Hernandez-Guzman v. Ashcroft

United States Court of Appeals for the Ninth Circuit
July 12, 2002 ***, Submitted, San Francisco, California; August 26, 2002, Filed
No. 01-71352

Reporter: 45 Fed. Appx. 672; 2002 U.S. App. LEXIS 18229

JESUS ALBERTO HERNANDEZ-GUZMAN, Petitioner, v. JOHN ASHCROFT, Attorney General **, Respondent.

Notice: [**1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: On Petition for Review of an Order of the Board of Immigration Appeals. INS No. A91-455-268.

Disposition: PETITION for review GRANTED; REVERSED AND REMANDED.

Core Terms

deportation, departure, reconsideration motion, collateral consequence, filing of the motion, withdrawal, notify, reopen, moot, removal proceedings, due process right, reconsider, deprived, re-enter, re-entry

Case Summary

Procedural Posture
Petitioner immigrant, a native and citizen of Mexico, petitioned for review of an order of the Board of Immigration Appeals (BIA) denying his motion for reconsideration pursuant to 8 C.F.R. § 3.2(d).

Overview
The immigration judge (IJ) found petitioner removable and denied his applications for cancellation of removal and voluntary departure. On appeal to the BIA, petitioner was represented by counsel. On March 16, 2000, the BIA dismissed the appeal, but did not notify counsel. On March 21, 2000, the Immigration and Naturalization Service (INS) removed petitioner from the United States. On April 25, 2001, counsel learned of the BIA's dismissal and filed a motion for reconsideration on May 25, 2001. Respondent, the Attorney General of the United States, asserted that the lack of communication between petitioner and his attorney after deportation mooted the appeal. The appellate court found that the appeal was not moot because the deportees faced collateral consequences from the deportation. "Departure from the United States" in § 3.2(d) applied only to a legally executed departure. The BIA failed to notify petitioner's counsel of its decision upholding the IJ's removal order, thereby violating petitioner's due process rights. Thus, petitioner's removal was not "legally executed," and the appellate court found that the BIA erred in dismissing his motion for reconsideration.

Outcome
The petition was granted. The dismissal was reversed, and the motion was remanded for determination on the merits.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments
Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue
Immigration Law > Deportation & Removal > Motions to Reconsider, Remand & Reopen

HN1 8 C.F.R. § 3.2(d) provides that any departure from the United States occurring after the filing of a motion to reconsider shall constitute a withdrawal of such motion.

Administrative Law > Judicial Review > Administrative Record > General Overview
Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments
Immigration Law > Deportation & Removal > Motions to Reconsider, Remand & Reopen

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*** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

** The Attorney General of the United States is the proper respondent in a petition for review of an order of removal. See 8 U.S.C. § 1252(b)(3)(A).

HN2 8 C.F.R. § 3.2(d) provides for withdrawal of a motion for reconsideration only when the petitioner is removed after the motion is filed.

Immigration Law > Deportation & Removal > Motions to Reconsider, Remand & Reopen

HN3 See 8 C.F.R. § 3.2(d).

Immigration Law > Deportation & Removal > Motions to Reconsider, Remand & Reopen

HN4 "Departure from the United States " in 8 C.F.R. § 3.2(d) applies only to a legally executed departure.

Counsel: For Jesus Alberto Hernandez-Guzman, Petitioner: Thomas Hutchins, Esq., Alexandria, VA.

For Immigration Naturalization And Services, Respondent: Regional Counsel, Immigration & Naturalization Service, Laguna Niguel, CA.

For Immigration Naturalization And Services, Respondent: District Director, Immigration & Naturalization Service, Phoenix, AZ.

For Immigration Naturalization And Services, Respondent: Linda S. Wendtland, Esq., James A. Hunolt, Esq., John S. Hogan, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For Immigration Naturalization And Services, Respondent: Ronald E. LeFevre, Chief Legal Officer, District Counsel, San Francisco, CA.

Judges: Before: FISHER, and PAEZ, Circuit Judges, and WHELAN [****], District Judges. **[**2]**

Opinion

[*673] MEMORANDUM [*]

Before: FISHER, and PAEZ, Circuit Judges, and WHELAN [****], District Judges

Petitioner Jesus Alberto Hernandez-Guzman ("Hernandez"), a native and citizen of Mexico, petitions for review of an order of the Board of Immigration Appeals ("BIA") denying his motion for reconsideration pursuant to 8 C.F.R. § 3.2(d) (*HN1* providing that any departure from the United States occurring after the filing of a motion to reconsider shall constitute a withdrawal of such motion). The permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 **[**3]** apply. *See Castro-Espinosa v. Ashcroft*, 257 F.3d 1130, 1131 n. 1 (9th Cir. 2001). We have jurisdiction pursuant to *8 U.S.C. § 1252(b)*. We reverse and remand.

