
FOR THE EIGHTH CIRCUITw (No.7) Tj3239

No. 00-3239

FOR ORAL ARGUMENT

deference as it involves an interpretation and application of its own regulations. 8

TABLE OF AUTHORITIES

CASES

<u>Beard v. Greene,</u> 523 U.S. 371 (1998)	25
<u>Block v. Community Nutrition Institute,</u> 467 U.S. 340 (1984)	17
<u>Board of Governors of the Federal Reserve System v. McCorp.</u> <u>Finance Inc.,</u> 502 U.S. 32 (1991)	3, 17
.....nstllo-Perezm v.INS.	

STATUTES

The Immigration and Nationality Act of 1952, as amended:

Section 208, 8 U.S.C. § 1158	1, 2, 13
Section 208(a), 8 U.S.C. § 1158(a)	17, 18
Section 208(a)(1), 8 U.S.C. § 1158(a)(1)	15
Section 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B)	2, 3, 9, 15, 17
Section 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D)	D)

Section 208
D)

I. Whether this Court lacks jurisdiction, under INA § 208(a)(3), 8 U.S.C.

²Ismailov was the only witness to testify in support of his asylum application and the facts are taken from his testimony. Id. at 56.

daughter with medical problems and Turkmenistan did not have adequate medical care. Id.

After arriving in Saratov, Ismailov and his family applied for, and were granted, refugee status. Id. at 60. Ismailov did not, however, despite applying several times, receive assistance from the Russian government, even though Russian law provides that refugees receive assistance from the government. Id. At the end of 1994 or early 1995, Ismailov was granted Russian citizenship. Id.

While living in Russia, Ismailov testified that he had difficulty finding jobs because he is ethnically Caucasian. Id. Ismailov testified that his wife was able to work, but that she had problems in Saratov because she used Ismailov's name. Id. Ismailov claimed that he attempted to start his own businesses selling wood and meat, but the businesses failed because of his ethnicity. Id.

Ismailov testified that he had problems with the police during the time that he lived in Russia and that the police harassment made him decide to leave Russia. Id. at 60-62. Ismailov obtained a Russian passport and went through a travel agent to obtain a visa. Id. at 62. Ismailov testified that he came to the United States with the idea that he would obtain permanent status in the United States. Id. Ismailov was aware that there were procedures for applying for refugee status in

Russia, but he choose not to follow those procedures. Id.

Ismailov testified that his new employer called the INS in Granite City, Illinois, but was unable to find out how Ismailov could file for status in the United States. Id.

Ismailov stated that he knew that once he was able to get to the United States it would be easier for him to apply for status in this country based on fears of mistreatment in Russia. Id. Ismailov testified, however, that, after arriving in the United States, he was not aware of the asylum process. Id. at 62. He testified that he found out about asylum only when he was arrested by INS officers in 1999. Id. Ismailov testified that he planned on remaining in the United States and making arrangements for his family to follow him. Id. at 65. Ismailov, however, never went to an INS office, nor did Id.

Judge noted that although Ismailov stated that his second employer called the INS

The Immigration Judge then analyzed whether Ismailov was eligible for the relief of withholding of deportation and concluded that he was not. Id. The Immigration Judge found that while Ismailov would be subjected to police scrutiny, it would not rise to the level of persecution. Id. at 74. Applying the same

In this case, Ismailov seeks review of the Board's determination that he is ineligible to apply for asylum under INA § 208, 8 U.S.C. § 1158, because he failed to file an asylum application within one year after arriving in the United States and failed to establish "extraordinary circumstances" for failing to meet the one-year time limit. However, pursuant to INA § 208(a)(3), 8 U.S.C. § 1158(a)(3), this Court lacks jurisdiction to review the Board's determinations. Section 208(a)(3) specifically divests courts of jurisdiction to review "any determination of the Attorney General" regarding whether an alien complied with the one-year time limit or whether the alien established extraordinary circumstances for failure to comply with the time limit. Accordingly, the Court should dismiss the petition for review for lack of jurisdiction.

If this Court reaches the merits of Ismailov's claim, it should affirm the Board's decision and reject Ismailov's assertion that he has established extraordinary circumstances for his non-compliance with the one-year filing requirement. The Board's judgement regarding what constitutes extraordinary circumstances is entitled to substantial deference as it involves an interpretation and application of its own regulation at 8 C.F.R. § 208.4(a)(5).

