CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

HARROW V. DEPARTMENT OF DEFENSE AND WHAT IT MEANS FOR IMMIGRATION CASES: THE 30-DAY TIME LIMIT FOR FILING A PETITION FOR REVIEW IS STILL VERY IMPORTANT, BUT PROBABLY NOT JURISDICTIONAL ANYMORE

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On May 16, 2024, the U.S. Supreme Court issued its opinion in *Harrow v. Department of Defense*. While this case did not relate in any obvious way to immigration, its holding and reasoning has a significant implication for people seeking review of removal orders in federal court. Specifically, *Harrow* implies that the 30-day deadline for filing a petition for review of a removal order is not "jurisdictional", in the sense of being something that cannot be waived and has no equitable exceptions. It is still crucial to file a petition for review in federal court within 30 days of a removal order if at all possible, but *Harrow* could give new hope to people for whom it was not possible to comply with this critical deadline.

Under 8 U.S.C. § 1252, the only way to seek judicial review of an order of removal, with very rare exceptions, is a petition for review in the appropriate Court of Appeals. According to 8 U.S.C. § 1252(b)(1), "The petition for review must be filed not later than 30 days after the date of the final order of removal." More than 29 years ago, the Supreme Court held in *Stone v. INS*, 514 U.S. 386 (1995), with respect to a previous version of the statute, that the time limit for filing a petition for review was "mandatory and jurisdictional" and "not subject to equitable tolling". The conventional wisdom, expressed by such illustrious sources as the American Immigration Council's practice advisory on petitions for review and others as well, has been that this is true of the current version of the statute as well. No matter how compelling the circumstances,

that is, a petition for review filed outside of the 30-day time limit could not be considered. The remedy in extreme cases was to move the Board of Immigration Appeals (or other agency component that had issued a reviewable removal order) to reopen the proceedings and reissue its decision so that a timely petition for review could be filed. Motions to reissue are not readily granted, although a denial of a motion to reissue can itself be subject to judicial review, and the Courts of Appeals have sometimes granted petitions for review of a refusal to reissue and remanded to the BIA where there are potentially convincing allegations of ineffective assistance of counsel, as in *Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006), or possible failure by the BIA to send a decision properly, as in *Jahjaga v. Att'y Gen.*, 512 F.3d 80 (3d Cir. 2008).

The Supreme Court held last year in *Santos-Zacaria v. Garland* that the requirement of exhaustion of remedies in 8 U.S.C. § 1252(d)(1) is not jurisdictional, but it did not address whether this was true of the 30-day deadline. The Supreme Court's recent decision in *Harrow*, however, suggests that the 30-day deadline is very likely not jurisdictional either.

The petitioner in *Harrow*, Stuart Harrow, had sought review by the Merits Systems Protection Board in 2013 regarding a six-day furlough. His case dragged on for years, because the Merits Systems Protection Board did not have a quorum of members for much of the time that the case was pending before it. By 2022, when the Merits Systems Protection Board finally decided Mr. Harrow's case, his email address had changed, and he missed the initial notice of the decision. As a result, he also missed the deadline to file a petition for review of the decision: 5 U.S.C. § 7703(b)(1) provides that "Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board."

The Court of Appeals for the Federal Circuit held that Mr. Harrow's untimely petition for review could not be considered, despite his explanation. As the Supreme Court explained:

> *The Court of Appeals declined Harrow's request for equitable consideration, believing it had an absolute obligation to dismiss his appeal. The court reasoned that the 60-day statutory deadline is a "jurisdictional requirement," and therefore "not subject to equitable tolling." App. to Pet. for Cert. 2a. "Harrow's situation" might be "sympathetic," the court stated, but it was also irrelevant. Ibid. Given the*

> *deadline's jurisdictional nature, the court lacked the capacity to "excuse a failure to timely file based on individual circumstances." Ibid.*

Harrow, slip op. at 2.

