No. 03-1450

In the Supreme Court of the United States

MOHAMMAD KHAN AND ERUM SYREDA, PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioners' petition to review the Board of Immigration Appeals' denial of their motion to reopen immigration proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-5a) is unreported. The orders of the Board of Immigration Appeals (Pet. App. 8a, 9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2003. A motion for reconsideration was denied on December 31, 2003 (Pet. App. 3a). The petition for a writ of certiorari was filed on March 29, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before the amendments to the Immigration and Nationality Act (INA) that were enacted by the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident under 8 U.S.C. 1254(a) (1994). Relief was available in the discretion of the Attorney General. To qualify for consideration, the alien was required to demonstrate, *inter alia*, that his deportation would result in "extreme hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) (1994). The alien was also required to satisfy a continual physical presence requirement and establish good moral character. *Ibid.* IIRIRA repealed 8 U.S.C. 1254(a) (1994), see Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-615, and enacted new provisions containing stricter criteria for obtaining discretionary relief, 8 U.S.C. 1229b(b)(1). See *Kalaw* v. *INS*, 133 F.3d 1147, 1150-1151 (9th Cir. 1997).[1]

Judicial review of the Attorney General's decision on an application for suspension of deportation under former 8 U.S.C. 1254(a) (1994) arose under 8 U.S.C. 1105a(a) (1994). IIRIRA repealed that provision and enacted a new judicial review provision, 8 U.S.C. 1252 (Supp. III 1997), which became effective on April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625. IIRIRA sets forth transitional rules that govern judicial review of immigration proceedings where the proceedings

[1] IIRIRA generally replaced "deportation" proceedings in the INA with "removal" proceedings. Accordingly, 8 U.S.C. 1229b(b)(1), the provision that replaced former 8 U.S.C. 1254(a)(1) (1994) (as well as other provisions of the INA), permits "cancellation of removal" by the Attorney General rather than "suspension of deportation."

were underway before IIRIRA's effective date of April 1, 1997, and no final order was entered by October 30, 1996. IIRIRA § 309(c), 110 Stat. 3009-625. Those transitional rules preclude judicial review of the Attorney General's discretionary determinations under, *inter alia*, former 8 U.S.C. 1254(a) (1994). IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626.

2. Petitioners, husband and wife, are natives and citizens of Pakistan. Petitioner Khan was admitted to the United States on March 22, 1986, as a nonimmigrant student. Certified Administrative Record (CAR) 927. Petitioner Syreda was admitted on August 9, 1989, as a nonimmigrant visitor. CAR 1013. On January 8, 1997, petitioners were placed in deportation proceedings because Khan failed to maintain his nonimmigrant status and Syreda overstayed her visa. CAR 929, 1015. Petitioners applied for asylum and for suspension of deportation under former 8 U.S.C. 1254(a)(1) (1994), claiming that deportation would result in extreme hardship. CAR 734, 741.

On December 1, 1998, an immigration judge (IJ) found petitioners deportable, denied them asylum and suspension of deportation, but granted them voluntary departure. CAR 421-445. With respect to the denial of suspension of deportation, the IJ found that petitioners satisfied the requirements concerning continuous physical presence and good moral character. CAR 438, 441. The IJ ruled, however, that petitioners had failed to establish that the hardship to them and to their United States citizen children if deported to Pakistan would amount to the "extreme hardship" necessary to obtain relief. CAR 438-444.

On January 22, 2003, the Board of Immigration Appeals (BIA) affirmed the IJ's decision without opinion. Pet. App. 11a-12a, 13a-14a. The IJ's decision therefore

became the final agency determination. *Id.* at 11a, 13a; see 8 C.F.R. 3.1(e)(4). Petitioners did not seek judicial review of the final agency determination.

3. On February 20, 2003, petitioners filed a motion with the BIA to reopen their deportation proceedings. CAR 20-30. Petitioners' motion did not seek reexamination of the determination that they were deportable or of the denial of their applications for asylum. The motion instead was limited to seeking reevaluation of their applications for suspension of deportation. Petitioners alleged that changed circumstances established the requisite extreme hardship, including the birth of two additional United States citizen children, the absence of family in Pakistan, the recent presence of all family members in the United States, their increased economic and community ties in the United States, the poor economic and educational opportunities for their children in Pakistan, and changed country conditions in Pakistan.

