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SUPREME COURT DECIDES REQUESTS FOR VOLUNTARY DEPARTURE MAY BE WITHDRAWN AFTER THE FACTPBUT CAN VOLUNTARY DEPARTURE STILL BE STAYED?

Posted on June 30, 2008 by Cyrus Mehta

By
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On June 16, 2008, the United States Supreme Court decided in the case of *Dada v. Mukasey*, ___ S. Ct. ___, 2008 WL 2404066, that an alien who has been granted voluntary departure may withdraw this request prior to the conclusion of the voluntary departure period, rather than departing. This ruling removes the possibility allowed by some Courts of Appeals of tolling a voluntary departure period automatically through the filing of a motion to reopen, but provides a new and potentially valuable option to aliens granted voluntary departure. It might arguably be thought to jeopardize another option that such aliens already had, that of seeking a stay of voluntary departure from a Court of Appeals, but for reasons further explained below it should not have that effect. New proposed regulations in line with the decision in *Dada*, however, may well force a choice between post-hearing voluntary departure and the pursuit of other remedies from within the United States.

At issue in *Dada* was the relief of post-hearing voluntary departure, pursuant to INA section 240B(b), 8 U.S.C. § 1229c(b). Under this provision, an alien who can establish a year of physical presence preceding the service of the Notice to Appear, five years of good moral character preceding the application for voluntary departure, and means and intent to depart the United States, may be permitted (upon posting a bond) to depart at the alien's own expense to a destination of the alien's own choice, rather than being forcibly removed to a

destination determined by the government. This carries the additional benefit that the alien will not be subject to the bars to re-admission that result from departing the United States under an order of removal.[1] The alien may seek other relief from removal, with voluntary departure requested only as alternative if other applications fail, and may appeal the denial of any such other relief to the Board of Immigration Appeals without having to depart in the interim.[2] Post-hearing voluntary departure is available for a maximum period of sixty days—that is, under the statute, sixty days is the maximum period of time after the order becomes final (following direct appeal to the Board of Immigration Appeals) that an alien can be given in which to voluntarily depart from the United States. If the alien does not depart in a timely fashion, an alternate of removal takes effect, and in addition to forfeiting the voluntary departure bond and being subject to forcible removal, the alien is "subject to a civil penalty of not less than $1,000 and not more than $5,000" and becomes ineligible for various forms of relief, such as cancellation of removal and adjustment of status, for a period of ten years.[3] INA § 240B(d), 8 U.S.C. § 1229c(d).

The difficulty arises when an alien who has been granted post-hearing voluntary departure seeks to reopen an otherwise final removal order in order to introduce new evidence or apply for relief that was not previously available. As the Court in *Dada* explained:

The case turns upon the interaction of relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (IIRIRA or Act). The Act provides that every alien ordered removed from the United States has a right to file one motion to reopen his or her removal proceedings. See 8 U.S.C. § 1229a(c)(7) (2000 ed., Supp. V). The statute also provides, however, that if the alien's request for voluntary departure is granted after he or she is found removable, the alien is required to depart within the period prescribed by immigration officials, which cannot exceed 60 days. See § 1229c(b)(2) (2000 ed.). Failure to depart within the prescribed period renders the alien ineligible for certain forms of relief, including adjustment of status, for a period of 10 years. § 1229c(d)(1) (2000 ed., Supp. V). Pursuant to regulation, however, departure has the effect of withdrawing the motion to reopen. See 8 CFR § 1003.2(d) (2007).

Dada, 2008 WL 2404066 at *3. Because motions to reopen often take longer to

adjudicate than the 60-day maximum allowable period of post-hearing voluntary departure, let alone the period of voluntary departure likely to be remaining when an alien moves to reopen, an alien irrevocably subject to a voluntary departure order would often – assuming the validity of 8 C.F.R. § 1003.2(d)[4] – be forced to suffer penalties for failure to voluntarily depart in order to preserve the statutorily bestowed right to a motion to reopen. As the Court put it, "an alien who seeks reopening has two poor choices: . . . remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or avoid penalties by prompt departure but abandon the motion to reopen."

