

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 99-70274

DAN MARIUS ANDREIU,

Petitioner,

v.

JANET RENO, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

**MOTION FOR RECONSIDERATION OR REHEARING
OF MOTION FOR STAY OF REMOVAL,
AND SUGGESTION FOR REHEARING EN BANC**

Pursuant to Fed.R.App.P. 35 and 40 and Circuit Rule 27-10, petitioner Dan Marius Andreiu hereby moves for reconsideration or rehearing and for rehearing en banc of his motion for a stay.

INTRODUCTION

This case presents an issue of first impression in this Circuit – whether the new rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)¹ prohibit the Court from issuing a stay pending the direct judicial review of a removal order, except where an extremely high standard is met. Based on a provision of the new rules that does not refer to stays – 8 U.S.C. § 1252(f)(2) - this Court held, over the dissent of Judge Thomas, that the statute imposes a new, high standard for such stays.² In finding that the term “enjoin” in § 1252(f)(2) encompasses a stay, the decision adopts an illogical, dictionary-based analysis that is incorrect as to the plain language of the statute, is contrary to the structure and history of § 1252 considered as a whole, and conflicts with controlling Supreme Court precedent distinguishing between a “stay” and an “injunction.”

Because the decision adopts a standard for stays that is higher than the standard for prevailing on the merits, any aliens who are granted temporary stays under the decision’s standard also will have established their cases on the merits, making further proceedings on the merits in such cases a needless exercise. Many other aliens who could prevail on the merits of their petitions for review will nonetheless be denied a stay if they cannot meet the higher stay standard of establishing “that the [removal] order was manifestly contrary to law.” Slip. op., attached hereto, at 11290. As Judge Thomas noted, “[t]he consequence of this holding is that thousands of asylum seekers who fled their native lands based on well-founded fears of persecution will be forced to return to that danger under the fiction that they will be safe while awaiting the slow wheels of American justice to grind to a halt.” Slip op. at 11308.

¹ Pub. L. 104-208, 110 Stat. 3009-625.

² While the panel opinion is the first published decision of a Court of Appeals to address this issue, the Seventh Circuit ruled directly to the contrary in an unpublished order in Lal v. Reno, No. 99-3160 (Oct. 4, 1999) (attached hereto). The court concluded that “[w]e do not read the requirements for injunctive relief imposed by 8 U.S.C. § 1252(f)(2) as governing

These consequences demonstrate that section 1252(f)(2) cannot serve, and was not intended to serve, as a standard for a stay pending direct judicial review of a removal order.

BACKGROUND

The only reference to a stay in IIRIRA's permanent rules (contained in 8 U.S.C. § 1252) is section 1252(b)(3)(B), which provides that a stay is not automatic but requires action by the court.³ IIRIRA used nearly identical language in the "transitional" rules that apply to deportation cases (IIRIRA § 309(c)(4)(F)),⁴ and this Court used a balancing test as the standard for determining whether to issue a stay under this provision. The petitioner must show "either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor." Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998). By using the same language regarding stays in the transitional and permanent rules, Congress provided that this standard would also apply to removal cases.

The petitioner in this case, Dan Marius Andreiu, is a Rumanian national who filed a pro se petition for review of the Board of Immigration Appeals decision denying his application for asylum and withholding, and requested a stay in conjunction with the appeal. There is no dispute that the Court has jurisdiction over his petition. However, the INS opposed a stay, asserting that INA § 1252(f)(2) imposes a new standard for such stays.⁵

stays pending a decision on a timely petition for review. See 8 U.S.C. § 1252(b)(3)(B) (speaking more directly to such stays)."

³ Section 1252(b)(3)(B) provides: "Service of the petition on the officer or employee [of the INS] does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."

⁴ IIRIRA § 309(c)(4)(F) provides, in pertinent part, that that "service of the petition shall not stay the deportation of the alien pending the court's decision on the petition, unless the court orders otherwise."

⁵ § 1252(f)(2) provides: "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by

Following oral argument, on September 8, 2000, the motions panel issued its decision, ruling that section 1252(f)(2) applies to stays pending judicial review, and fashioning a high standard to apply to stay requests.⁶

REASONS FOR GRANTING REHEARING

The pivotal question in this case, as both the majority and dissent agree, is whether § 1252(f)(2) applies to temporary stays pending direct judicial review of removal orders. The majority concluded that the term “enjoin” in paragraph (f)(2) encompasses a “stay.” As Judge Thomas cogently points out, the panel’s dictionary approach to interpreting the statute not only misses the context that would be provided by “analyzing the statutory structure as a whole,” but also is wrong as a matter of dictionary definition. Slip op. at 11305.⁷ The exhaustive list of examples of injunctions provided by Black’s Law Dictionary notably does not include the term “stay,” (Black’s Law Dictionary 788 (7th ed. 1999)) and “[n]othing could be plainer, the two are not the same.” Slip Op. at 11306 (Thomas, dissenting). Because the terms are different, the plain language of § 1252(f)(2), which only restricts orders that “enjoin” removal, does not apply to stays.

