



2007

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## Recommended Citation

John Brozovich, *Immigration and Aliens - Catch 22: Aliens Face No Win Situation after the Fifth Circuit Declines to Toll the Voluntary Departure Period for Timely Filed Motions to Reopen*, 60 SMU L. Rev. 291 (2007)  
<https://scholar.smu.edu/smulr/vol60/iss1/9>

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# IMMIGRATION AND ALIENS—CATCH 22: ALIENS FACE NO WIN SITUATION AFTER THE FIFTH CIRCUIT DECLINES TO TOLL THE VOLUNTARY DEPARTURE PERIOD FOR TIMELY FILED MOTIONS TO REOPEN

John Brozovich\*

**A**LTHOUGH the current immigration debate is ongoing, Congress showed decisiveness toward illegal aliens when it passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in 1996. Under the IIRIRA, illegal aliens deemed removable may depart from the country voluntarily and at their own expense if an immigration judge enters an order granting their voluntary departure.<sup>1</sup> Each illegal alien may file one motion to reopen, which creates an opportunity to disprove his or her removability, within ninety days of the entry of a final order of removal.<sup>2</sup> Ideally, an alien would agree to voluntarily depart, then file a motion to reopen with the Board of Immigration Appeals (“BIA”), and the BIA would hear and rule on that motion within the voluntarily departure period. The BIA, however, seldom hears a motion to reopen before the voluntary departure period expires.<sup>3</sup> When the BIA does not hear the motion to reopen within the voluntary departure period, the alien has a Hobson’s choice between either (a) staying in the country, overstaying the departure period, and thus having the motion denied for violating the voluntary departure order or (b) leaving the country and thereby automatically withdrawing the motion to reopen.<sup>4</sup> As a result of this dichotomy, a growing split has emerged in the federal circuits as to whether courts should tell the voluntary departure period for an alien’s timely filed motion to reopen.<sup>5</sup> The U.S. Fifth Circuit’s decision in *Banda-Ortiz v. Gonzales*, which went con-

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1. 8 U.S.C.A. § 1229c(a), (b) (West 2006).

2. *Id.* § 1229a(c)(7)(A), (C)(i).

3. *See, e.g.,* *Dekoladenu v. Gonzales*, 459 F.3d 500, 504 (4th Cir. 2006).

4. *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 392 (5th Cir. 2006) (Smith, J. dissenting).

5. *Compare Banda-Ortiz*, 445 F.3d at 391, and *Dekoladenu*, 459 F.3d at 507 (refusing to toll the voluntary departure period), with *Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006), *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005), *Kanivets v. Gonzales*, 424 F.3d 330, 336 (3d Cir. 2005), and *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (permitting the tolling of the voluntary departure period).

trary to an established line of cases, was the first opinion to hold that an alien's voluntary departure period should not be tolled for a pending motion to reopen.<sup>6</sup> The decision was in error because, while it gave great weight to the concept of voluntary departure, it altogether ignored the alien's statutory right to file and obtain judgment on a motion to reopen.

Sergio Banda-Ortiz, a Mexican citizen, entered the United States in 1989.<sup>7</sup> In March of 2000, the Immigration and Naturalization Service ("INS") served Banda-Ortiz with a Notice to Appear, which charged him with removability from the United States because he had never been paroled or admitted into the country.<sup>8</sup> At the time he was charged, Banda-Ortiz was employed, had never been convicted of a crime, and had two children born as U.S. citizens.<sup>9</sup> Although Banda-Ortiz conceded removability, he requested cancellation of removal from the immigration judge.<sup>10</sup> Banda-Ortiz claimed the "exceptional and extremely unusual hardship" exception provided under 8 U.S.C. § 1229b(b)(1)(D) on account of the difficulties his departure would impose on his American-born children; in the alternative, he requested voluntary departure.<sup>11</sup> The immigration judge denied Banda-Ortiz's claim for the hardship exception but granted his request for voluntary departure.<sup>12</sup> Banda-Ortiz appealed the decision to the BIA, which affirmed the lower court's decision and gave him a thirty day voluntary departure period.<sup>13</sup>

While he was still technically within the voluntary departure period, Banda-Ortiz filed a motion to reopen his removal proceedings in order to introduce new evidence of the applicability of the hardship exception to his case.<sup>14</sup> The BIA initially granted Banda-Ortiz's motion to reopen and remanded the case to the immigration judge for consideration of the new evidence.<sup>15</sup> On remand, however, the immigration judge held that Banda-Ortiz was ineligible for any cancellation of removal because he had failed to depart the United States within the voluntary departure period; the BIA affirmed that decision.<sup>16</sup>

Banda-Ortiz appealed the order denying the cancellation of his removal to the Fifth Circuit. Banda-Ortiz argued that the voluntary departure period should have been tolled because, as other circuits had held, it would be "nonsensical" to allow an alien one motion to reopen which, if still pending at the end of the voluntary departure period, would never be

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6. *Banda-Ortiz*, 445 F.3d at 391 (Smith, J., dissenting).

