No. 08-693

In the Supreme Court of the United States

SOLOMON DEBESSAY TESFAGABER, PETITIONER

v.

MARK FILIP, ACTING ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in 8 U.S.C. 1252(f)(2), or instead by the traditional test for preliminary injunctive relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Convention, statutes and regulations:

Statue and regulations—Continued: Page

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 2a-3a) and the immigration judge (Pet. App. 4a-10a) are unreported.

JURISDICTION

The order of the court of appeals was entered on November 12, 2008. The petition for a writ of certiorari was filed on November 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline judicial review of aliens' claims and expedite the removal of illegal aliens from the United States. See

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA made three amendments to the INA that are particularly relevant here.

First, IIRIRA modified a provision of the INA that previously had provided for an automatic stay of the enforcement of a removal order upon the filing of a petition for review in a court of appeals. As a result, the INA now provides that "[s]ervice of the petition [for judicial review] * * * *does not* stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." IIRIRA § 306(a)(2), 110 Stat. 3009-608 (emphasis added) (enacting 8 U.S.C. 1252(b)(3)(B)).

Second, Congress repealed a provision of the INA that had barred further consideration of a petition for review following an alien's departure or removal from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a (1994)). Post-IIRIRA, therefore, "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States." *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2320 (2008).

Third, Congress enacted a new provision, which states that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." IIRIRA § 306(a)(2), 110 Stat. 3009-612 (enacting 8 U.S.C. 1252(f)(2)). That provision is at issue here.

2. Petitioner is a native and citizen of Ethiopia who was admitted to the United States in 1986 as a refugee.

Pet. App. 6a. In 1993, petitioner's status was adjusted to that of a lawful permanent resident. *Ibid.*

In 1995, petitioner was convicted of two drug offenses. On April 21, 1995, he was convicted of possession of cocaine in state court in Howard County, Maryland. Pet. App. 6a. On September 21, 1995, he was convicted of conspiracy to possess cocaine with the intent to distribute it in state court in Prince George's County, Maryland. *Ibid.*

As a result of his crimes, petitioner was charged with being removable from the United States. Pet. App. 4a-6a; see 8 U.S.C. 1227(a)(2)(A)(iii) (authorizing removal of any alien who has been convicted of an aggravated felony); 8 U.S.C. 1227(a)(2)(B)(i) (authorizing removal of any alien who has committed a violation of a controlled substance law, other than an offense involving possession of 30 grams or less of marijuana); see also 8 U.S.C. 1101(a)(43)(B) (defining "aggravated felony" to include a drug trafficking crime such as petitioner's).[1]

Although petitioner was served with a notice to appear, he failed to appear at his removal hearing. Pet. App. 6a. An immigration judge (IJ) therefore ordered him removed *in absentia*. *Ibid.*

3. Petitioner appealed to the Board of Immigration Appeals (Board), contending that he was present in the courtroom at his removal hearing but did not hear his name called. Pet. App. 6a-7a. The Board reopened petitioner's proceedings and remanded his case to the IJ. *Id.* at 7a.

Petitioner was mailed a notification of the date of his new removal hearing before the IJ. Pet. App. 7a. That

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[1] Petitioner apparently does not contest that he is removable as charged. See Pet. 4.

notification was sent to petitioner's home address of record, but the notification was returned to the immigration court "by an individual who appear[ed] to live" at that address. *Ibid.* Petitioner now asserts that the notification was returned by his sister, with whom he was estranged at the time of the remanded proceeding (although they now live together once again). Pet. 5; see 8 U.S.C. 1229(a)(1)(F)(ii) (requiring an alien to "immediately" provide written notification to the immigration court upon any change in his mailing address). Petitioner failed to appear at his scheduled removal hearing, and he was again ordered removed *in absentia*. Pet. App. 7a.

4. In August 2007, petitioner was taken into custody by Immigration and Customs Enforcement. Pet. App. 7a. In March 2008, petitioner filed a motion to reopen his removal proceedings, but it was rejected by the immigration court because it failed to comply with several local court operating procedures. *Ibid.* Petitioner filed a new motion to reopen, which was accompanied by a motion for a stay of a removal and an application for asylum, withholding of removal, and relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 7a.