1. The Supreme Court has expressly distinguished between stays and injunctions. In Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279 (1988) the Court ruled that a federal court’s order “that relates only to the conduct or process of litigation before that

clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.”

⁶ The panel decision holds that, for the Court to grant a stay, “the alien must either: 1) show by clear and convincing evidence that the order was based on an erroneous finding of fact; or 2) establish that the order was manifestly contrary to law.” Slip. op. at 11290.

⁷ It does not follow from the definition of “enjoin” as “to legally prohibit or restrain by injunction,” of “injunction” as “[a] court order commanding or preventing an action,” and of “stay” as “[t]he postponement or halting of a proceeding, judgment, or the like,” that the term “enjoin” encompasses a stay. Slip op. at 11282. On the contrary, the terms used to describe a

court ordinarily is not considered an injunction and therefore is not appealable under [28 U.S.C.] § 1292(a)(1).” The Court rejected the plaintiff’s characterization of the stay as “analogous” to an injunction, and held that the order denying the stay was not immediately appealable. *Id.* at 287. In Coleman v. PACCAR, Inc., 424 U.S. 1301, 1305 (1976), then-Justice Rehnquist confirmed that a stay is distinct from an injunction, rejecting the contention that a stay issued by the court of appeals is governed by the provisions of the Fed. R. Civ. P. Rule 65. This precedent establishes that a “stay” is not an “injunction.” Yet despite the dissent’s identification of the seminal nature of Gulfstream, the majority nowhere discusses the case, and errs in citing to Coleman for the proposition that courts use the terms interchangeably.

2. The evident impracticality of the standard adopted by the majority demonstrates that § 1252(f) is not, and cannot be intended as, a standard for a stay pending direct judicial review of a removal order. Any alien who meets this standard and is granted a stay necessarily has established the invalidity of the removal order, such that the required further proceedings on the merits of the case will be a completely unnecessary formality.

It is equally clear that this stay standard is substantially higher than the standard applicable to the adjudication of petitions for review on the merits, so that individuals with meritorious petitions will be removed to their home countries. The general rule is that the standard for review on the merits of legal questions is de novo review (see Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996)(en banc). Only in two kinds of cases do the permanent rules modify this general rule: challenges to a decision that an alien is not eligible for admission and *discretionary* decisions not to grant asylum. § 1252(b)(4). This higher standard does not

stay – “postponement” and “halting” – are temporary, while the terms used to describe “enjoin” are more permanent. Slip Op. at 11305 (Thomas, dissenting).

extend to asylum eligibility determinations such as in this case, nor to any other legal decisions.

Yet the stay standard adopted by the panel requires the alien to “establish that the [removal] order was manifestly contrary to law,” and the panel defines this standard to prohibit a stay except where the removal order is “clearly antithetical to an existing law.” Slip. op. at 11290. Thus, close cases, cases of first impression (common given the many changes in immigration law), asylum claims based on newly established forms of persecution (e.g., gender, sexual orientation, mixed-motive imputed persecution) and even not-so-close cases where the Court ultimately would reverse the Board of Immigration Appeals, may not satisfy a motions panel that the removal order is “manifestly contrary to law.” Thus, “the majority’s ruling will permit the INS immediately to expel asylum-seekers to the very countries where they may have suffered brutal persecution.” Slip. op. at 11291 (Thomas, dissenting).⁸

3. Not only does § 1252 contain separate references to stays (§ 1252(b)(3)) and injunctions (§ 1252(f)), but also subsection (f) itself distinguishes between the terms “enjoin” and “restrain.” Paragraph (f)(1) bars courts from issuing orders to “enjoin or restrain” the operation of the statute, whereas (f)(2) applies only to circumstances in which a court seeks to “enjoin” removal. The different terminology employed for the restrictions on injunctive relief

⁸ If Congress truly envisioned that aliens with meritorious petitions should nonetheless return to their home countries while their petitions are adjudicated, it would have made exceptions for persons who cannot do so, such as those with claims for asylum, withholding, and cancellation (cases where the alien’s removal would cause “exceptional and extremely unusual hardship” – 8 U.S.C. § 1229b(b)). Indeed, given the mandatory nature of withholding, returning an alien eligible for withholding to his or her home country would directly conflict with the withholding statute. See *INS v. Stevic*, 467 U.S. 407, 422 n. 15 (1984); see also *Cardoza-Fonseca*, 480 U.S. at 424 (withholding statute gives certain aliens “a statutory right not to be deported to the country where they are in danger,” mirroring the provisions of the United Nations Protocol Relating to the Status of Refugees). The same relief is available in removal proceedings. 8 U.S.C. § 1231(b)(3).

