Naturalization form I-130 to classify her as an "immediate relative."

Ms. Sharkey also filed a form I-485 to adjust her immigration status to that of lawful permanent resident.

After a 2001 interview in the New York District Office of U.S. Citizenship and Immigration Services to determine whether their marriage was genuine, a district adjudications officer decided to adjust her status and placed a temporary stamp on her passport which read "Processed for

**The decision
will be published
Wednesday.**

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Exception Permits Review

I-551. Temporary Evidence of Lawful Admission for Permanent Residence Valid Until Nov 29 2002. Employment Authorized."

However, one year later, on Nov. 29, 2002, when Ms. Sharkey went to renew the stamp, another adjudications officer crossed out the I-551 stamp and wrote "cancelled with prejudice" above the seal.

When Ms. Sharkey did not receive her alien registration card or other evidence of her lawful permanent resident status, she sued in the Southern District, claiming that the agency failed to follow required statutory and regulatory procedures in both in rescinding her status and failing to provide her with proof of her status.

She offered two bases for jurisdiction in the case—the Federal Question Statute, 28 U.S.C. §1331, based on claims under the Administrative Procedure Act, and the Mandamus Statute, 28 U.S.C. §1361.

Judge Paul Crotty dismissed the case, issuing three rulings in the process.

First, he said, the mandamus statute only applies where a government official is required to perform an act, and in this case, the denial of lawful permanent resident status was a discretionary act.

Second, the Administrative Procedure Act, 28 U.S.C. §701(a)(2), does not apply "to the extent

that...agency action is committed to agency discretion by law."

Third, §1252(a)(2)(B)(D) of Title 8, strips courts of jurisdiction to review "any judgment regarding the granting of relief under §1255, which governs applications for adjustment of status."

Ms. Sharkey appealed to the Second Circuit, where the New York District Director, Andrea Quarantillo, urged in court papers that "the court should reject Sharkey's attempt to spin a grant of lawfully permanent residence status out of what was, at most, an INS officer's mistake."

The service's argument was that Ms. Sharkey could not have been given lawful status without action on her husband's petition.

The Second Circuit reversed.

'Non-discretionary Duty'

Judge Pooler first tackled the Administrative Procedure Act, §706(2) of which allows a reviewing court to "hold unlawful and set aside agency action, findings and conclusions found to be...without observance of procedure as required by law" and §706(1) of which requires a court to "compel agency action unlawfully withheld."

Judge Pooler pointed out that the U.S. Supreme Court has ruled that

congressional restrictions on judicial review of agency actions must be interpreted narrowly in the light of a strong presumption in favor of judicial review under the act.

While the jurisdiction-stripping provision of §1252(a)(2)(B)(D), bars court review of the grant of lawful permanent resident status, Judge Pooler said there is nothing that prevents a court from determining whether a decision was made.

The agency, she said, "has a non-discretionary duty to commence rescission procedures prior to rescinding" lawful permanent residence status. Similarly, she said, the agency has a non-discretionary duty to provide proof of status.

The circuit also rejected the government's argument the court could not review the case because there had been no final agency action.

And when the government challenged the ripeness of the issue, Judge Pooler said there were two reasons why the issue was ripe for review: first, it "presents legal questions and there is a dispute between the parties," and second, "Sharkey would suffer significant hardship if no court considered the issue."

The circuit then remanded the case to the district court for further proceedings.

David Kwang Soo Kim of Bretz & Coven represented Ms. Sharkey.

Mr. Kim said this was a case where the agency was "completely out of line."

"Once they grant lawful permanent residence and they want to take it away for whatever reason, except for fraud, they have five years to do so," Mr. Kim said. "But they never provided any explanation or gave a reason why the officer crossed it out, and they were required to, including providing notice of intent to rescind to the alien."

Special Assistant U.S. Attorney F. James LoPrest, Jr. and Assistant U.S. Attorney David S. Jones represented the government.

Cheyrl R. David, a Manhattan practitioner, is the American Immigration Lawyers Association's liaison to U.S. Immigration and Customs Enforcement, and is past president of the association's New York chapter.

"It's a great decision in terms of putting the service in its place. It says that they have to follow the law and, if they don't think something was properly done, they just can't take it away," said Ms. David, who is not involved in the case. "While holding that the service has to conduct itself properly, the decision also reemphasizes that they don't have the authority to review cases that were denied by discretion."

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