PROCEDURAL BACKGROUND

On September 30, 1999, the Immigration Judge ("IJ") found Hernandez removable and denied his applications for cancellation of removal and voluntary departure. On appeal to the BIA, Hernandez was represented by counsel. On March 16, 2000, the BIA dismissed Hernandez's appeal, but did not notify counsel of its decision. On March 21, 2000, the Immigration and Naturalization Service ("INS") removed Hernandez from the United States.

On April 25, 2001, counsel first learned of the BIA's dismissal and filed a motion for reconsideration on May 25, 2001. The BIA denied that motion pursuant to 8 C.F.R. § 3.2(d) on July 11, 2001. [1]

[4]** DISCUSSION

Respondent John Ashcroft ("Respondent") asserts that the lack of communication between Hernandez and his attorney after deportation moots this appeal. We disagree. In *United States v. Valdez-Gonzalez*, 957 F.2d 643, 646-47 (9th Cir. 1992), we considered whether an appeal of a sentencing departure was moot when the defendants had been deported and no one knew their whereabouts. *Id.* Relying on *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2, 77 L. Ed. 2d 22, 103 S. Ct. 2573 (1983), we held that the appeal was not moot because the deportees faced collateral consequences from the deportation. These collateral consequences included the potential that the deportees "could face further proceedings in this case upon reentering the country," *Valdez-Gonzalez*, 957 F.2d at 647, and that "the Government could bar any attempt by [the deportees] to voluntarily re-enter this coun-

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[*] The Honorable Thomas J. Whelan, United States District Judge for the Southern District of California, sitting by designation.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[****] The Honorable Thomas J. Whelan, United States District Judge for the Southern District of California, sitting by designation.

[1] The BIA mistakenly found that Hernandez was removed from the United States*after* the filing of the motion for reconsideration, thus resulting in withdrawal of the motion. (*See* Administrative Record at 2.) However, the record reflects that Hernandez was removed over one year *prior* to the filing of the motion for reconsideration. *HN2* Section 3.2(d) provides for withdrawal of the motion only when petitioner is removed *after* the motion is filed. Therefore, the BIA's reliance on that part of § 3.2(d) was misplaced.

try," *Villamonte-Marquez*, 462 U.S. at 581 n.2; *see also United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 n.8 (9th Cir. 2002) (listing numerous collateral consequences for an alien convicted of an aggravated **[**5]** felony).

These same consequences sustain a case or controversy here. Hernandez's deportation may result in a bar to Hernandez's re-entry into the United States. Moreover, if he re-enters without authorization **[*674]** from the Attorney General, he may be subject to criminal prosecution for unlawful re-entry after deportation. *8 U.S.C. § 1326*.

Respondent also contends that the BIA lacked jurisdiction over the motion for reconsideration because Hernandez's counsel filed that motion subsequent to his client's removal from the United States. We disagree.

Section § 3.2(d) provides that:

> ***HN3*** A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

We have previously held that ***HN4*** "departure from the United States" applies only to a legally **[**6]** executed departure. In *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977), as here, the INS deported an immigrant without notifying his counsel, thereby depriving him of due process. At that time, *8 U.S.C. § 1105a* deprived the courts of jurisdiction over a petition to review once the petitioner had departed from the United States. *Section 1105a* provided that "an order of deportation or of exclusion shall not be reviewed by any court if ... [the petitioner] has departed from the United States after the issuance of the order." *Mendez*, 563 F.2d at 958.

We held that *§ 1105a* did not bar this court from exercising jurisdiction when the deportation resulted from a due process violation. We later applied the reasoning in *Mendez* to § 3.2(d). In *Wiedersperg v. INS*, 896 F.2d 1179, 1181-82 (9th Cir. 1990), we concluded that § 3.2(d)'s bar to BIA review of a deportation order after the petitioner departed the United States applied only if the departure was legally executed. Holding that petitioner's departure was not legally executed, we reversed the BIA's denial of the motion to reopen. *Id.*

Here, the BIA failed **[**7]** to notify Hernandez's counsel of its decision upholding the IJ's removal order, thereby violating Hernandez's due process rights. Because Hernandez's due process rights were violated, his removal was not "legally executed." Accordingly, the BIA erred in dismissing Hernandez's motion for reconsideration pursuant to § 3.2(d).

CONCLUSION

We REVERSE the BIA's dismissal of Hernandez's motion for reconsideration and REMAND to the BIA for a determination on the merits.

PETITION GRANTED; REVERSED AND REMANDED.