in the two paragraphs of the same subsection shows that Congress intended a more limited restriction in (f)(2). See INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).⁹

The distinct meanings of “restrain” and “enjoin” are further illustrated by the usage of the Hobbs Act, which is the foundation for the INA’s petition for review procedure. The Hobbs Act uses the term “restrain” in connection with a temporary stay pending judicial review (see 28 U.S.C. § 2349(b)), but never uses the term “enjoin” in that sense. The Hobbs Act uses “enjoin” only in connection with orders for *permanent* relief. see, e.g., §§ 2342, 2348 and 2349(a). Thus, Congress’ distinct use of the terms “enjoin and restrain” in paragraph (f)(1) and “enjoin” in paragraph (f)(2) is readily understood in the context of the usage of the Hobbs Act as excluding temporary stays from the reach of (f)(2).

The Supreme Court has taught that “the need for precision in legislative drafting” counsels against interpreting precise terms used in the judicial review provisions of IIRIRA as “a shorthand way” of making a broader reference, or as “synecdoche.” Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) (narrowly interpreting terms in § 1252(g)). In contrast, the majority simply equates Congress’s use of the distinct terms “stay,” “restrain” and “enjoin” in different subsections of § 1252.

Even were the dictionary definitions of “stay” and “injunction” considered to create ambiguity as to whether the former term is encompassed in the latter, Supreme Court precedent requires that the ambiguity be interpreted in favor of the alien. Cardoza-Fonseca,

⁹ Moreover, unless the term “enjoin or restrain” is interpreted to be different and broader than the term “enjoin,” the words “or restrain” would be mere surplusage, contrary to the longstanding principle that “[s]tatutes must be interpreted, if possible, to give each word some operative effect” (Walters v. Metropolitan Educ. Enterp., Inc., 519 U.S. 202, 209 (1997); Northwest Forest Resource Counsel v. Glickman, 82 F.3d 825, 834 (9th Cir. 1996).

480 U.S. at 449. Moreover, the Court has directed that courts “should not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command’ ... or an ‘inescapable inference’ to the contrary.” Miller v. French, 120 S.Ct. 2246, 2255 (2000) (citations omitted).

4. The placement of (f)(2) in § 1252 shows that it was not intended to apply to stays. Congress did not place the provision within subsection (b), which contains not only express standards for the adjudication of petitions, but also the only provision of § 1252 that expressly governs stays. § 1252(b)(3)(B).¹⁰

The history of § 1252(f) confirms that it does not address the standard for a stay. Paragraph (f)(2) was added to subsection (f) by the Conference Committee shortly before the law was enacted. Subsection (f) was not intended to apply to judicial review under the statute, but rather to affirmative litigation challenging removal procedures. See 8 Gordon, Mailman & Yale-Loehr, Immigration Law and Procedure § 104.13[4][g][ii] (subsection (f) “relates to district court actions challenging policies and practices of the INS, the Justice Department’s Executive Office for Immigration Review (EOIR), and other federal agencies that implement or enforce the [Immigration and Nationality] Act”). As the legislative history of § 1252 explains, subsection (f) is directed at “lawsuits” brought as “challenges to the new procedures,” and is intended to ensure that “single district courts or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing aliens from the U.S.” H.R. Rep. No. 104-469(I), 104th Cong., 2d Sess. 359, 473 (Mar. 4, 1996).

¹⁰ The panel acknowledges that “the lucidity of section 1252(a)(1) would have benefited from the placement of the stay standard in section 1252(b).” Slip op. at 11287.

Thus, paragraph (f)(1) applies to actions “to enjoin or restrain the operation of the provisions” of chapter 4 of title II of the INA. § 1252(f)(1) (emphasis added). Petitions for review are not “lawsuits” raising “challenges to the new procedures,” and individuals who use the statute’s procedure for direct judicial review of removal orders are not seeking to “enjoin or restrain the operation of the provisions” of the INA.

As the Supreme Court has stated, § 1252(f) “[b]y its plain terms, and even by its title... is nothing more or less than a limit on injunctive relief” that limits “classwide injunctive relief,” but “does not extend to individual cases.” Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. at 481-82 (1999). Paragraph (f)(2) is designed as a further, more particular and limited restriction on the power of courts to issue injunctions in collateral lawsuits.

In sum, the plain language of § 1252(f)(2) shows that it does not apply to stays, both because Congress carefully differentiated between the terms “enjoin” and “stay” in § 1252, and because the provision does not provide a workable standard for stays. Both the structure and legislative history of § 1252 confirm this conclusion.

CONCLUSION

For the foregoing reasons, the Court should grant reconsideration or rehearing en banc.

Dated: September 18, 2000.

Respectfully submitted,

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Appointed Counsel for Petitioner on the Stay Motion