Under 8 C.F.R. § 208.4(a)(5), extraordinary circumstances "refer[s] to

ARGUMENT

I. The Petition Should Be Dismissed Because INA § 208(a)(3), 8 U.S.C. § 1258(a)(3), Divests This Court Of Jurisdiction Over Any Determination Of The Attorney General Under INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D).

A. Standard Of Review

The issue of whether this Court is divested of jurisdiction, under

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(d)(2)

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this Court of jurisdiction to review the Board's determination.

While federal courts will not infer congressional intent to restrict their jurisdiction, the presumption in favor of judicial review may be rebutted by a showing of "clear and convincing evidence" that Congress intended to preclude judicial review. Board of Governors of Fed. Reserve Sys. v. MCorp Financial Inc., 502 U.S. 32, 44 (1991). The burden may be met where a "congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'"

³Even though Ismailov has not claimed to the contrary, it should be noted that there is no constitutional issue present in this case. Because the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest, any claim of deficient representation that prevented Ismailov from being eligible for asylum, a form of relief which is statutorily vested in the discretion of the Attorney General, see Feleke v. INS, 118 F.3d 594, 597 (8th Cir. 1997), would not deprive him of due process. See Mejia Rodriguez v. Reno, 178 F.3d 1131, 1146-47 (11th Cir. 1999), cert. denied, 2000 WL 868747 (2000)(holding that because “suspension of deportation” is committed to the discretion of the Attorney General, the discretionary nature of that decision does not deprive the alien of due process).

208(a)(2)(D). Because of the existence of section 208(a)(3), however, this Court is precluded from reviewing that determination.

the exclusive grounds for an extraordinary circumstances claim, demonstrate, along with the term “extraordinary circumstances” and “beyond the alien’s control,” an intent that only the most extreme circumstances would excuse an alien’s failure to timely file an asylum application. The plain import of the regulation is that the alien must show that he was literally unable to avoid the events or factors that he was r“beyond the5e wai,e

speaking and understanding some English. Id. at 3. Second, Ismailov tried to contact his attorney only a few times after submitting his documents to him. See id. Ismailov had a duty to monitor his attorney's actions more closely and at least attempt to ensure that his lawyer was filing the necessary paperwork. Certainly, it was not beyond his control to do so. Third, Ismailov was not ignorant of the availability of asylum in the United States. See id. Ismailov testified that he was aware of the possibility of being a refugee and seeking asylum in the United States.

⁵Ismailov also argues that by enacting statutory bars on access to asylum, the United States is in breach of its legal obligations toward refugees because the United Nations Convention Relating to the Status of Refugees does not contain any provisions concerning a filing deadline for asylum applicants. See Pet. Br. at 25.

requirements for a claim of ineffective assistance of counsel set forth by the Board in Matter of Lozada, 19 I & N Dec. 637, 1998 WL 235454 (1988).⁶

In this case, as the Board correctly found, Ismailov has not met any of the requirements of section 208.4(a)(5)(iii). He has not filed “an affidavit setting forth in detail the agreement that was entered into with counsel,” has not attempted to inform his prior lawyer of the allegations leveled against him and given the lawyer an opportunity to respond, and has not indicated whether a complaint has been filed with the appropriate disciplinary authorities with respect to a violation of his prior counsel’s legal or ethical responsibilities. Indeed, the board specifically noted that Ismailov knew his prior counsel’s name, address, and telephone number and, therefore, had “sufficient information with which to fulfill the requirements of

⁶In Lozada, the Board set out the following requirements for a claim of ineffective assistance of counsel: 1) an affidavit by the alien setting forth the relevant facts, including the agreement with counsel regarding the alien’s representation; 2) evidence that counsel was informed of the allegations and allowed to respond, including any response; and 3) an indication that, assuming that a violation of “ethical or legal responsibilities” was claimed, a complaint has been lodged with the relevant disciplinary authorities, or an adequate explanation for the failure to file such a complaint. See id. at 639.

the Lozada requirements is always sufficient. In cases where the Loz

the Lozada requirements. As the Board properly found, there was sufficient information with which to fulfill of the requirements of Lozada. Id.

CONCLUSION

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STATEMENT OF RELATED CASES

Based on a survey of the attorneys in this office, Counsel for Respondent states that he is unaware of any related cases.

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Dated: December __, 2000

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(A)(7)(B),(C), I certify that the text of the answering brief is double spaced proportionately spaced 14

CERTIFICATE OF SERVICE

I hereby certify that on the