The government opposed petitioners' motion to reopen on the ground that the evidence offered in support of the motion was not material evidence with respect to the extreme hardship determination. CAR 4. On June 2, 2003, the BIA issued per curiam orders denying petitioners' motion to reopen. Pet. App. 8a, 9a. The orders state that, having "considered [petitioners'] motion papers [we] do not find that reopening of the proceedings is warranted." *Ibid.*

4. On July 1, 2003, petitioners filed a petition for review in the United States Court of Appeals for the Seventh Circuit, seeking review of the BIA's denial of their motion to reopen. On October 8, 2003, the government moved to dismiss the petition for review, arguing that the transitional rules enacted by IIRIRA preclude judicial review of the denial of suspension of

deportation for failure to establish extreme hardship. See IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626. The government argued in the alternative that, under 8 U.S.C. 1252(b)(2), the petition for review should be transferred to the United States Court of Appeals for the Ninth Circuit because the proceedings before the IJ had taken place in Los Angeles, California.

On November 13, 2003, the court of appeals issued an unpublished order granting the government's motion to dismiss the petition for review. Pet. App. 4a-5a. The order states that "[c]ourts do not have jurisdiction to review discretionary denials of applications for suspension of deportation." *Id.* at 5a. Judge Rovner dissented and would have transferred the case to the Court of Appeals for the Ninth Circuit. *Ibid.*

ARGUMENT

Petitioners argue that the court of appeals erred in concluding that it lacked jurisdiction to review the BIA's denial of their motion to reopen. That contention lacks merit and does not warrant review.

1. Because petitioners' deportation proceedings commenced before April 1, 1997, and no final order had been issued by October 30, 1996, judicial review in their immigration proceedings is governed by IIRIRA's transitional rules. Those rules provide that "there shall be no appeal of any discretionary decision under section * * * 244" of the INA, IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626, including the discretionary denial of an application for suspension of deportation under former 8 U.S.C. 1254(a)(1) (1994). The courts of appeals have uniformly held that the transitional rules bar direct review of the denial of an application for suspension of deportation for failure to establish extreme hardship. *Mendez- Moranchel* v. *Ashcroft*, 338 F.3d 176, 179 (3d

Cir. 2003); *Valenzuela-Alcantar* v. *INS*, 309 F.3d 946, 949 (6th Cir. 2002); *Kalkouli* v. *Ashcroft*, 282 F.3d 202, 204 (2d Cir. 2002); *Okpa* v. *United States INS*, 266 F.3d 313, 317 (4th Cir. 2001); *Al Najjar* v. *Ashcroft*, 257 F.3d 1262, 1298 (11th Cir. 2001); *Escalera* v. *INS*, 222 F.3d 753, 755 (10th Cir. 2000); *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 62 (1st Cir. 1999); *Moosa* v. *INS*, 171 F.3d 994, 1013 (5th Cir. 1999); *Kalaw* v. *INS*, 133 F.3d 1147, 1152 (9th Cir. 1997); *Skutnik* v. *INS*, 128 F.3d 512, 514 (7th Cir. 1997).

Petitioners therefore could not have obtained direct review of the agency's adverse determination on extreme hardship. In this case, after the BIA entered that adverse determination, petitioners filed a motion with the BIA to reopen their immigration proceedings, arguing that changed circumstances warranted reevaluation of whether they satisfied the extreme hardship requirement. Petitioners then sought judicial review of the BIA's denial of their motion to reopen.

In those circumstances, the court of appeals correctly dismissed petitioners' appeal for lack of jurisdiction. Because the court would have lacked jurisdiction to review the denial of petitioners' applications for suspension of deportation, the court necessarily also lacked jurisdiction to review the denial of a motion to reopen seeking reexamination of the same applications for suspension of deportation. A contrary conclusion would allow an alien easily to circumvent the statutory prohibition against direct review of an adverse determination on extreme hardship simply by filing a motion to reopen the proceedings for a reexamination of extreme hardship and then seeking judicial review of the denial of that motion.

Petitioners argue (Pet. 11-12) that the court of appeals' decision conflicts with the Ninth Circuit's deci-

sion in *Arrozal* v. *INS*, 159 F.3d 429 (9th Cir. 1998). In that case, the alien was ordered deported for overstaying her visa. She then filed a motion to reopen the proceedings to permit her to file an application for suspension of deportation under former 8 U.S.C. 1254(a) (1994) on grounds of extreme hardship. After the BIA denied her motion to reopen, she sought review in the Ninth Circuit. The Ninth Circuit held that IIRIRA's transitional rules did not preclude review of the BIA's denial of the motion to reopen, ruling that the denial was not a "decision under" former 8 U.S.C. 1254(a) (1994) within the meaning of IIRIRA's transitional rules, IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626. The court reasoned that, because the alien's deportation order was issued under Section 241(a)(2) of the INA for overstaying her visa and the motion to reopen "was intertwined with the deportation order", the denial of the motion to reopen "should be treated as an order under § 241(a)(2)" rather than an order under former 8 U.S.C. 1254(a) (1994). *Arrozal*, 159 F.3d at 432. And because IIRIRA's transitional rules did not preclude review of orders under Section 241(a)(2), the court concluded, there was no bar to review of the BIA's denial of the motion to reopen. *Ibid.*

