Supreme Court Holds that Noncitizens Granted Voluntary Departure Must Be Allowed to Seek Reopening; Court Rejects Automatic Tolling

Dada v. Mukasey, No. 06-1181, 554 U.S. ___ (June 16, 2008)

http://www.supremecourtus.gov/opinions/07pdf/06-1181.pdf

A divided Supreme Court held that voluntary departure recipients must be permitted to unilaterally withdraw a voluntary departure request before the expiration of the voluntary departure period in order "to safeguard the right to pursue a motion to reopen." The Court, however, rejected the argument that the voluntary departure period automatically tolls when a motion to reopen is filed.

This case resolves a circuit split. Four courts had found that the filing of a motion to reopen automatically tolls the voluntary departure period. *See Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006). Three courts concluded otherwise. *See Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006), *petition for cert. pending*, No. 06-1252 (filed Mar. 22, 2007); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007); *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007) (pet. for reh'g filed Oct. 15, 2007).

Background:

Petitioner Samson Taiwo Dada was placed in removal proceedings in 2004. While he was in proceedings, his United States citizen wife filed an immigrant petition (I-130) on his behalf. The immigration judge denied Mr. Dada's request for a continuance pending adjudication of the I-130 petition and entered a voluntary departure order. Mr. Dada filed an appeal with the Board of Immigration Appeals and when his appeal was denied, the Board ordered him to depart within 30 days.

Prior to the expiration of the voluntary departure period, Mr. Dada filed a motion to reopen and reconsider his removal and to stay his removal pending his motion to reopen. In addition, he asked to *withdraw* his request for voluntary departure. After the voluntary departure period had expired, the Board denied his motion, finding that the overstay made him ineligible for adjustment of status under INA § 240B(d). Mr. Dada petitioned for review to the Court of Appeals for the Fifth Circuit.

While his appeal was pending, the Fifth Circuit held in *Banda Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), that a motion to reopen does not toll the voluntary departure period. The Fifth Circuit subsequently denied Mr. Dada's petition for review in an unpublished decision. The Supreme Court granted certiorari to consider the following question: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." After oral argument, the Court ordered the parties to brief

the following questions: "Whether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period."

Supreme Court Decision:

Writing for the majority, Justice Kennedy began the Court's analysis by describing voluntary departure as a *quid pro quo* between the noncitizen and the government. The government benefits because voluntary departure expedites removal and avoids the costs of removal. The noncitizen benefits because he or she avoids extended detention, is allowed to choose when to depart, and can select the country of destination. In addition, he or she avoids an order of removal and its consequences (i.e., bar to inadmissibility), and therefore voluntary departure facilitates the possibility of readmission.

Turning to the government's argument that a person granted voluntary departure knowingly surrenders the opportunity to seek reopening, the Court held that the statute did not support this interpretation. Neither the motion to reopen statute, INA § 240(c)(7), nor the voluntary departure statute, INA § 240B(b)(2), says anything about motions to reopen for people with voluntary departure. Further, there is no statutory language that would put a person on notice that voluntary departure would bar him or her from reopening his removal proceedings if new facts arose.

Yet, the government's interpretation "would render the statutory right to seek reopening a nullity in most cases of voluntary departure." A person granted voluntary departure could file a motion to reopen and depart the United States in accordance with the voluntary departure order, but doing so would result in the motion being deemed withdrawn under 8 C.F.R. § 1003.2(d). Alternatively, a person could remain in the United States to pursue reopening, but doing so would likely result in overstaying the voluntary departure period and making him or her statutorily ineligible for the very relief sought through reopening. See INA § 240B(d)(1) (failure to depart renders person ineligible for adjustment of status, cancellation of removal, and change of status for ten years). The Court concluded, "[i]t is necessary, then, to read the Act to preserve the alien's right to pursue reopening while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement."

Despite rejecting the government's position, the Court did not agree with Petitioner that the voluntary departure period must be tolled during the pendency of the motion to reopen. The Court noted that voluntary departure is an exchange of benefits and that if the noncitizen is permitted to stay past the statutory period of voluntary departure and yet still allowed to depart voluntarily, "the benefit to the Government – a prompt and costless departure – would be lost."

Rather, the court held that voluntary departure recipients must be permitted to unilaterally withdraw a voluntary departure request before the expiration of the voluntary departure period. "As a result, the alien has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and

remain in the United States to pursue an administrative motion." The Court recognized that choosing to pursue this motion to reopen puts the person in the same position as someone with a final order of removal. In adopting this compromise solution, the Court noted that the government has issued a proposed regulation that provides for automatic termination of the voluntary departure grant upon the filing of a motion to reopen filed during the voluntary departure period. *See* 72 Fed. Reg. 67674 (Nov. 30, 2007) *available at* http://www.aila.org/content/default.aspx?docid=23939.

At the end of its decision, the Court noted that "a more expeditious solution" to the conflict between motions to reopen and voluntary departure would be to allow noncitizens to pursue motions post departure. However, the regulation barring motions post departure was not challenged in this case. In addition, earlier, the Court noted that it was not deciding whether the courts of appeals may stay voluntary departure during the pendency of a petition for review.

Justices Stevens, Souter, Ginsburg, and Breyer joined the opinion of the Court. Justice Scalia filed a dissent in which Chief Justice Roberts and Justice Thomas joined. Justice Alito filed a separate dissenting opinion. The dissents would have upheld the Fifth Circuit's decision denying the petition for review.