The Supreme Court unanimously disagreed with the Federal Circuit, holding that the deadline at issue in Harrow was not jurisdictional. Under recent precedent, the Supreme Court explained, it "will treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Harrow*, slip op. at 3. The statute at issue in *Harrow*, the Supreme Court pointed out, contains "no mention of the Federal Circuit's jurisdiction, whether generally or over untimely claims." *Id.* at 5. Absent a clear mention of jurisdiction, current Supreme Court precedent generally holds time limits to be non-jurisdictional. There is an exception regarding a notice of appeal from one court to another, but as the Supreme Court explained, it is a limited one:

> *The Government identifies one kind of time limit that counts as jurisdictional, but we have already made plain its exceptional nature. As the Government notes, the Court held in Bowles v. Russell, 551 U. S. 205 (2007), that the deadline for filing an appeal from a district court's decision in a civil case is jurisdictional, even though the statute setting that limit does not say as much. See Brief for United States 24. In that decision, we reaffirmed a line of precedents pre-dating our current approach to such matters. See 551 U. S., at 209–210, and n. 2. But we have since taken care to delineate both where Bowles applies and where it does not. Bowles governs statutory deadlines to appeal "from one Article III court to another." Hamer v. Neighborhood Housing Servs. of Chicago, 583 U. S. 17, 25 (2017). As to all other time bars, we now demand a "clear statement." Id., at 25, n. 9. This case falls outside the Bowles exception because Harrow appealed to the Federal Circuit not from another court by from an agency.*

Harrow, slip op. at 8. Thus, as a non-jurisdictional time limit, the 60-day limit for a petition for review in *Harrow* was presumptively subject to equitable tolling, although the government was given the opportunity to rebut that presumption on remand if it could (unless it had waived the issue, a question the Supreme Court also declined to resolve). *Id.* at 9.

The language of 8 U.S.C. § 1252(b)(1) relating to petitions for review of removal orders is very similar to the language of 5 U.S.C. § 7703(b)(1) that was at issue in *Harrow*. If anything, it is less emphatic, saying only that "The petition for review must be filed not later than 30 days after the date of the final order of removal." Unlike the deadline at issue in *Harrow*, the deadline for an immigration petition for review is not stated to operate "otwithstanding any other provision of law." And like the petition for review at issue in *Harrow*, a petition for review in an immigration case does not involve an appeal from one Article III Court to another, as in *Bowles*, but rather involves court review of an agency decision. Thus, the conclusion seems inescapable that under *Harrow*, the petition for review deadline of 8 U.S.C. § 1252(b)(1), like that of 5 U.S.C. § 7703(b)(1), is not jurisdictional.

Courts of Appeals might still defer to *Stone* and find the petition for review deadline to be jurisdictional, because the Supreme Court has said in cases such as *Agostini v. Felton*, 521 U.S. 203 (1997) and *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989) that "f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Arguably, following *Harrow* in the vast majority of current immigration cases would not require overruling *Stone* – which, as previously mentioned, concerned an earlier version of the statute – but would merely require declining to extend Stone's holding regarding the former INA § 106 to the current INA § 242, 8 U.S.C. § 1252. But even if Courts of Appeals do follow *Stone*, as the Seventh Circuit did earlier this year despite *Santos-Zacaria* in *F.J.A.P. v. Garland*, at some point in the future, the Supreme Court, if it follows its unanimous decision in *Harrow*, should overrule this aspect of *Stone*.

Thus, in any case where exceptional circumstances have rendered it impossible to comply with the 30-day deadline to file a petition for review of a removal order, filing a late petition for review and citing *Harrow* is likely advisable, even if a motion to reissue the decision is also filed with the Board of Immigration Appeals to provide an alternate pathway to success. There is a good chance that those who preserve the issue will find, ultimately, that they have access to equitable tolling, if they meet the criteria for it.

It is important to keep in mind that it is not easy to qualify for equitable tolling, even in areas of law where equitable tolling is available. The Supreme Court

held in *Menominee Tribe of Wis. v. United States*, 577 U.S. 250 (2016), quoting its earlier decision in *Holland v. Florida*, 560 U.S. 631 (2010), that "a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."

In cases of "extraordinary" attorney misconduct such as *Holland*, the Supreme Court has indicated that equitable tolling may apply. In that case,

> *Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.*

Holland, 560 U.S. at 652. If a similarly egregious attorney failure causes late filing of a petition for review of a removal order, *Harrow* suggests that equitable tolling may be available under *Holland*. Other extraordinary circumstances could also qualify, depending on the details.

Therefore, while the 30-day deadline for filing a petition for review of a removal order remains crucial, and should be complied with if at all possible, *Harrow* may give new hope to those who have been prevented by extraordinary circumstances from complying with that deadline.