

## CHAPTER ONE

### INITIAL CONSIDERATIONS—THE CLAIMS TO BE PRESENTED

At every level of the immigration adjudicatory process, factual and legal errors are made. After 9/11, the immigration agency (then, the Immigration and Naturalization Service, or INS) fostered a “Culture of No.” Adjudicators were not disciplined for incorrectly denying or withholding a benefit, but they lost jobs for granting a benefit in error. There were and continue to be inordinate delays in adjudication. In some cases, there are ex parte administrative instructions to deny a case. In the immigration court, a supposedly neutral forum, ex parte pressure on immigration judges (IJs) has created a conflict of interest that is “insidious and pervasive.”<sup>1</sup> As one former member of the immigration review board, the Board of Immigration Appeals (BIA), put it: “Nobody ever got rewarded for discovering an egregious asylum denial and preventing someone getting killed. What people were praised for was deporting people, essentially.”<sup>2</sup>

Perhaps the most visible sign of the crisis in the immigration system is the number of appeals filed in the federal courts. As it becomes more and more evident that immigration agencies are failing to provide fair and competent adjudication, more and more often individuals feel that they have to resort to the federal courts in order to vindicate their rights. For example, in the Ninth Circuit Court of Appeals, which handles approximately one-half of all immigration appeals nationwide, the number of immigration cases has risen from approximately 900 in 2001, to 6,000 in 2004.<sup>3</sup> Immigration cases now constitute approximately 45 percent of the court’s docket.<sup>4</sup> Nationwide, over the past five years, the number of immigration cases pending before the federal courts has increased from 3 percent to 18 percent of all federal appeals.<sup>5</sup>

Federal courts have recognized that at least part of the problem lies with the immigration bureaucracy. The former INS’s functions have now been placed under the authority of the Department of Homeland Security (DHS); specifically, immigration benefits are handled by U.S. Citizenship and Immigration Services (USCIS); border security is controlled by U.S. Customs and Border Protection (CBP); and immigration enforcement (including immigration prosecution) is governed by U.S. Immigration and Customs Enforcement (ICE). These agencies have not been able to keep up

---

<sup>1</sup> S. Legomsky, “Deportation and the War on Independence,” 91 *Cornell Law Review* 369, 373 (Jan. 2006).

<sup>2</sup> “Judges Blast Immigration Rulings,” *Nat’l L.J.* (Oct. 24, 2005) (statement of Lory Rosenberg).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Recent Case, “Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts,” 119 *Harvard L. Rev.* 2596 (2006).

with the crush of cases they must adjudicate, and they have not been able to adjudicate cases in a timely and fair manner where a “Culture of No” has been fostered. The Seventh Circuit has noted that immigration agencies “may be overworked because of additional duties placed on them in the aftermath of the 9/11 terrorist attacks on the United States.”<sup>6</sup> But that does not justify “pervasive analytical error[s],” nor should courts “be forgiving of errors precipitated by the agency’s financial inability to hire the number of competent adjudicative officers needed to handle the workload without constantly committing errors.”<sup>7</sup>

One federal circuit court has stated that “the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”<sup>8</sup> There is “[a] disturbing pattern of [immigration judge] misconduct.”<sup>9</sup> In one case, the court criticized the IJ’s analysis as “so inadequate as to raise questions of adjudicative competence.”<sup>10</sup> Other IJs have been criticized for “bullying” applicants and for being “hostile and at times ... extraordinarily abusive,”<sup>11</sup> and for rendering decisions that are “incomprehensible.”<sup>12</sup> The BIA has not escaped censure: “The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.”<sup>13</sup> Courts have been “skeptical that Congress ... meant to leave all oversight of [immigration cases] in the hands of ... bungling bureaucrats.”<sup>14</sup> Thus, in handling an immigration case, one cannot assume that the agency will get the facts right and interpret and apply the law correctly. More and more often, in order to obtain a fair and legally correct decision, a practitioner must resort to the federal courts.

Before filing a lawsuit in federal court, counsel must consider the claims to be presented. The claims presented will determine when and where the lawsuit can be filed. Consider, for example, the following case:

John Doe came to the United States as a refugee from Vietnam in December 1982, when he was two years old. He has lived in the United States since that time. He obtained permanent resident status in 1984. In April 1998, when he was 18 years old, he attempted to pass a forged check at a bank. He was arrested at the bank and he later pleaded guilty to criminal impersonation. He was not required to serve any time in jail, but was sentenced to two years of probation. Mr. Doe has no other offenses on his record. Ever since the offense,

---

<sup>6</sup> *Muhur v. Ashcroft*, 355 F.3d 958, 961 (7th Cir. 2004).