7. *Id.* at 388.

8. *Id.*; see 8 U.S.C.A. § 1182(a)(6)(A)(i) (West 2006).

9. *Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting).

10. *Id.* at 388.

11. *Id.* (citing 8 U.S.C.A. § 1229b(b)(1)(D)).

12. *Id.* (citing 8 U.S.C.A. § 1229c(b)(1)).

13. *Id.*

14. *Id.* at 388 n.2 (noting that Banda-Ortiz filed his motion to reopen two days after the voluntary departure period expired and then obtained a two-day *nunc pro tunc* extension from the INS, which made that motion timely).

15. *Id.*

16. *Id.* (citing 8 U.S.C.A. § 1229c(d)).

heard if the alien (a) complied with voluntary departure and left the United States, or (b) violated the departure period by staying in the country beyond the departure date.<sup>17</sup> The Fifth Circuit disagreed with Banda-Ortiz's arguments and held that his timely filed motion to reopen did not toll the voluntary departure period.<sup>18</sup>

The Fifth Circuit's refusal to toll the voluntary departure period for an alien awaiting judgment on a motion to reopen disregarded the alien's right to one motion to reopen. The court's rationale instead focused on two arguments in support of strictly adhering to the voluntarily departure statute. First, the court emphasized that voluntary departure is a mutual agreement between the alien and the government that is structured in such a way that both parties benefit, and as such, each party must uphold its end of the agreement.<sup>19</sup> Second, the court interpreted statutes that preclude any extensions of the voluntary departure period to prohibit the tolling of that period as well.<sup>20</sup>

The Fifth Circuit first emphasized that voluntary departure is a two-step process: the alien must first request voluntary departure, and then agree to its terms.<sup>21</sup> As a part of the agreement, the alien must prove that he intends to leave the country within the departure period.<sup>22</sup> The court claimed that Banda-Ortiz did not have the requisite intent to depart from the United States because he did not leave the country within the departure period. The court, therefore, found that Banda-Ortiz's request for tolling was an attempt to benefit unjustly from the voluntary departure agreement.<sup>23</sup> Voluntary departure benefits an alien because it enables the alien to (1) "choose his own destination," (2) arrange his personal affairs without fear of arrest, (3) be free from detention before removal, (4) avoid the "stigma of forced removal," and (5) remain eligible for an adjustment of status.<sup>24</sup> In exchange for these benefits, the alien accepts the burdens of fines and the possibility of being ineligible for further relief if he does not leave within the specified period.<sup>25</sup> While voluntary departure gives the alien incentives to depart voluntarily, the government also benefits because voluntary departure allows agencies and courts to devote fewer resources to the deportation of aliens.<sup>26</sup> The Fifth Circuit reasoned that if a timely filed motion to reopen tolled period, the voluntary departure, the government would lose the financial benefits of the alien's self-managed and expedient departure while the alien would still retain his benefits by voluntarily departing the country at a later date.<sup>27</sup>

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17. *Id.* at 389 (citing *Azarte v. Ashcroft*, 394 F.3d 1278, 1288-89 (9th Cir. 2005)).

18. *Id.* at 391 (citing 8 U.S.C.A. § 1229c(d)).

19. *Id.* at 389-90.

20. *Id.* at 390 (citing 8 U.S.C.A. § 1229c(b)(2)).

21. *Id.* at 389 (citing 8 C.F.R. § 240.25(c) (2006)).

22. *Id.* (citing 8 U.S.C.A. § 1229c(b)(1)(D)).

23. *Id.*

24. *Id.* at 389-90 (citing *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)).

25. *Id.* at 390 (citing 8 U.S.C.A. § 1229c(d)).

26. *Id.* (citing *Alimi v. Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004)).

27. *Id.* at 390 (citing *Ballenilla-Gonzalez v. I.N.S.*, 546 F.2d 515, 521 (2d Cir. 1976)).