Several Courts of Appeals had held, prior to *Dada*, that this dilemma should be resolved by considering the filing of a motion to reopen to automatically toll the voluntary departure period during the pendency of that motion. *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; *Ugokwe v. United States Atty. Gen.*, 453 F.3d 1325 (11th Cir. 2006). In other words, under this interpretation, if an alien is granted 60 days to voluntarily depart, and then files a nonfrivolous motion to reopen, the 60-day "clock" would stop running upon the filing of the motion and only resume when the motion was adjudicated. This rule had been rejected by several other Courts of Appeals, *see Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), and the Supreme Court granted certiorari in *Dada* to resolve the circuit split.

The Court in *Dada* rejected the rule of automatic tolling of the voluntary departure period by a motion to reopen, finding that it "d not conform to the statutory design." *Dada*, 2008 WL 2404066 at *12. Instead, the *Dada* Court determined that "the appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period." *Id.* An alien who does this

gives up the possibility of readmission and becomes subject to the IJ's alternate order of removal. See 8 CFR § 1240.26(d). The alien may be removed by the Department of Homeland Security within 90 days, even if the motion to reopen has yet to be adjudicated. See 8 U.S.C. § 1231(a)(1)(A). But the alien may request a stay of the order of removal, see BIA Practice Manual § 6.3(a), online at

http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm ; cf. 8 U.S.C. § 1229a(b)(5)(C) (providing that a removal order entered *in absentia* is stayed automatically pending a motion to reopen); and, though the BIA has discretion to deny the motion for a stay, it may constitute an abuse of discretion for the BIA to do so where the motion states nonfrivolous grounds for reopening.

Dada, 2008 WL 2404066 at *13. That is, an alien who withdraws a request for voluntary departure is put in the same position as an alien who had never made one – with the exception that the alien who was awarded voluntary departure and subsequently withdrew the request has been allowed to stay in the United States for an additional period of up to 60 days without being arrested and removed during that time.

Withdrawal of the application for voluntary departure, however, is not the only potential relief available to an alien who has been granted voluntary departure but wishes to pursue his or her case further before departing. As the Court in *Dada* noted, "some Federal Courts of Appeals have found that they may stay voluntary departure pending consideration of a petition for review on the merits." *Dada*, 2008 WL 2404066 at *6. Indeed, the vast majority of the Courts of Appeals that have addressed the issue have found themselves to possess this power, which when exercised stops the 60-day voluntary departure "clock" until the Court of Appeals has finished reviewing the case. *See*, *e.g., Vidal v. Gonzales*, 491 F.3d 250, 252-254 (5th Cir. 2007); *Thapa v. Gonzales,* 460 F.3d 323, 329-332 (2d Cir. 2006); *Obale v. Attorney General of United States,* 453 F.3d 151, 155-157 (3d Cir. 2006); *Bocova v. Gonzales,* 412 F.3d 257, 267 (1st Cir.2005); *Lopez-Chavez v. Ashcroft,* 383 F.3d 650, 653 (7th Cir.2004); *Rife v. Ashcroft,* 374 F.3d 606, 615 (8th Cir.2004); *El Himri v. Ashcroft,* 344 F.3d 1261, 1262 (9th Cir.2003); *Nwakanma v. Ashcroft,* 352 F.3d 325, 327 (6th Cir.2003). *Contra Ngarurih v. Ashcroft,* 371 F.3d 182, 194 (4th Cir. 2004).