<sup>7</sup> *Id.*

<sup>8</sup> *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

<sup>9</sup> *Wang v. Attorney General*, 423 F.3d 260, 268 (3d Cir. 2005).

<sup>10</sup> *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004).

<sup>11</sup> *Fiadjoe v. Attorney General*, 411 F.3d 135, 144, 154 (3d Cir. 2005).

<sup>12</sup> *Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005).

<sup>13</sup> *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000).

<sup>14</sup> *Fornalik v. Perryman*, 223 F.3d 523, 532 (7th Cir. 2000).

he has been employed as a manager at a local Vietnamese restaurant. He lives with and provides financial support to his elderly U.S. citizen parents.

In November 2005, Mr. Doe went to Vietnam for a two-week vacation. Upon his return, he was questioned by DHS officials at the Los Angeles International Airport. Because of his prior criminal conviction, DHS officials confiscated his permanent resident card and told him that he would have to report to his local immigration office for a deferred inspection. On March 31, 2006, when he reported to the local immigration office as required, he was taken into custody by ICE and he has been held in detention without bond since that time. The ICE officers say that they never set bond for “arriving aliens.”

At the initial master calendar hearing on April 10, 2006, the IJ refused to consider bond, claiming that she has no jurisdiction under 8 CFR §1003.19(h) because Mr. Doe is an “arriving alien.” She also stated that Mr. Doe is inadmissible under §212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA)<sup>15</sup> for having been convicted of a crime involving moral turpitude. Mr. Doe then stated that he wanted to apply for a waiver under INA §212(h), which allows for a waiver provided that Mr. Doe can show that his U.S. citizen parents will suffer “extreme hardship” if he is removed from the United States.

The individual hearing was held on July 10, 2006. At the hearing, Mr. Doe explained the hardships that his parents would suffer. The IJ refused to allow Mr. Doe’s mother to testify. In her decision, the IJ summarized the relevant testimony that had been presented; evaluated the hardships that had been presented; stated that Mr. Doe had not established that his parents would suffer “exceptional and extremely unusual hardship”; and denied the §212(h) waiver application. Mr. Doe filed an appeal to the BIA, and he continues to be held in custody.

In considering what claims to present in a lawsuit, it is useful to keep in mind as a preliminary matter that a government agency or official has no authority to take any action against another person (even a noncitizen seeking to enter the United States) unless authorized to do so by Congress. Where Congress has granted authority to a government agency, the agency is authorized to take action only within the limits of the authority that has been delegated. Any action beyond the scope of what has been authorized is *ultra vires*. In some cases, Congress creates benefits that *must* be granted to qualifying individuals, so long as the individuals meet the minimum qualifications. In other cases, Congress creates discretionary benefits, giving individuals an opportunity to apply for a benefit as long as they meet certain minimum qualifications and allowing the agency discretionary authority to decide whether to grant the benefit. Officials are not authorized to make decisions in an arbitrary or unfair manner.

---

<sup>15</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (*codified as amended at 8 USC §§1101 et seq.*) (INA).

A claim presented in a lawsuit against the government is an allegation that the defendant has violated a particular statute, regulation, or constitutional provision, for instance by acting beyond the scope of what is authorized by the statute (*e.g.*, taking a person into custody or attempting to remove a person from the United States when the statute does not authorize the agency to do so), or by failing to discharge a duty (*e.g.*, failing to grant an immigration benefit to which a person is entitled under the statute). In any given case, there may be several different claims that can be presented. In the example above, Mr. Doe has several claims, including but not limited to the following:

- DHS has violated due process by holding Mr. Doe in detention without bond and without the opportunity for review by a neutral adjudicator;
- Mr. Doe is not an arriving alien under INA §101(a)(13); thus, the IJ does not lack jurisdiction to consider bond under 8 CFR §1003.19(h) and she must consider the merits of the bond request;
- Mr. Doe is not inadmissible under INA §212(a)(2)(A)(i)(I) because he has not been convicted of a crime involving moral turpitude;
- The IJ violated due process by refusing to allow Mr. Doe's mother to testify at the individual hearing;
- The IJ violated INA §212(h) by applying an incorrect legal standard in denying the application for the waiver;
- The IJ abused discretion by failing to correctly balance the hardship factors.

A discussion of the substantive constitutional, statutory, and regulatory provisions governing immigration cases is largely beyond the scope of this book. Nevertheless, before filing a lawsuit, one must be able to articulate the substantive legal claims that form the basis of the lawsuit. In order to successfully present the claims to the court, one needs to know how to get into court in the first place—when and where to assert the claims. Any given case may involve several different claims that the government has acted improperly, and these different claims may have to be presented to different federal courts at different times. In the above case, Mr. Doe may seek judicial review of both the order of removal and also the decision not to set bond.