While the dissent in *Banda-Ortiz* agreed that voluntary departure constitutes an agreement between the alien and the government, it recognized that the larger statutory framework also grants the alien the right to one motion to reopen.<sup>28</sup> The majority's rationale, which only upholds a motion to reopen insofar as it is heard within the departure period, forces aliens to forfeit a motion to reopen not heard within the voluntary departure period. The majority overlooked that when Congress granted aliens the right to a motion to reopen, it limited that right by only granting one motion, by requiring a factual basis for the motion, and by requiring the alien to file the motion within ninety days of the removal order.<sup>29</sup> Congress made no indication that it wanted to exclude voluntarily departing illegal aliens from those who can file a motion to reopen.<sup>30</sup>

The second prong of the Fifth Circuit's analysis focused on strict construction of the voluntary departure statutes. The court referred to 8 C.F.R. § 1240.26(f), which limits the authority to extend voluntary departure to "the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs."<sup>31</sup> The court noted that in several cases, appeals courts have held they lacked jurisdiction over the BIA's voluntary departure order to toll the voluntary departure period.<sup>32</sup> The court also reasoned that tolling of the voluntary departure period is not permitted under 8 U.S.C. § 1229c(b)(2) and 8 C.F.R. § 1240.26 because both—which do not address tolling—state that the period should not exceed sixty days.<sup>33</sup>

The dissent in *Banda-Ortiz* argued that other courts have tolled the voluntary departure period and that such tolling is not barred by statute.<sup>34</sup> The cases cited by the majority to further its argument for lack of jurisdiction, with the exception of *Ngarurih v. Ashcroft*, derived from circuits that have subsequently found jurisdiction and allow the tolling of the voluntary departure period.<sup>35</sup> The lack of jurisdiction claim made by the Fourth Circuit in *Ngarurih* is inapplicable to a case such as *Banda-Ortiz*'s because the "most fundamental" support for the *Ngarurih* court's lack of jurisdiction was that it could still hear the merits of the petition for review after the alien left the country.<sup>36</sup> *Banda-Ortiz*'s motion to reopen, by contrast, would be withdrawn immediately if he left the country. The majority's rigid interpretation of the voluntary departure

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28. *Id.* at 392 (Smith, J., dissenting) (citing 8 C.F.R. § 240.25(c) (2006) and *Azarte v. Ashcroft*, 394F.3d 1278, 1289 (9th Cir. 2005)).

29. *Id.* (Smith, J., dissenting) (citing *Azarte*, 394 F.3d at 1283-84 and 8 U.S.C.A. § 1229a(c)).

30. *Id.* (Smith, J., dissenting) (noting that Congress did not state the right to file a motion to reopen "depends on . . . the order of removal").

31. *Id.* at 390 (quoting 8 C.F.R. § 1240.26(f)).

32. *Id.*

33. *Id.*

34. *Id.* at 391 (Smith, J., dissenting)

35. *Id.* at 394 (Smith, J., dissenting) (noting that the Third and Ninth Circuits now allow for tolling of the voluntary departure period so that courts may consider an alien's motion to reopen).

36. *Id.* at 394 (citing *Ngarurih v. Ashcroft*, 371 F.3d 182, 192-93 (4th Cir. 2004)).

statutes was also flawed. First, by refusing to toll the voluntary departure period, the majority prohibited not only consideration of a motion to reopen but also precluded review of all decisions after the voluntary departure period has expired.<sup>37</sup> Second, the majority failed to consider the statutes that grant aliens the right to a motion to reopen, and those statutes make no exclusions for aliens that have agreed to depart voluntarily.<sup>38</sup> The Fifth Circuit's conclusion that tolling goes against the voluntary departure statute is misplaced: tolling suspends the period of time provided in a statute, but it does not extend time against the meaning of the statute.<sup>39</sup> For Banda-Ortiz, this tolling would have preserved his right to one motion to reopen and would have prevented the automatic denial of his hardship claims.

The Fifth Circuit erroneously refused to toll the voluntary departure statute while Banda-Ortiz's motion to reopen was pending. In so holding, the Fifth Circuit split from the Third, Eighth, and Ninth Circuits, which had developed a line of cases that permitted the tolling of the voluntary departure period for an alien's timely filed motion to reopen.<sup>40</sup> The federal courts generally should be wary of creating such a circuit split, particularly when it varies the rights of an alien from one circuit to the next.<sup>41</sup> The key facts of Banda-Ortiz's case, moreover, are consistent with the voluntary departure cases in other circuits where one problem has been constant: the "BIA rarely if ever rules on a motion to reopen before an alien's voluntary departure period has expired."<sup>42</sup> The Fifth Circuit overlooked this problem and as a result, will prevent countless aliens from their one opportunity to remain in the United States.