Although, under current law, an alien's departure does not in and of itself destroy jurisdiction over a petition for review in the Court of Appeals, the Court of Appeals for the Second Circuit has persuasively explained why this is insufficient reason to force an alien to pursue a potentially meritorious claim in judicial review from abroad:

n alien who departs voluntarily is barred from admission to the United States for a period of either three years (for aliens who had been present in the United States for more than 180 days but less than one year) or ten years (for

aliens who had been present in the United States for more than one year), regardless of what legal avenues for a change of immigration status might otherwise be available to him or her. 8 U.S.C. § 1182(a)(9)(B). Additionally, while the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") revised the INA to permit aliens to appeal adverse decisions of the BIA even after leaving the United States, *see Rife,* 374 F.3d at 615, such a long-distance appeal is logistically difficult. Moreover, for those aliens who have sought asylum, withholding of removal, or relief under the Convention Against Torture and who may find it difficult as a practical matter to depart to any other country than the one they wish to flee, departing may present real danger. *See id.* "Thus," as the Seventh Circuit has explained, "aliens who are granted voluntary departure face a difficult choice: either follow the rules, depart voluntarily, and obtain a few benefits, at the price of serious or fatal difficulty in pursuing relief and exposure to intolerable conditions in the country of destination; or break the rules by failing to leave, accept the penalties associated with that failure, and continue to press any appeals." *Lopez-Chavez,* 383 F.3d at 651.

Thapa, 460 F.3d at 328. A stay of voluntary departure will therefore issue in most Circuits when there is sufficient merit in the petition for review to justify a stay under the traditional preliminary injunction test, which requires the court "to balance 'the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest." *Thapa*, 460 F.3d at 334 (quoting *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002)); *accord El Himri*, 344 F.3d at 1262-63; *Nwakanma*, 352 F.3d at 328. In the application of this test, "he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." *Thapa*, 460 F.3d at 334 (quoting *Mohammed*, 390 F.3d at 101).

The Court in *Dada* explicitly refrained from addressing the question of what effect, if any, its decision had on cases such as *Thapa*, stating that "his issue is not presented here . . . and we leave its resolution for another day." *Dada*, 2008 WL 2404066 at *6. One can anticipate, however, that the government may now argue stays of voluntary departure are unnecessary because the applicant can simply withdraw the request for voluntary departure under *Dada*. But in many of the sorts of cases that motivated courts to provide for stays of voluntary departure in the first place, this will not be an appropriate solution.

One such case might be that of an applicant for asylum, withholding of removal, or relief under the Convention Against Torture who fears persecution if returned to his or her home country. A key advantage of voluntary departure over an order of removal in such an instance, even an order of removal that is stayed by the Court of Appeals or the BIA, is that if and when the applicant's claims are finally rejected, the applicant may attempt to seek refuge in some third country rather than being forcibly sent back to the country of persecution.[5] It would be inappropriate to require such an applicant to give up a statutory right to move to reopen, or the ability to petition for review in the Court of Appeals without facing the difficulties identified in *Thapa*, *Rife*, and *Lopez-Chavez*, in order to preserve the ability to flee to a third country. And yet, where the applicant is not certain of his or her ability to successfully find refuge in such a third country, forcing the applicant to voluntarily depart, and potentially face grave harm, before obtaining review of the merits of his or her claim is also clearly inappropriate. So, in any potentially meritorious case where the possibility of flight to a third country is an uncertain one – which would describe a significant proportion of otherwise-meritorious asylum claims[6] – a stay of voluntary departure remains the proper remedy.

Alternatively, imagine an applicant for other relief, such as cancellation of removal under INA § 240A(b) or adjustment of status under INA § 245, who is a single parent of a young child. Voluntary departure would allow the parent to make arrangements for the care of the child within the United States (if the child has the right to remain), or arrangements to transport the child outside the United States without undue trauma, and without the parent and child being separated. Forcible removal of the parent following withdrawal of the request for voluntary departure, on the other hand, would likely result either in separation of parent and child, psychological trauma to the child, or both. In such a case, if the alien parent had a sufficiently meritorious petition for review, it would be inappropriate to put that parent to the choice of abandoning the right to eventual voluntary departure or abandoning his or her legal claim. Here again, a stay of voluntary departure would remain the appropriate remedy even after *Dada*.