Typically (although not always), a claim that the order of removal is unlawful is presented in a petition for review to the court of appeals after exhausting an administrative appeal to the BIA. Thus, Mr. Doe should wait until the BIA resolves the appeal of the removal order; if that decision is adverse, he can then appeal to the appropriate court of appeals. On the other hand, a claim that a person is being held in custody unlawfully is presented in a petition for habeas corpus filed with the federal district court. Typically (although not always), the petitioner is not required to exhaust an appeal to the BIA concerning the detention issue. Thus, Mr. Doe may be able to file a habeas lawsuit in district court immediately seeking his release from detention.

The questions of when and where a lawsuit should be filed have become extremely complex over the past 10 years, since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).<sup>16</sup> The question of which court, if any, has jurisdiction depends on the type of case being litigated, the specific claims being presented, and, in some cases, on the circuit in which the petitioner happens to “reside.” As a starting point, counsel should be familiar with the general constitutional and statutory framework for judicial review.

At the most fundamental level, the U.S. Constitution embodies the principle of the rule of law. Administrative agencies that apply the law to individuals must follow the law as enacted by Congress; an independent judicial branch—insulated from political pressures—must be available to review the administrative action to ensure that the relevant laws (the Constitution, the statute, and regulations) are followed. This principle of the rule of law is embodied in Clause 2 of Article I, Section 9: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Habeas review tests the lawfulness of the government action—*i.e.*, whether the restriction of the person’s liberty is consistent with the Constitution and the governing statute and regulations. If the agency is acting beyond the scope of what has been authorized by Congress or in a manner that is inconsistent with the governing statutory and regulatory provisions, then the courts will issue the writ and require the agency to release the petitioner from custody.

The Constitution provides further in Article III, Sections 1 and 2, that the judicial power “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . .,” and that the judicial power “shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Thus, the rules for when and where to file suit depend on what is “ordained and established” by Congress—*i.e.*, the statutory provisions granting, restricting, or eliminating the jurisdiction of the “inferior” federal courts.

The following chapters are divided into sections that correspond to the different types of immigration cases:

- Chapter 4 covers challenges to orders of removal;
- Chapter 5 covers challenges to “release from custody” decisions;
- Chapter 6 covers review of other agency decisions; and
- Chapter 7 covers review of legalization and Legal Immigration Family Equity Act of 2000 (LIFE Act)<sup>17</sup> decisions; naturalization denials; and agency delays (mandamus cases).

---

<sup>16</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

<sup>17</sup> The Legal Immigration and Family Equity Act of 2000, Pub. L. No. 106-553, 114 Stat. 2672 (LIFE Act), as amended by the LIFE Act Amendments, Pub. L. No. 106-554; 114 Stat. 2763.

There are different jurisdictional rules for each of these types of cases.

When to file a lawsuit (Chapter 2) is governed by the general principle that administrative remedies should be exhausted before resorting to the federal courts. Typically (although not always), one must first wait for a final administrative decision to be made. After all administrative appeals have been exhausted, if the decision is adverse, the person can seek judicial review in the federal courts. What administrative remedies are available, and whether there are exceptions to the exhaustion requirement, depends on the type of case being litigated.

Where to file a lawsuit and whether any court has subject-matter jurisdiction to hear the lawsuit (Chapters 3 to 7) depend on the jurisdictional rules that Congress has “from time to time ordain[ed] and establish[ed].” Since the enactment of IIRAIRA in 1996, the jurisdictional rules for the “inferior courts” have become exceedingly complex and the subject of much litigation. The largest portion of this book is devoted to these jurisdictional issues.

The default rule is that there is jurisdiction in the district court either under 28 USC §1331 (general federal question jurisdiction) or, alternatively, under 28 USC §2241 (habeas corpus jurisdiction) if the person is in custody. However, there are special jurisdictional rules that override the default rule for certain types of cases: judicial review of orders of removal is governed by INA §242; judicial review of legalization cases and LIFE Act cases is governed by INA §§210(e) and 245A(f); judicial review of naturalization cases is governed by INA §§310(c) and 336(b).

In addition, an important issue since 1996 has been the scope and effect of various statutory provisions that purport to restrict or eliminate judicial review. The dint of these provisions has been softened by the REAL ID Act of 2005,<sup>18</sup> in which Congress specifically recognized that there always must be judicial review of constitutional issues and questions of law. But the scope of IIRAIRA’s jurisdiction-stripping provisions nonetheless remains the subject of much litigation and the focus of a large part of Chapters 3 and 4.

Chapter 8 offers some general comments regarding the preparation of the complaint or petition for review, and Chapter 9 describes the logistics of filing the complaint or petition for review. Finally, several sample pleadings are included in the appendix material.