It is not clear that the Ninth Circuit would conclude that it has jurisdiction under IIRIRA's transitional rules on the facts of this case. In *Arrozal*, the alien filed a motion to reopen her proceedings to permit her to file an application for suspension of deportation on grounds of extreme hardship. At the time of her motion to reopen, there had been no agency determination addressing the merits of her application for suspension of deportation and no discretionary determination that she failed to establish extreme hardship. In this case, by contrast, petitioners moved to reopen proceedings

that had already culminated in the denial of suspension of deportation for failure to establish extreme hardship; and the sole ground for reopening the proceedings cited by the motion was to obtain a reevaluation of the adverse determination on extreme hardship. The BIA therefore characterized petitioners' motion as seeking to "reopen our decision dated January 22, 2003," Pet. App. 8a, 9a, a decision that constituted a final agency determination that petitioners had failed to establish extreme hardship. This case thus even more squarely implicates the statutory prohibition against direct review of discretionary determinations concerning extreme hardship.

Insofar as *Arrozal* would permit direct review in the circumstances of this case, however, *Arrozal* was wrongly decided. IIRIRA cannot be construed to have barred direct review of a discretionary decision concerning extreme hardship while at the same time permitting review of the denial of a motion to reopen designed solely to introduce additional evidence of extreme hardship. Any such result would be particularly unwarranted in light of the fact that decisions whether to grant a motion to reopen also lie within the discretion of the Attorney General. As this Court has explained, the "Attorney General has 'broad discretion' to grant or deny such motions." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) (quoting *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985)).

In any event, the court of appeals' unpublished summary order has no precedential effect, and any questions concerning the scope of judicial review under IIRIRA's transitional rules are of little and diminishing practical significance. For removal proceedings commenced after IIRIRA's effective date of April 1, 1997, judicial review of the denial of discretionary relief is

governed by 8 U.S.C. 1252(a)(2)(B)(i). Under that provision, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under," *inter alia*, 8 U.S.C. 1229b(b)(1), the provision that replaced former 8 U.S.C. 1254(a)(1) (1994). Whereas the transitional rules precluded review of a "decision under" former 8 U.S.C. 1254(a) (1994), IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626, the permanent provisions more broadly preclude review of "any judgment regarding the granting of relief under" 8 U.S.C. 1229b. 8 U.S.C. 1252(a)(2)(B)(i). No court of appeals has yet addressed whether, and to what extent, 8 U.S.C. 1252(a)(2)(B)(i) permits judicial review of the denial of a motion to reopen where the motion seeks reexamination of an adverse agency determination on extreme hardship.[2] Cf. *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 525-527 (9th Cir. 2004) (relying on *Arrozal* and holding that 8 U.S.C. 1252(a)(2)(B)(i) does not preclude review of a denial of a motion to reopen to allow the alien to seek adjustment of status when the agency has not ruled on a petition for adjustment of status).

2. Petitioners also argue (Pet. 13) that, instead of dismissing their petition for review for lack of jurisdiction, the court of appeals should have transferred the appeal to the Ninth Circuit because the proceedings before the IJ were conducted in Los Angeles, California. See 8 U.S.C. 1252(b)(2). There is no warrant for reviewing petitioners' fact-bound contention on venue

[2] An alien applying for suspension of deportation under former 8 U.S.C. 1254(a)(1) (1994) was required to demonstrate, *inter alia*, "extreme hardship," but an alien seeking cancellation of removal under 8 U.S.C. 1229b(b)(1) must demonstrate, *inter alia*, that "removal would result in exceptional and extremely unusual hardship."

because the court of appeals did not reach the issue. In addition, petitioners elected to seek judicial review in the Seventh Circuit rather than the Ninth Circuit, and when the government moved to dismiss petitioners' appeal or in the alternative to transfer the proceedings to the Ninth Circuit, petitioners responded that the proceedings should remain in the Seventh Circuit. See Petitioners' Response to Respondent's Motion to Dismiss, Transfer and Response to Stay of Removal (filed Oct. 22, 2003). There is no basis in these circumstances to review petitioners' current contention that the Seventh Circuit should have transferred the proceedings to the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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