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Great Decision on Jurisdiction, Withholding, and CAT Out of...the Fifth Circuit?!

Last Updated: January 29, 2024

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The Fifth Circuit reversed its previous decision denying a petition for review and instead found that the 30-day filing deadline following withholding proceedings runs from the BIA's final order at the conclusion of those proceedings. *Argueta-Hernandez v. Garland*, 87 F.4th 698 (2023). The Fifth Circuit also found that where a respondent does not file a timely petition, the court's jurisdiction to consider the petition is not stripped. In regards to the merits of the respondent's claims, the court found the following: physical harm is not required for a persecution finding; the existence of multiple motivations for persecution does not defeat a claim; and the BIA had ignored crucial evidence in denying the respondent's CAT claim.

Summary of Facts and Procedural History

Mr. Argueta-Hernandez, a citizen of El Salvador, entered the United States without inspection, was ordered removed, and later re-entered. Following his re-entry, the Department of Homeland Security (DHS) reinstated his removal order. Later, during a reasonable fear interview, Mr. Argueta Hernandez stated that in El Salvador, members of the MS-13 gang had done the following: repeatedly threatened his life and the lives of his family; stalked and surveilled them; and attempt to kill his son. Mr. Argueta-Hernandez also testified that four Salvadoran government agencies said his life was in danger and that they could not protect him. He stated that the gang's threats

and after he refused to pay them money or be complicit in their activities. He also testified that he was the President of Evangelism in his church and that Salvadoran officials told him that he was persecuted due to his being a Christian. After the asylum officer found that Mr. Argueta-Hernandez had a credible and reasonable fear of torture in El Salvador, DHS initiated withholding-only proceedings.

During his proceedings, Mr. Argueta-Hernandez supplemented his evidence with Department of State reports detailing gang threats to religious individuals and expert analysis finding an extremely high likelihood of his torture or death. He also provided testimony that El Salvador's prosecutor's office said there was nothing it could do for him except provide a document certifying that he could not stay in El Salvador. The Salvadoran police asked Mr. Argueta-Hernandez to sign a document waiving its liability were MS-13 to find and torture him. After a three-week detainment by the anti-gang unit in El Salvador, the police put him in a taxi that drove him to the Guatemalan border.

Despite all this evidence, however, the IJ ruled that the Salvadoran government was willing and able to protect Mr. Argueta-Hernandez. It also found that he had been threatened not solely because of his religion, but also because of his reputation as a good person. As a result, on September 23, 2021, the IJ ordered Mr. Argueta-Hernandez removed and denied his applications for withholding of removal and deferral of removal under CAT. The BIA affirmed the IJ's decision on April 27, 2022.

Mr. Argueta-Hernandez filed a petition for review to the Fifth Circuit on May 27, 2022, within 30 days of the BIA's order denying him withholding of removal and CAT relief. The appellate court initially denied his petition for lack of jurisdiction, but later reversed its finding. The court granted his petition for rehearing in order to address the court's jurisdiction and Mr. Argueta-Hernandez's substantive claims.

Analysis and Holding

Jurisdiction

Before discussing the merits of the case, the Fifth Circuit analyzed whether it had jurisdiction to consider the case under INA §§ 242(a)(1) and (b)(1). Those sections govern judicial review of final orders of removal and provide that the deadline for filing a petition for review is 30 days following the final order of removal. Circuit courts have long interpreted *Stone v. INS*, 514 U.S. 386 (1995), to mean that failing to file a petition for review within those 30 days would strip the circuit court of its jurisdiction to consider the petition. In this case, however, the Fifth Circuit joined the Ninth Circuit, which recently found that the Supreme Court's decision in *Santos-Zacaria*, 598 U.S. 411 (2023), which held that the exhaustion requirement in INA § 242(d)(1) was not jurisdictional, meant that the filing requirement at INA § 242(b)(1) is also not jurisdictional. This meant that the Fifth Circuit could consider a late-filed petition for review.¹

The Fifth Circuit then decided whether the BIA's order affirming the IJ's order reinstating the respondent's previous removal order at the conclusion of his withholding-only proceedings was "final" for the purposes of calculating the 30-day deadline. The court noted that the Supreme Court in two cases — *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), and *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021) — where it found that orders on CAT and withholding do not affect the final underlying removal orders, was not considering the finality of such orders for the purposes of

review under INA § 242 and therefore did not overrule previous Fifth Circuit precedent. The Circuit followed that precedent and found that, for the purposes of judicial review, statement orders are only considered final for the purposes of INA § 242(b)(1) upon the completion of withholding-only proceedings. In doing so, the court reasoned that "[i]t cannot be the case that a petitioner may only seek review before reinstatement of a removal order, and without a full administrative record." *Argueta-Hernandez*, at 8.

Withholding

The Fifth Circuit turned next to Mr. Argueta-Hernandez' s withholding claim and found that he had suffered past persecution. The BIA had determined that the harm Mr. Argueta-Hernandez had suffered – a number of phone threats, surveillance, and a gang hitman following and shooting at his son – was not enough to rise to the level of persecution. It noted that Mr. Argueta-Hernandez had suffered no physical harm, and the attempt on his son' s life had been "non-threatening." In contrast, the Fifth Circuit focused on the fact that Mr. Argueta-Hernandez had received repeated death threats – "threats so credible that numerous Salvadoran officials told Argueta-Hernandez to flee the country." *Argueta-Hernandez* at 12.

