No. 03-132

In the Supreme Court of the United States

NAJWA BAKAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals (BIA) correctly dismissed petitioner's appeal of an *in absentia* removal order when petitioner failed to follow the statutory procedure for challenging the order.

2. Whether the BIA's dismissal of petitioner's appeal, for failure to follow the required procedure, denied petitioner due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter, but is reprinted in 56 Fed. Appx. 650. The per curiam order of the Board of Immigration Appeals (Pet. App. 12a-13a) and the decision of the immigration judge (Pet. App. 14a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2003. A petition for rehearing was denied on February 28, 2003 (Pet. App. 43a). On May 20, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 28, 2003. The petition for a writ of certiorari was filed on

July 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 545(a), 104 Stat. 5061, Congress took steps to reduce the frequency with which criminal aliens and other aliens failed to appear at their scheduled deportation hearings. See H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 150 (1990). Congress required the Immigration and Naturalization Service (INS) to provide aliens in removal proceedings written notice of, *inter alia*, the nature of the proceeding, the grounds for the INS's charge of removability, the alien's right to be represented by counsel, and the consequences of failing to appear at the proceeding. 8 U.S.C. 1229(a)(1) and (2). Congress then directed that an alien who fails to appear at his deportation hearing "shall be ordered removed in absentia if the [INS] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A).

If the alien received the statutorily required notice and was not prevented from appearing due to being held in federal or state custody, then the alien may not seek rescission of the removal order entered *in absentia* unless the alien moves "within 180 days after the date of the order of removal" to reopen the removal proceeding and "demonstrates that the failure to appear was because of exceptional circumstances (as defined in [8 U.S.C. 1229a(e)(1)])." 8 U.S.C. 1229a(b)(5)(C)(i).

Congress also addressed judicial review of removal orders entered *in absentia*, providing that review of such orders by a court of appeals "shall * * * be

confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." 8 U.S.C. 1229a(b)(5)(D).

Administrative regulations incorporate the statutory requirements for obtaining reopening of an *in absentia* removal order in the immigration court. See 8 C.F.R. 1003.23(b)(4)(ii). The regulations further provide that an alien may not appeal the entry of an *in absentia* removal order directly to the Board of Immigration Appeals (BIA). 8 C.F.R. 1240.15. Rather, the alien may take an appeal to the BIA if the immigration judge (IJ) denies the alien's motion to reopen the removal proceeding. See *In re Guzman-Arguera*, 22 I. & N. Dec. 722, 723 (BIA 1999) (en banc) ("Only when an alien has exhausted this avenue of relief [by filing a motion to reopen] may he or she file an appeal with the [BIA].").

2. Petitioner is a native and citizen of Iraq. In March 1993, petitioner was admitted to the United States on a tourist visa. In August 1994, she pleaded guilty in Michigan to committing first degree retail fraud (theft of merchandise valued at greater than $1000), for which she was placed in a youth trainee program and sentenced to probation. Pet. App. 2a.

In September 1995, petitioner applied for adjustment of her immigration status to that of a lawful permanent resident of the United States. Petitioner falsely stated on her application that she had not been "arrested, cited, charged, [or] indicted * * * for breaking or violating any law or ordinance." Pet. App. 2a. In March 1996, the INS granted petitioner's application and adjusted her status to that of a lawful permanent resident. *Ibid.*

In October 1999, after discovering petitioner's false statement on her adjustment application, the INS com-

menced proceedings to remove petitioner from the United States based on her 1994 theft conviction and the false statement to the INS. Pet. App. 2a-3a (citing statutes).

In her removal proceeding before an IJ, petitioner denied that she is removable. Pet. App. 19a. In February 2000, the IJ continued petitioner's case until July 2000. The IJ advised petitioner that, if she failed to appear, she would face the possibility of being ordered removed *in absentia*. *Id.* at 30a-31a. In July 2000, the IJ further continued the proceeding until August 18, 2000, at 1 p.m., to allow additional investigation. *Id.* at 34a. The IJ again advised petitioner that if she failed to attend the hearing, she would face removal *in absentia*. *Id.* at 35a.

Petitioner did not appear at her removal hearing on August 18, 2000. In the presence of her counsel, the IJ reviewed and considered the record evidence concerning petitioner's removability. Pet. App. 37a-41a. The IJ sustained the INS's factual allegations, determined that petitioner is removable from the United States, and entered an *in absentia* order of removal to Iraq. *Id.* at 14a-15a, 39a-40a.

3. Petitioner did not file a motion with the immigration court to reopen her case, as she was permitted to do under 8 U.S.C. 1229a(b)(5)(C) and 8 C.F.R. 1003.23(b)(4)(ii) (to be codified; formerly codified as 8 C.F.R. 3.23(b)(4) (2002)). Instead, on August 31, 2000, petitioner appealed the IJ's removal order to the BIA. Petitioner contended in her appeal that the record did not support the IJ's finding of removability. See Pet. App. 3a.

In May 2001, the BIA entered a per curiam order dismissing petitioner's appeal and returning the record of the case to the immigration court. Pet. App. 12a-13a.

The BIA explained that a motion to reopen the IJ's proceedings would have been the correct way of challenging the *in absentia* removal order, and that the BIA lacked jurisdiction to hear petitioner's appeal. *Id.* at 12a.

4. Petitioner filed a petition for review of the BIA's decision in the United States Court of Appeals for the Sixth Circuit. After entering a stay of petitioner's removal pending its consideration of her petition for review, see Pet. App. 9a-11a, the court of appeals later denied the petition and affirmed the decision of the BIA, *id.* at 1a-8a. The court determined that, because 8 U.S.C. 1229a(b)(5)(C) and the implementing regulations establish reopening as the exclusive procedure for rescinding an *in absentia* order of removal, the BIA lacked authority to hear petitioner's direct appeal from the IJ's entry of her removal order. Pet. App. 4a-6a.