The IJ denied petitioner's motion to reopen. Pet. App. 4a-10a. The IJ first explained that he "considered the entire record carefully," including "all of the evidence" petitioner submitted. *Id.* at 8a. He also noted that an alien generally is limited to only one motion to reopen, *id.* at 8a (citing 8 C.F.R. 1003.23(b)(1)); that the alien must provide "material" evidence that "was not available and could not have been discovered or pre-

sented at the former hearing" in order for the motion to be granted, *ibid.* (citing 8 C.F.R. 1003.23(b)(3)); and that the granting of a motion to reopen is discretionary, *id.* at 9a.

The IJ then denied the motion to reopen. He explained that petitioner "was already granted the opportunity to renew his case * * * following the first in absentia removal order," but he "failed to appear" and "failed to comply with his obligation to notify the Court of any change in address," even though he was specifically advised of that requirement in the initial notice to appear. Pet. App. 9a. The IJ also considered and rejected petitioner's claims for withholding of removal and CAT relief. *Id.* at 9a-10a.[2] The IJ observed that although petitioner has been present in the United States since 1986, and seven years passed between the issuance of the notice to appear and the present motion to reopen, petitioner had never before asserted his claims that he would be persecuted or tortured in Ethiopia. *Id.* at 9a. The IJ then determined that petitioner did not establish prima facie eligibility for relief because he presented no "evidence supporting a claim that he is likely to be persecuted or tortured in either" Ethiopia or Eritrea. *Id.* at 10a.

5. The Board dismissed petitioner's appeal. Pet. App. 2a-3a. It observed that, although petitioner had been ordered removed *in absentia* once before, and that removal order made him "keenly aware of the dire consequences of failing to appear," he nonetheless failed to

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[2] The IJ explained that petitioner was statutorily ineligible for asylum and withholding of removal because he had committed multiple aggravated felony offenses, so that the only possible relief available was deferral of removal under the CAT. Pet. App. 10a & n.2 (citing 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii); 8 C.F.R. 1208.13(c)(1)).

notify the immigration court of his change in address as required by his notice to appear. *Id.* at 3a. The Board also noted that, notwithstanding petitioner's contention that he did not live at his address of record at the time of the remanded proceedings, he used that address in his prior appellate filings with the Board and in his current motion to reopen and related filings. *Ibid*. The Board therefore concluded that the IJ properly denied the motion to reopen. *Ibid.*

6. Petitioner filed a petition for review with the court of appeals and sought a stay of removal pending consideration of the petition. In his stay motion, petitioner contended that he was entitled to a stay under the standard set forth in 8 U.S.C. 1252(f)(2), which is the standard that has been adopted by the Fourth Circuit. See *Teshome-Gebreegziabher* v. *Mukasey*, 528 F.3d 330, 332-335 (2008). He also contended, however, that the Fourth Circuit should revisit its precedent and evaluate his motion using the four-part standard for assessing requests for preliminary injunctive relief. Pet. Stay Motion 5-19. The government opposed the stay motion, arguing that petitioner did not meet the requirements for a stay of removal under 8 U.S.C. 1252(f)(2). Gov't Stay Opp. 7-14.

The court of appeals denied the stay motion in an unpublished, per curiam order, which reads:

> Upon review of submissions relative to the motion for stay pending appeal, the Court denies the motion.

Pet. App. 1a.[3]

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[3] Petitioner filed his opening brief in the court of appeals on January 12, 2009.

DISCUSSION

In *Nken* v. *Filip*, No. 08-681 (argued Jan. 21, 2009), this Court is currently considering whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in 8 U.S.C. 1252(f)(2), or instead by the four-part standard traditionally used for preliminary injunctive relief. The petition in this case presents the same question. The Court therefore should hold the petition pending its decision in *Nken*, and then dispose of it accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Nken* v. *Filip*, 08-681, and then be disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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