CRS Reports & Analysis

Legal Sidebar

Court Order Requiring that Removed Aliens Be Returned to the United States Raises Questions About Stays of Removal and the ICE "Return Policy"

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At what point in removal proceedings can an alien be lawfully removed from the United States? Can an alien be removed while an appeal of an administrative order of removal is pending before a federal court? If so, what happens if the alien later prevails on appeal? Does the government pay for or otherwise provide for the alien's return to the United States? These and other, related questions have been raised by recent reports that the U.S. Court of Appeals for the Third Circuit ordered immigration officials to bring back to the United States a mother and daughter who had been removed to Guatemala.

Only a few details about this case are publicly available. However, what has been reported suggests that the case is typical in some ways, but unusual in others. Specifically, the case seems typical in that aliens who are subject to final administrative orders of removal may be lawfully removed unless a federal court stays the alien's removal pending an appeal of the final order of removal, as discussed below. On the other hand, the Third Circuit ordering that the aliens be returned, apparently at the government's expense, is unusual. More commonly, aliens who prevail on appeal after being removed may be permitted to return at their own expense pursuant to U.S. Immigration and Customs Enforcement (ICE) policy guidance. This Sidebar provides background information on final orders of removal, stays of removal, and ICE's return policy.

Final Orders of Removal

Aliens who are issued a notice to appear (NTA), or are subject to a warrant of arrest for removal proceedings, are generally subject to so-called formal removal proceedings before an immigration judge, who is an officer of the Department of Justice (DOJ). These proceedings can result in an order of removal, which becomes final upon its entry, in cases where the alien does not show up for proceedings and is ordered removed *in absentia*. In other cases, the order becomes final upon the expiration of the 30-day period allotted for appeal to the Board of Immigration Appeals, or upon dismissal of the appeal by the BIA. The BIA is the highest administrative body for reviewing and applying immigration law, and is also part of the DOJ. (Federal courts generally lack jurisdiction over removal proceedings until there is a final order of removal.)

Once the order is final, immigration officials may generally lawfully execute it at any time, unless a court stays removal. Filing a petition for review of a removal order with a federal court of appeals—which is generally the only means for challenging the validity of a final administrative order of removal—does not automatically stay execution of the order under current law. It generally did prior to 1996. However, with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress amended the Immigration and Nationality Act (INA) both to permit the removal of aliens who have appealed final administrative orders of removal, *and* to allow aliens to challenge removal orders after they have been removed from the United States. As a result, aliens must now generally file a motion for a stay of removal with the appellate court along with or subsequent to their appeal in order to be assured of avoiding removal while the appeal is pending.

Stays of Removal

Initially, after the 1996 amendments, there was some uncertainty as to whether motions for stays of removal orders were to be decided using the "traditional" standard for stays, or whether such stays were to be seen as injunctions and, thus, subject to a higher standard under INA §242(f)(2). The traditional stay factors consider (1) whether the person applying for the stay has made a strong showing that he or she is likely to succeed on the merits; (2) whether that person will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. However, INA §242(f)(2) prohibits a court from enjoining the removal of any alien pursuant to a final order of removal unless the alien shows "by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."

The Supreme Court ultimately resolved this question with its 2009 decision in *Nken v. Holder*, which found that the traditional stay factors apply, in part, because stays are not injunctions for purposes of INA §242(f)(2). The *Nken* Court further noted that the first two factors in the traditional stay analysis—i.e., the likelihood of success on the merits, and the harm to the party seeking the stay—are "the most critical" in the analysis. It also noted that likelihood of relief requires more than a "mere 'possibility' of relief," and that removal is not a "categorically irreparable" harm because aliens who are removed may continue to pursue their petitions for review, and those who prevail "can be afforded effective relief by the [government's] facilitation of their return." In addition, the Court found that the last two factors—namely, the interests of the other party and the public interest—generally "merge" in immigration cases because the government is the opposing party *and* represents the public interest. Moreover, while the Court recognized a public interest in preventing aliens from being wrongfully removed, it also noted that there is "always a public interest in prompt execution of removal proceedings."

Return Policy

Following the *Nken* decision, immigrants' rights groups sued to discover more information about the government "policy and practice" of facilitating the return of removed aliens who prevail on appeal that the Supreme Court had referenced in finding that removal is not, *per se*, irreparable harm. This litigation eventually led to the Office of the Solicitor General (OSG) sending a letter to the Clerk of the Supreme Court on April 24, 2012, "clarify[ing] and correct[ing]" the government's representations regarding its "policy and practice" of facilitating aliens' return in *Nken*. Among other things, this letter noted that "the government is not confident that the process for returning removed aliens, either at the time its brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied."

The OSG letter also noted that ICE had promulgated a policy on "Facilitating the Return to the United States of Certain Lawfully Removed Aliens" on February 24, 2014. This policy, which apparently remains in effect, provides that, "[a]bsent extraordinary circumstances," ICE "will facilitate" the return of aliens who are removed while appeals of their final orders of removal are pending and subsequently prevail on appeal if (1) the court's decision restores the alien to lawful permanent resident (LPR) status, or (2) the alien's presence is necessary for continued administrative removal proceedings. ICE notes that such facilitation could include issuing a "Boarding Letter" to permit commercial air travel, or paroling the alien into the United States upon his or her arrival at a point of entry. However, facilitation would "not necessarily include" paying for the alien's travel via commercial airline, or making flight arrangements for the alien, and the alien could be detained by immigration officials upon his or her return.