No. 06-1181

In the Supreme Court of the United States

SAMSON TAIWO DADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE RESPONDENT

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1. Petitioner argues that an alien who has been granted voluntary departure by the Board of Immigration Appeals should be permitted to withdraw from that arrangement through his own unilateral action. Supp. Br. 6 (advocating a rule under which an alien's "withdrawal of the voluntary departure request * * * would be effective immediately upon filing"). Petitioner's premise is that this Court must recognize *some* atextual exception to the express statutory and regulatory restrictions on voluntary departure in order to "reconcile" and "give content to both the voluntary departure and motion to reopen provisions." *Id.* at 3, 4. That premise is incorrect.

Like any alien whose arguments for permitting him to remain in the United States have been rejected by the BIA, an alien whose final order provides for voluntary departure in lieu of removal may generally "file one motion to reopen." 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005). And, like an

alien who has been ordered removed, an alien who has been granted voluntary departure may not obtain adjudication of such a motion if he departs or is removed from the United States. 8 C.F.R. 1003.2(d).[1] The fact that such an alien is subject to certain penalties if he fails to depart within the specified time means that the decision to seek voluntary departure has real consequences. It does not, however, mean that the alien has "forfeit[ed]" the ability to pursue a motion to reopen. Pet. Supp. Br. 5.

Congress has provided that an alien who overstays a period of voluntary departure generally becomes "ineligible, for a period of 10 years, to receive" several specified forms of *discretionary* relief, including cancellation of removal, adjustment of status, and a future grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005); see Gov't Br. 6-7 (describing other consequences). But such an alien remains eligible for *other* forms of protection from removal—including asylum,[2] withholding of removal,[3] and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong, 2d Sess. (1988), 1465 U.N.T.S. 85—and he may con-

[1] That regulation, which petitioner has not challenged (1/7/08 Tr. 9; Gov't Br. 36-37 n.16)—and the parallel regulation providing that an appeal of an immigration judge's decision to the BIA shall be dismissed if the alien leaves the country, 8 C.F.R. 1003.4—have been integral features of the regulations since immediately after the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*, was passed in 1952. See 17 Fed. Reg. 11,475, 11,476 (1952). Their premise is that because the whole purpose of the administrative proceedings is to effect the alien's removal from the United States, those proceedings (including any appeals or ancillary matters) are properly terminated if the alien departs.

[2] 8 U.S.C. 1158 (2000 & Supp. V 2005).

[3] 8 U.S.C. 1231(b)(3) (2000 & Supp. V 2005).

tinue to pursue such claims through a motion to reopen even if he overstays his voluntary departure period. Under this regime, an alien's failure to comply with the terms of an order granting voluntary departure—itself "a discretionary form of relief," Pet. Supp. Br. 1—renders the alien ineligible to remain in the United States as a matter of grace based on his personal circumstances. In contrast, even an alien who overstays does not lose the ability to seek protection from removal if subsequent developments *outside* the United States have made it unsafe for him to depart.

Thus, under the INA and the Attorney General's current regulations, a request for voluntary departure reflected in the BIA's final order effectively concludes the removal proceedings insofar as possible discretionary relief such as cancellation of removal and adjustment of status are concerned. An alien who wishes to keep open the option of pursuing such relief should not request voluntary departure. While an alien granted voluntary departure by the BIA is not categorically barred from subsequently moving to reopen to seek such relief, the combined effect of the INA, the regulations, and the time it takes to grant reopening may effectively preclude such relief. But there is nothing irrational about requiring an alien to choose between requesting voluntary departure and continuing to pursue such relief after entry of a final order, or about providing that reopening motions may still lead to *other* forms of relief.

The INA does not require the Attorney General to either *automatically* toll the voluntary departure period or *automatically* terminate voluntary departure if the alien requests reopening. And petitioner did not diligently pursue relief on his own behalf: he failed to seek a remand on the basis of supposed changed circumstances while his ap-

peal was pending before the BIA, waited until the end of the departure period to seek reopening and request withdrawal of voluntary departure, failed to request expedited consideration of that motion, and failed to request an extension of the departure period to allow the BIA time to act. Gov't Br. 12.

In short, petitioner is not seeking to "safeguard access to motions to reopen for aliens granted voluntary departure." Supp. Br. 6. Rather, he is seeking to leverage a *procedural* right to file a motion to reopen into an exemption from a *substantive* restriction that Congress has imposed on the Board's ability to grant *certain* (but not all) forms of discretionary relief.

2. Petitioner has failed to identify *any* language in the INA, the Attorney General's current regulations, or the BIA's order in this case that supports his contention that he was entitled to withdraw unilaterally from his voluntary departure agreement. Nor is such a result supported by any precedential decision of the BIA.

Petitioner's reliance on the Board's unpublished, single-member decision in *Davis*, B.I.A. No. A76-832-166 (Mar. 3, 2006) (per curiam), is misplaced. Only three-member or en banc Board decisions serve as precedents for future cases, 8 C.F.R. 1003.1(g), and only if they are designated for publication, *Board of Immigration Appeals Practice Manual* § 1.4(d)(ii), at 10 (July 30, 2004). The BIA resolved 8841 motions to reopen in 2006, 10,995 in 2005, and 10,121 in 2004.[4] A one-paragraph decision that provides neither explanation nor citation for its one-sentence statement that it would not "reinstate" a voluntary departure period that had never been vacated in the first place, and that had, at least

[4] Executive Office for Immigration Review, U.S. Dep't of Justice, *FY 2006 Statistical Year Book* T2 (2007) <http:www.usdoj.gov/eoir/statspub/fy06syb.pdf>.

according to its terms, already expired by the time the BIA ruled, cannot possibly be said to reflect official Board policy or a widespread practice of granting such requests. 8 C.F.R. 1240.26(f) (providing that an IJ or the BIA "may reinstate voluntary departure in a removal proceeding that has been reopened," but only "if reopening was granted prior to the expiration of the original period of voluntary departure").