The court noted that the phone threats Mr. Argueta-Hernandez received were persistent, followed by in-person threats and a direct attempt on his son' s life by a known assassin. The gang subsequently confirmed that they had tried and would continue to try killing his son. The Fifth Circuit found that the BIA had disregarded all of this evidence of persecution, even though it did not dispute the IJ' s accepting Mr. Argueta-Hernandez' s account as credible.² Because Mr. Argueta-Hernandez had proved past persecution and the government had not shown any fundamental change in conditions or that he could relocate, the court found a likelihood of future persecution.

The court then disagreed with the BIA' s analysis of nexus. The BIA had stated that the threats, including both extortion and threats of death, were motivated by "criminal intent, personal vendettas, or monetary gain," and that because Mr. Argueta-Hernandez had failed to show that "he was not allowed to preach or otherwise exercise his religious rights," he did not show nexus to a protected ground. The Fifth Circuit disagreed and found that the BIA incorrectly applied an "either-or" analysis. The court stated that although some threats followed Mr. Argueta-Hernandez' s refusal to pay money to and collaborate with the gang, subsequent threats were motivated by his religion and status in the church. The court cited direct statements from Mr. Argueta-Hernandez' s persecutors where they said they were targeting him because he was a Christian and "good with God." The court also cited reports that indicated prevalent threats against religious individuals and an extremely high likelihood of torture or death to Mr. Argueta-Hernandez, as well as his own statement that he was only targeted after he became the President of Evangelism. The fact that Mr. Argueta-Hernandez had a reputation in the community for being a good person and businessman did not contradict the words and actions of his persecutors, which showed that his religion was one central reason for his persecution.³

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th Circuit then turned to Mr. Argueta-Hernandez' s CAT claims. The court agreed with Mr. Argueta-Hernandez and found that the BIA and IJ had ignored critical evidence that supported granting CAT protection. The BIA had found that the Salvadoran authorities' accommodation of Mr. Argueta-Hernandez at an anti-gang safe house and facilitation of his departure from El Salvador did not show that Salvadoran officials would turn a blind eye to Mr. Argueta-Hernandez' s future torture by gang members. The Fifth Circuit, however, pointed to additional evidence the BIA had ignored. This included the following: governmental agencies telling Mr. Argueta-Hernandez that they cannot protect him or his family; that nowhere in El Salvador would be safe for him; that all the police could do for him was have him sign a document certifying that "he could not stay in El Salvador" ; that MS-13 "will kill" him; and that he should sign a document waiving liability of the government should he stay in El Salvador. The court said this evidence was distinguishable from the circuit' s precedent, in which previous petitioners had not alleged that the government intended to acquiesce to their torture or that they even reported attacks to the government. In contrast, government officials to whom Mr. Argueta-Hernandez reported the incidents had told him that he would be killed if he stayed and tried to obtain a waiver of liability in the event it happened.

Conclusion

This is a welcome decision from the Fifth Circuit, which is one of the most conservative courts of appeals. Although the decision does not set forth specific tolling arguments or equitable standards for late-filed petitions for review, the court' s joining the Ninth Circuit in reversing years of precedent is nevertheless a monumental change. Practitioners in all circuits, but especially the Fifth and Ninth, are encouraged to screen potential clients' cases where they filed an untimely petition for review and consider advancing creative arguments for the tolling of the 30-day deadline.⁴ Practitioners in the Fifth Circuit may now cite case law holding that the deadline for filing a petition for review does not run until after the conclusion of any withholding or CAT proceedings, which includes the appeal to the BIA.

This decision is also replete with helpful quotations that acknowledge years of precedent in the areas of withholding and CAT: physical harm is not required to establish persecution; a protected ground need not be the sole motivation for that persecution; and adjudicators cannot cherry-pick certain pieces of evidence and ignore other critical evidence that supports the grant of an application. Both the IJ and BIA were egregiously wrong in their analyses and conclusions. Were it not for the Fifth Circuit' s reversal on the jurisdictional question, Mr. Argueta-Hernandez would not have received the decision his case merited. Practitioners should thus be encouraged to keep fighting zealously for their clients and take all necessary appeals.

¹ The Fifth Circuit did not discuss whether any tolling requirements must be met or outline any equitable standards for determining whether consideration of a late-filed petition is appropriate.

² The court also found that the BIA had committed legal error by requiring proof of motive to establish persecution.

ifth Circuit also found that the BIA had failed to consider one of Mr. Argueta-Hernandez' s posed particular social groups, "Salvadoran informants against gang members."

A sample fair tolling argument in the context of motions to reopen removal proceedings can be found at CLINIC' s website. See CLINIC, Sample Equitable Tolling Argument for Motion to Reopen Removal Proceedings for DACA Recipients, Oct. 7, 2020

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BIA Restates that Choice of Law Is Based on Venue, Which Only Parties Can Move to Change

Posted on June 26, 2024

The Board of Immigration Appeals (BIA) has issued a precedential decision regarding choice of law for proceedings in which the administrative control court has changed. The BIA reiterated that the controlling circuit law in immigration court proceedings is the law governing the geographic location of the immigration court where venue lies, and that courts cannot change venue by changing the court that has administrative control over the record of proceedings. The BIA also found that only the parties can move to change venue and, thus, the choice of law.

Removal Proceedings

EOIR Case Portal Registration and User Guide

Posted on April 29, 2024

Beginning in February 2022, practitioners have been required to use the Executive Office of Immigration Review (EOIR) Courts and Appeals System (ECAS) for all filings in cases pending with EOIR.

Removal Proceedings

Seventh Circuit Determines Reinstatement Is Final for Judicial Review Upon the Completion of Withholding-Only Proceedings

Posted on April 26, 2024

The Seventh Circuit held that a reinstated order of removal was not final for purposes of judicial review until the agency had completed withholding proceedings under the Convention Against Torture (CAT).