The court of appeals also rejected petitioner's argument that she was denied due process when the BIA dismissed her appeal. The court explained that petitioner "was given a fair opportunity to be heard" at her removal hearing and "simply failed to prosecute her own case." Pet. App. 7a. The court further concluded that the IJ's removal order was supported by the record evidence and "stands on solid legal and factual grounds." *Id.* at 8a. The court stated that the validity of the IJ's removal decision "allayed" "[a]ny conceivable Due Process concerns" in this case and made it unnecessary for the court to consider "issues of Due Process that might arise in the scenario where the government's charges or proofs of removability are clearly and materially defective." *Id.* at 7a, 8a.

On February 28, 2003, the panel denied petitioner's request for rehearing.

ARGUMENT

Petitioner contends that the Board of Immigration Appeals erred in dismissing her administrative appeal of the *in absentia* removal order, and that the BIA's dismissal order denied her due process. The unpublished decision of the court of appeals, upholding the BIA's action, is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. a. The BIA, upheld by the court of appeals, correctly applied the controlling statute and regulation. Section 1229a(b)(5)(C) of Title 8 of the United States Code states that a removal order entered *in absentia* following the alien's failure to appear "may be rescinded only * * * upon a motion to reopen." 8 U.S.C. 1229a(b)(5)(C)(i) and (ii). Consistent with Congress's establishment of an exclusive avenue of relief, agency regulations state that "no appeal shall lie" to the BIA "from an order of removal entered in absentia." 8 C.F.R. 1240.15 (to be codified; formerly codified as 8 C.F.R. 240.15 (2002)). Rather, an appeal may be taken to the BIA if the immigration judge denies the alien's motion to reopen the *in absentia* order. *In re Guzman-Arguera*, 22 I. & N. Dec. 722 (BIA 1999) (en banc). If the BIA denies such an appeal, the alien may challenge that decision, within the bounds set by Congress in 8 U.S.C. 1229a(b)(5)(D), by filing a petition for review in the appropriate court of appeals.

Applying that statutory framework in this case, the BIA and the court of appeals both correctly determined that petitioner's failure to file a motion to reopen with the IJ precluded petitioner from appealing her *in absentia* removal order to the BIA.

b. Because petitioner failed to follow the statutory procedures for challenging her removal order, petitioner's discussion of the scope of judicial review when the correct procedures *are* followed, see Pet. 7-11, is irrelevant to her case.

The court of appeals' grant of a stay pending appeal, on which petitioner also relies (Pet. 8-9), likewise does not aid petitioner. In granting a stay, the court of appeals stated (Pet. App. 10a) that it would have been futile for petitioner to file a motion to reopen with the IJ because petitioner had conceded that she cannot satisfy the statutory criteria for reopening the *in absentia* order, see 8 U.S.C. 1229a(b)(5)(C). The court of appeals therefore did not require petitioner to file a "pointless" motion to reopen with the IJ before it would review the BIA's dismissal of her administrative appeal. *Ibid.* Contrary to petitioner's suggestion (Pet. 9), there is no inconsistency between the court of appeals' procedural decision to review the BIA's order of dismissal without requiring further agency proceedings, and the court's determination on the merits that the BIA correctly dismissed petitioner's appeal due to her failure to follow the statutorily required procedures.

c. There is no conflict between the Sixth Circuit's unpublished decision in this case and the decisions of the First and Ninth Circuits that petitioner cites (Pet. 11-12). In *Herbert* v. *Ashcroft*, 325 F.3d 68 (1st Cir. 2003), and *Celis-Castellano* v. *Ashcroft*, 298 F.3d 888 (9th Cir. 2002), the aliens followed the statutory procedure of filing a motion to reopen, and the courts of appeals therefore reviewed the administrative removal decisions under 8 U.S.C. 1229a(b)(5)(D). See 325 F.3d at 70-71; 298 F.3d at 890-891. In this case, by contrast, petitioner did not file a motion to reopen and her procedural default required the BIA to dismiss her appeal.

The court of appeals correctly upheld the BIA's decision on the basis of petitioner's procedural default, without reference to Section 1229a(b)(5)(D)'s standards for judicial review in a case where there has not been a procedural default.

2. Petitioner's due process argument also lacks merit. Petitioner is flatly incorrect when she states (Pet. 13) that she was "denied any opportunity or forum to contest [the] finding that [she was] removable." As the court of appeals explained, petitioner "was given a fair opportunity to be heard at her deportation hearing. Her claim of a denial of Due Process i[gn]ores the reality that she failed to attend her own hearing." Pet. App. 7a. The court further noted that petitioner's "*in absentia* order is akin to a default judgment," which generally raises no due process concerns. *Ibid.*

Petitioner cites no authority for her further claim (Pet. 14-15) that it was a violation of due process to require her to file a motion to reopen in the immigration court, rather than taking an appeal to the BIA in the first instance. The requirement of seeking reopening ensures that, when an alien who failed to appear for a removal proceeding seeks to challenge the ensuing *in absentia* order, the IJ who considered the evidence will have the initial opportunity to consider the defaulting alien's arguments for avoiding removal.

A due process challenge to the procedures for review of *in absentia* orders is particularly unfounded on the facts of this case. Petitioner conceded in the court of appeals that she received notice of the August 18, 2000, hearing and that there were no "exceptional circumstances" that caused her failure to appear at that hearing. Pet. App. 10a. Furthermore, the court of appeals reviewed the record of petitioner's removal proceeding and independently determined that the INS proved

petitioner's removability by clear, unequivocal, and convincing evidence. *Id.* at 7a-8a; see 8 U.S.C. 1229a(b)(5)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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