

No. 20-140

In the Supreme Court of the United States

REZA HEIDARI, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether to grant the petition for a writ of certiorari, vacate the judgment below, and remand for reconsideration in light of *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is reprinted at 789 Fed. Appx. 444.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2020. A petition for rehearing was denied on March 10, 2020 (Pet. App. E1). The petition for a writ of certiorari was filed on August 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Iran. Pet. App. D3. He was admitted to the United States as a refugee in 2004 and became a lawful permanent resident in 2006. *Ibid.* In 2012, he pleaded guilty to attempted distribution of a controlled substance (opium),

in violation of 21 U.S.C. 841(a)(1) and 846, and he was sentenced to 18 months of imprisonment. Pet. App. D3.

After petitioner's criminal conviction, the Department of Homeland Security (DHS) initiated proceedings to remove him from the United States. Pet. App. A2. DHS charged petitioner with being removable as having been convicted of an aggravated felony, 8 U.S.C. 1227(a)(2)(A)(iii), and as having been convicted of a controlled-substance offense, 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. A2. Petitioner conceded his removability on both grounds but sought deferral of removal under the regulations implementing the United States' obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention or CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 114. See Pet. App. D2. Petitioner alleged that he had been previously imprisoned and tortured in Iran and that he feared that he would be killed if returned there, in part because of his political activities in the United States. *Id.* at D6-D7.

On September 1, 2013, an immigration judge (IJ) found petitioner removable on the two charged grounds, denied his request for deferral of removal under the CAT regulations, and ordered him removed to Iran. Pet. App. D1-D13. The IJ found that petitioner's "testimony [was] insufficient to establish the facts requisite to support his claim" and that petitioner had failed to present "corroborative evidence." *Id.* at D12. Petitioner declined to appeal the IJ's decision. *Id.* at A2.

2. On July 18, 2017, almost four years after he was ordered removed, petitioner moved to reopen his removal proceedings. Pet. App. C2. Generally, any motion by an alien to reopen removal proceedings "must

be filed within 90 days of the date of entry of a final administrative order of removal.” 8 C.F.R. 1003.23(b)(1). But an alien’s motion to reopen is exempt from the 90-day limitation if the purpose of the motion is to apply for CAT protection and the motion is based on evidence of “changed country conditions arising in the country * * * to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding.” 8 C.F.R. 1003.23(b)(4)(i).

The IJ denied petitioner’s motion. Pet. App. C1-C3. The IJ found the motion “clearly untimely” and rejected petitioner’s arguments for not applying the 90-day time limitation. *Id.* at C2. The IJ observed that petitioner “did not allege or submit any evidence alleging facts that would establish changed country conditions since his hearing in September 2013,” and that petitioner’s motion was instead based on changes in his own “personal circumstances,” such as his marriage to a U.S. citizen. *Ibid.* The IJ also found that, even if petitioner’s “changed personal circumstances” could furnish an appropriate basis for excusing his failure to comply with the 90-day time limitation on motions to reopen, petitioner had still failed to “establish prima facie eligibility” for CAT protection. *Id.* at C3.

The Board of Immigration Appeals (Board) dismissed petitioner’s appeal, upholding the IJ’s determination. Pet. App. B1-B2. The Board agreed with the IJ that petitioner’s motion was untimely and that the exception for motions based on changed country conditions was inapplicable. *Id.* at B1. Like the IJ, the Board also found that petitioner had failed to “demonstrate[] prima facie eligibility for the relief he seeks.” *Id.* at B2.

3. On January 7, 2020, the court of appeals dismissed a petition for review in an unpublished, per curiam decision. Pet. App. A1-A5. The court concluded that it lacked jurisdiction over the petition under 8 U.S.C. 1252(a)(2)(C), which states that “no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense” covered in certain provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*—including offenses covered in the two provisions under which petitioner was found to be removable. Pet. App. A3-A4. The court stated that it could still “review ‘constitutional claims or questions of law raised upon a petition for review’[] even when, as in this instance, § 1252(a)(2)(C) otherwise precludes jurisdiction.” *Id.* at A4 (citing 8 U.S.C. 1252(a)(2)(D)). But it understood petitioner to be challenging the Board’s “factual determination” that he had failed to show “[p]rima facie eligibility for deferral of removal.” *Ibid.* Because the court found that it “lack[ed] jurisdiction to review whether [petitioner] established *prima facie* eligibility for deferral of removal under the CAT” regulations, it declined to address any other issues. *Id.* at A5.