For many individuals living in the United States, the immigration laws are unreasonable, out of sync with reality, and brutally inhumane. The impact on individuals, including U.S. citizen family members, can be devastating. For example, one young man was born in Thailand and spent his first year in an orphanage. He was adopted by an American family when he was two years old and grew up in the United States. As a teenager he was convicted of writing bad checks and stealing a car. Several years later, acting pursuant to the mandatory detention and mandatory deportation policies of IIRAIRA, INS arrested him, held him in detention until he gave up his

---

<sup>18</sup> The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

right to judicial review, and then deported him to Thailand. This occurred despite the fact that he had not been to Thailand since he was an infant, did not speak Thai, and would have been able to make a showing of rehabilitation.<sup>19</sup>

In another case, a permanent resident mother of three U.S. citizen children was deported from the United States to Canada for marijuana possession. She had obtained permanent resident status in 1980. In May 1987, she was attacked and shot with a shotgun in her chest and arm; the attack resulted in the permanent loss of 35 percent of the use of her right arm. After the attack, she began using marijuana as pain medication. On two occasions in 1998, she pleaded guilty to simple possession of marijuana, a misdemeanor offense. On each occasion, she was sentenced to one day in jail and given a fine. Because she was eligible for a first offender program, in lieu of jail time, she was required to perform community service and attend a drug and alcohol program. After she had complied with all of the requirements of her sentence, INS placed her in deportation proceedings, and she was ordered removed as an “aggravated felon.” On October 11, 2000, she was arrested at her house and immediately deported from the United States.<sup>20</sup>

It is difficult to exaggerate the hardships inflicted on immigrants and their families by the mandatory detention and mandatory deportation provisions of IIRAIRA. Individuals are imprisoned at remote locations in abysmal conditions far away from their families.<sup>21</sup> People wait for years for their deportation cases to be resolved.<sup>22</sup> In the meantime, the family often loses a primary breadwinner and suffers severe financial hardship, in addition to the emotional trauma of losing a loved one. In spite of the anguished plea of family members—in the words of one U.S. citizen child: “I know that I would fall apart ... How can I have a future without my father?”<sup>23</sup>—the agencies turn a deaf ear. As one commentator recently stated:

The deepest problem with these laws is not their retroactivity or even their preclusion of judicial review. It is their brutal inhumanity, their disproportionality, their lack of consideration of the cruelty of deporting persons who may have grown up in the U.S., who have all their family here as U.S. citizens or permanent legal residents, and who may well know no other country. This harshness

---

<sup>19</sup> “Placing Immigrants at Risk: The Impact of Our Laws and Policies on American Families,” *Catholic Legal Immigration Network, Inc.* 44 (2000).

<sup>20</sup> *Mario Alfredo Lares-Reyes v. United States of America*, Case No. 12.379 (Inter-American Comm’n on Human Rights 2001), Petition, at 10.

<sup>21</sup> “Structural Vulnerability: A Report on the Visit of Mexican Human Rights Experts to Chicago,” at 21–23 (1999).

<sup>22</sup> “The Needless Detention of Immigrants in the United States: Why Are We Locking Up Asylum-Seekers, Children, Stateless Persons, Long-Term Permanent Residents, and Petty Offenders?,” *Catholic Legal Immigration Network, Inc.* 24–30 (2001).

<sup>23</sup> Bunis, “Immigration Lawmakers Try to Amend Law Regarding Criminals that Critics Say Is Too Harsh,” *Orange County Register* (Sept. 3, 1999).

is all the more difficult to accept as deportation law and practice have focused on an increasingly minor array of offenses.<sup>24</sup>

Quite often a lawsuit begins with the sense that something is terribly wrong and the agency is unwilling or unable to right it. But it is not just an abstract sense that what the agency is doing is wrong that moves the lawsuit forward. Before filing a lawsuit, one's sense that something is wrong must be informed by the relevant constitutional principles, statutory provisions, and regulations. In other words, before filing a lawsuit, a practitioner must be able to articulate the legal claims that will form the legal basis for any remedy that the federal court may grant. Convincing readers that our immigration laws and immigration practices are unjust and inhumane and stand in need of reform is beyond the scope of this book. Also beyond the scope is a discussion of the substantive immigration rules and regulations that may form the causes of action presented in a lawsuit. But for those who face injustices and who can articulate the legal claims to remedy the injustices, the author hopes that this manual will offer some help on how to successfully present those claims to the federal courts.

---

<sup>24</sup> Daniel Kanstroom, "*St Cyr* or Insincere: The Strange Quality of Supreme Court Victory," 16 *Geo. Immigr. L.J.* 413 (2002).