To better comprehend the conflict between the voluntary departure and motion to reopen statutes, courts outside of the Fifth Circuit have looked to the history behind both statutes. The voluntary departure statute set out in 8 U.S.C. § 1229c greatly specifically the amount of time granted for voluntarily departure, which previously had been granted up to a year at a time.<sup>43</sup> The goals of voluntary departure, however, remained constant: the government could reduce its costs associated with deporting individuals while allowing the alien to avoid the "stigma" associated with formal deportation.<sup>44</sup> Similarly, the motion to reopen was originally a regulatory form of relief, without any time limitation, that was later made into a carefully restricted statutory right.<sup>45</sup> And the mo-

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37. *Id.* at 395 (Smith, J., dissenting).

38. *Id.* (Smith, J., dissenting) (citing 8 U.S.C.A. § 1229a(c)(7) (West 2006)).

39. *Id.* (Smith, J., dissenting); *see also* BLACK'S LAW DICTIONARY 1525 (8th ed. 2004) (defining "toll" as "to stop" or "to abate").

40. *See Kanivets v. Gonzales*, 424 F.3d 330, 336 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (tolling an alien's voluntary departure period while a motion to reopen is pending).

41. *See, e.g., Alfaro v. Comm'r*, 349 F.3d 225, 229 (5th Cir. 2003).

42. *Azarte*, 394 F.3d at 1282.

43. *Id.* at 1284-85.

44. *Id.* at 1284-85 n.12.

45. *Id.* at 1283.

tion to reopen still allows an alien to produce new, relevant information to the courts regarding his removability.<sup>46</sup> While it is evident that the goals of these statutes have remained constant, it is the recent changes to specific provisions that require the courts presently to interpret their new significance and implications.<sup>47</sup>

In order to interpret the new voluntary departure and motion to reopen statutes, the majority of circuits have chosen to harmonize the two statutory schemes and not isolate them as the Fifth Circuit did in *Banda-Ortiz*. A court interpreting a statute should “not look merely to a particular clause in which general words may be used, but [should] take in connection with it the whole statute.”<sup>48</sup> This analytical framework encourages courts to recognize the voluntary departure period while accommodating the alien’s one motion to reopen as well. While a broader reading of the statutes is consistent with this construction, this rationale is also supported by key policy arguments. First, statutes must be interpreted to avoid absurd results, and, as several courts have observed, it is at the very minimum somewhat “absurd to conclude that Congress ‘intended to allow motions to reopen to be filed but not heard.’”<sup>49</sup> Second, given the serious nature of the voluntary departure agreement and the severe consequences for an alien’s non-compliance with it, construction of these statutes “should be resolved in favor of the alien.”<sup>50</sup> The tolling of the voluntary departure statute successfully resolves the conflict between voluntary departure and motions to reopen by creating an opportunity for the BIA to hear the alien’s motion to reopen while still upholding the relevant statutes and the policies behind them.

The Fifth Circuit’s decision in *Banda-Ortiz* complicated the nationwide landscape as to whether aliens who have agreed to voluntary departure will or will not have the departure period tolled by timely filing motions to reopen.<sup>51</sup> This recent split in the circuits contravenes the importance of “uniformity of federal law and consistency in the enforcement of the immigration laws.”<sup>52</sup> For *Banda-Ortiz* and countless aliens in his position, the lapse of the voluntary departure period while a motion to reopen is

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46. See, e.g., *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 388 (5th Cir. 2006).

47. See *Azarte*, 394 F.3d at 1287.

48. *Id.* at 1288 (quoting *Kokszka v. Belford*, 417 U.S. 642, 650 (1974)).

49. *Id.* at 1282 (quoting *Shaar v. I.N.S.*, 141 F.3d 953, 960 (9th Cir. 1998) (Browning, J., dissenting)).

50. *I.N.S. v. Errico*, 385 U.S. 214, 225 (1966) (construing a deportation statute); see also *id.* at 1289 (quoting *Kwai Fun Wong v. United States*, 373 F.3d 952, 962 (9th Cir. 2004)).

51. Compare *Banda-Ortiz*, 445 F.3d at 391, and *Dekoladenu v. Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006) (refusing to toll the voluntary departure period), with *Azarte*, 394 F.3d at 1289, *Kanivets v. Gonzales*, 424 F.3d 330, 336 (3d Cir. 2005), *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005), and *Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006) (permitting the tolling of the voluntary departure period).

52. *Banda-Ortiz v. Gonzales*, 458 F.3d 367, 368 (5th Cir. 2006) (Smith, J., dissenting) (quoting *Renteria-Gonzalez v. I.N.S.*, 322 F.3d 804, 814 (5th Cir. 2002)).

pending results from an administrative delay on the part of the BIA and not any fault on the part of the alien. It was inequitable for the Fifth Circuit to deny even one alien's opportunity to a home, a family, and a life in the United States on account of such a technicality.