Any apparent conflict between the BIA's decisions in *Davis* and this case would warrant, at most, a remand to the agency for further explanation. But given that Davis and petitioner were represented by the same attorney before the BIA and the Fifth Circuit; that, when the BIA's decision in *Davis* was issued, petitioner still had seven days in which to file a motion to reconsider the denial of his motion to reopen, Pet. App. 3; 8 U.S.C. 1229a(c)(6)(B) (Supp. V 2005); and that petitioner failed to mention *Davis* in his brief to the court of appeals or his certiorari petition, petitioner should be deemed to have forfeited any claim to such a remand.

The BIA's decision in *Diaz-Ruacho*, 24 I. & N. Dec. 47 (2006) (see Pet. Supp. Br 10-11), and the regulation upon which it relied, actually undermine petitioner's argument that an alien who has been granted voluntary departure by the Board may unilaterally withdraw from that arrangement on the eve of his departure date.[5] The INA provides that an alien who is granted voluntary departure by an IJ at the conclusion of removal proceedings "shall be required to post a voluntary departure bond." 8 U.S.C. 1229c(b)(3).

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[5] The other regulations petitioner cites (Supp. Br. 10 n.14) involve grants of voluntary departure made before the conclusion of removal proceedings. 8 C.F.R. 240.25(f) (pre-removal proceeding grants by the Department of Homeland Security); 8 C.F.R. 1240.26(b)(3)(ii) (grants by IJs before the conclusion of removal proceedings).

The Attorney General's regulations currently provide that the bond "shall be posted * * * within 5 business days of the immigration judge's order granting voluntary departure," and that, if the bond is not so posted, "the voluntary departure order shall vacate automatically and the alternate order of removal will take effect on the following day." 8 C.F.R. 1240.26(c)(3). In *Diaz-Ruacho*, the BIA concluded that because "[t]he posting of a voluntary departure bond is a statutory *condition precedent* to ensure that an alien departs within the time afforded," an IJ's grant of voluntary departure "remains inchoate until the posting of a bond within 5 days of the order." 24 I. & N. Dec. at 50 (quoting *A-M-*, 23 I. & N. Dec. 737, 744 n.8 (B.I.A. 2005)). As a result, the BIA further concluded that an alien who fails to post the required bond is not subject to the statutory penalties prescribed for aliens who fail to depart within the time specified in a final order granting voluntary departure. *Id.* at 51.[6]

This case differs from *Diaz-Ruacho* in every material respect. Filing a motion to reopen (unlike posting a bond) is not a pre-condition to obtaining voluntary departure, and there is no current regulation that provides that an alien's act of filing a motion to reopen automatically terminates a previous grant of voluntary departure. In addition, because DHS may detain an alien who is granted voluntary departure until he posts a bond, 8 C.F.R. 1240.26(c)(3), and because the requirement to post a bond is *not* suspended by the alien's filing of an appeal to the BIA, see *A-M-*, 23 I. & N. Dec. at 744 n.8, an alien who does not intend to live up to his voluntary departure bargain cannot manipulate the

[6] The Attorney General's proposed regulations would abrogate *Diaz-Ruacho* and "make clear that the failure to post a voluntary departure bond does not exempt the alien[] from * * * the penalties for failure to depart voluntarily." 72 Fed. Reg. 67,684 (2007).

bond requirement in order to place himself in a better position than an alien who was never granted voluntary departure in the first place.[7]

3. Finally, petitioner suggests (Supp. Br. 6 n.4) that this Court "could also construe the statute such that the filing of a motion to reopen by an alien granted voluntary departure would trigger withdrawal from voluntary departure (thus also reaching aliens who did not request withdrawal expressly)." But nothing in the INA or the current regulations so provides, and aliens who have been granted voluntary departure currently file motions to reopen without any notice of such an automatic termination rule. Cf. 72 Fed. Reg. 67,686 (2007) (proposed 8 C.F.R. 1240.26(b)(3)(iii)) (providing that the IJ "shall advise the alien of" the consequences of filing "a post-decision motion to reopen or reconsider"). For these and other reasons, any alteration of the current voluntary departure regime should be made prospectively only, and only after full consideration by the Attorney General. Gov't Supp. Br. 10.

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[7] Petitioner asserts (Supp. Br. 7) that permitting unilateral withdrawal "would not invite any abuse." This case demonstrates otherwise. If petitioner's unilateral assertion that he wished to withdraw from his agreement to depart voluntarily had the effect of automatically eliminating the grant of voluntary departure contained in the Board's final order, it would mean that petitioner was able to secure a 28-day deferral of the entry of a final order of removal without the *ex ante* or *ex post* assent of the BIA.

* * * * *

For the foregoing reasons and those stated in the respondent's merits and supplemental briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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