Finally, imagine an applicant for adjustment of status under INA § 245 who has not accumulated unlawful presence so as to become subject to the ground of inadmissibility at INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B).[7] Voluntary

departure would allow the alien to consular process on an equivalent immigrant visa without requiring a waiver of the bar to readmission of previously removed aliens,[8] but leaving before judicial review is complete could result in an expensive round trip back to the alien's home country, prolonged absence from the alien's job in the United States and/or prolonged separation from close relatives here, and general logistical difficulty in carrying on the litigation, all of which may prove to have been completely unjustified if the petition for review is ultimately granted. Thus, if the Court of Appeals deems the petition sufficiently meritorious, it would be inappropriate to put the alien to the choice of abandoning the *status quo* for the duration of the litigation or giving up the right to seek re-entry without being subject to the bar that would result from removal.

This is not intended to be an exhaustive list of cases in which a stay of voluntary departure pending judicial review would still be appropriate notwithstanding the alien's ability to withdraw the request for voluntary departure under *Dada*. The point is that the same traditional preliminary-injunction balancing test, weighing the probability of ultimate success on the petition for review against the amount of irreparable injury if the stay is denied, can be applied in the presence of the *Dada* withdrawal option as was applied in its absence. The amount of irreparable injury in a particular case if a stay is denied may sometimes be affected by *Dada*, but there is no reason to suppose that it will generally be reduced to zero.

Furthermore, the underlying logic of *Thapa* and similar cases with respect to the power of Courts of Appeals to stay voluntary departure is not affected by the *Dada* right to withdraw a voluntary departure request. As the Second Circuit noted, there is a general statutory presumption "that, in reviewing orders of federal agencies, 'the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition.'" *Thapa*, 460 F.3d at 329 (quoting 28 U.S.C. § 2349(b), incorporated by reference in INA § 242(a)(1), 8 U.S.C. § 1252(a)(1)). "The grant or denial of a stay pending appeal is a customary part of the judicial function." *Rife*, 374 F.3d at 613. Overcoming the presumption that a court may issue such a stay would require a specific statutory prohibition, and as *Thapa*, *Rife* and other cases regarding stays of voluntary departure have explained, no such prohibition exists in this context. The right of withdrawal recognized by *Dada* manifestly does not supply such a prohibition.

New regulations proposed by the Department of Justice, however, may remove the ability to seek a stay of voluntary departure by causing the voluntary departure order to be deemed terminated upon the filing of a petition for review. Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 72 Fed. Reg. 67674 (Nov. 30, 2007). Under the proposed regulations, the act of filing a motion to reopen or reconsider or a petition for review, while still inside the United States during the voluntary departure period, will cause the voluntary departure order to terminate immediately, and the alternate order of removal to take effect. 72 Fed. Reg. at 67686-67687. Thus, according to the proposal, "there would no longer be any period of voluntary departure to be stayed or tolled during the pendency of the judicial review." 72 Fed. Reg. at 67682.[9]

The new regulations would only apply to orders of voluntary departure issued after the regulations have become final (assuming that this occurs), and will not affect previously issued orders of voluntary departure. 72 Fed. Reg. at 67678. Thus, the interaction of *Dada* with the *Thapa* line of cases, as discussed above, will remain an important issue for some time even if the new regulations become final and are upheld as valid.

It is worth noting, however, that the notion of destroying the courts' power to stay voluntary departure by mere regulatory amendment, as the new regulations propose to do, is in significant tension with the indication in *Thapa*, *Rife* and similar cases that Congressional action would be required to take away this power. Those adversely affected by the proposed new regulations should therefore consider challenging them if they do become final. While the seeming prohibition on judicial review of regulations pertaining to voluntary departure that is set out in INA § 240B(e)[10] may present difficulties, it should be overcome in an appropriate case by INA § 242(a)(2)(D), which was added to the INA by the Real ID Act of 2005 and which preserves "review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals" even in instances where other sections of the INA purport to eliminate it.[11]

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[1] *See* INA section 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

[2] Voluntary departure pursuant to INA section 240B(a), 8 U.S.C. § 1229c(a), is more generous insofar as it may be granted for a period of up to 120 days and requires only that the alien not be deportable for an aggravated felony or controlled substance violation. By statute, however, it must be granted before the conclusion of proceedings, and by regulation, 8 C.F.R. § 1240.26(b)(1)(i), it can only be granted without the consent of DHS if the alien requests it prior to the case being calendered for a merits hearing, concedes removability, seeks no other relief, and waives appeal.