On March 10, 2020, the court of appeals denied a petition for rehearing. Pet. App. E1.

ARGUMENT

Petitioner asks (Pet. 7-10) that this Court grant the petition for a writ of certiorari, vacate the judgment below, and remand for reconsideration in light of *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), which was issued after the court of appeals had already denied rehearing. Although this case does not present the same question as *Nasrallah*, the government agrees that it would be

appropriate to grant, vacate, and remand in order to afford the court of appeals an opportunity to address *Nasrallah* in the first instance.

In *Nasrallah*, this Court considered the scope and application of Section 1252(a)(2)(C), the same jurisdictional bar applied in the decision below. Section 1252(a)(2)(C) precludes judicial review of factual challenges to “any final order of removal” entered against an alien who is found to be removable by reason of having committed a criminal offense specified in certain provisions of the INA. 8 U.S.C. 1252(a)(2)(C); see 8 U.S.C. 1252(a)(2)(D). The question presented in *Nasrallah* was whether Section 1252(a)(2)(C) precludes review of factual challenges to the denial of an alien’s request for protection under the Convention in removal proceedings. 140 S. Ct. at 1690. This Court held that it does not. *Ibid.*

The Court reasoned that Section 1252(a)(2)(C) limits review of “final orders of removal,” and that an administrative decision denying an alien’s request for CAT protection in removal proceedings (a “CAT order”) “is not itself a final order of removal because it is not an order ‘concluding that the alien is deportable or ordering deportation.’” *Nasrallah*, 140 S. Ct. at 1690-1691 (quoting the INA’s definition of “order of deportation,” 8 U.S.C. 1101(a)(47)(A)). The Court further reasoned that a CAT order should not be considered part of the “final order of removal” for purposes of Section 1252(a)(2)(C) because a CAT order does not “affect the validity of the final order of removal,” *id.* at 1691, which remains in effect even if the alien is granted CAT protection. Accordingly, the Court determined that Section 1252(a)(2)(C) does not preclude review of factual

challenges to CAT orders, which should instead be reviewed under the “highly deferential * * * substantial-evidence standard.” *Id.* at 1692.

Here, petitioner does not seek review of a “CAT order” as this Court used that term in *Nasrallah*. The CAT order in this case—*i.e.*, the administrative decision denying petitioner’s request for CAT protection—was entered by the IJ in September 2013, and petitioner declined to seek any further review of that decision. See p. 2, *supra*. Petitioner instead seeks review of the IJ’s August 2017 order, affirmed by the Board, denying petitioner’s motion to reopen the removal proceedings. Pet. App. A1-A3, C3.

Nasrallah did not address whether Section 1252(a)(2)(C) bars judicial review of factual challenges to orders denying motions to reopen, where the alien seeks to reopen the proceedings in order to apply (or re-apply) for protection under the CAT regulations. In cases decided before *Nasrallah*, the Fifth Circuit had consistently found Section 1252(a)(2)(C)’s jurisdictional bar applicable in those circumstances. See Pet. App. A4 (citing *Zhong Qin Yang v. Sessions*, 728 Fed. Appx. 376, 376-377 (5th Cir. 2018) (per curiam)); see also, *e.g.*, *Barillas-Rivera v. Lynch*, 668 Fed. Appx. 81, 82 (5th Cir. 2016) (per curiam); *Henry v. Holder*, 581 Fed. Appx. 377, 378 (5th Cir. 2014) (per curiam).

As noted above, the government agrees with petitioner that it would be appropriate to grant the petition, vacate the judgment below, and remand this case, so that the court of appeals may have an opportunity to consider the effect of *Nasrallah*, if any, on its jurisdiction. Granting, vacating, and remanding would also afford that court an opportunity to consider whether the

Board's order denying reopening might be upheld on alternative grounds. See Gov't C.A. Br. 18-23 (arguing that petitioner's challenge to the Board's finding of untimeliness lacked merit).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for reconsideration in light of *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020).

Respectfully submitted.

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