[3] In addition to cancellation of removal under INA § 240A and adjustment of status under INA § 245, an alien who fails to comply in a timely fashion with an order of voluntary departure is ineligible for ten years for any further voluntary departure relief, change of status under INA § 248, or registry under INA § 249. INA § 240B(d)(1)(B), 8 U.S.C. § 1229c(d)(1)(B). There is an exemption for certain petitioners seeking relief under the Violence Against Women Act, where extreme cruelty or battery was a central reason for their overstay. INA § 240B(d)(2), 8 U.S.C. § 1229c(d)(2).

[4] The author of this article considers 8 C.F.R. § 1003.2(d), which was not challenged in *Dada*, *see* 2008 WL 2404066 at *13, to be *ultra vires* (that is, beyond the authority of the Department of Justice to promulgate) and invalid.

See William v. Gonzales, 499 F.3d 329 (4th Cir. 2007).

[5] This option can be crucial even if we assume that the applicant's claims will be, in the end, properly rejected as a matter of law. An alien who has failed without sufficient excuse to meet the one-year deadline for an asylum claim, for example, *see* INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B), can fail to obtain the alternative relief of withholding of removal under the INA or withholding of removal under the Convention Against Torture even if there is a substantial chance that he or she will be persecuted or tortured, so long as the alien cannot prove that this is "more likely than not" to occur, 8 C.F.R. § 1208.16(b)(2), (c)(2), and cannot benefit from a presumption such as that available in the INA withholding context to victims of past persecution, *see* 8 C.F.R. § 1208.16(b)(1)(ii). It is readily apparent that an alien with, for example, a 40% chance of suffering future persecution or torture upon return to his or her home country faces a substantial likelihood of irreparable harm, and would suffer significant irreparable harm in a probabilistic sense, if forcibly removed there.

[6] An alien who has previously firmly resettled in a third country (and thus would generally be expected to have the right to return to that country) is ineligible for asylum pursuant to INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi), and an alien who may be removed to a treaty-designated "safe third country" can also be denied asylum pursuant to INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A). (Currently, Canada is the only country with which the United States has entered into a treaty that can be used under some circumstances to invoke the "safe third country" provision.) Many countries in the world do offer some sort of refugee or asylee protection or other possibly available means of entry, however, so a significant number of aliens whose claims are rejected by the United States will have at least a speculative possibility of seeking refuge somewhere other than the country of feared persecution—although actually obtaining such refuge will often be very "difficult as a practical matter," *Thapa*, 460 F.3d at 328.

[7] A properly filed affirmative application for adjustment of status tolls the accumulation of unlawful presence, and continues to do so if it is denied and properly renewed in removal proceedings. *See* Johnny Williams, Memorandum for Regional Directors et al., Subject: Unlawful Presence, June 12, 2002.

[8] *See* INA section 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A).

[9] Notwithstanding the termination of the voluntary departure order and the coming into effect of the alternate order of removal, the alien would remain eligible to recoup the voluntary departure bond upon proving timely departure from the United States, either within the original voluntary departure period or within 30 days after the filing of a petition for review. 72 Fed. Reg. at 67683. The Department of Justice has also solicited public comment regarding whether it would be advisable and possible in connection with the new rule to somehow exempt aliens who file a petition for review but then timely depart from the subsequent inadmissibility that would otherwise result from having departed under an order of removal, *see* INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A). 72 Fed. Reg. at 67682.

[10] "The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection." 8 U.S.C. § 1229(c).

[11] "Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D).