No. 04-113

In the Supreme Court of the United States

TEYENT LOULOU, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in amending its opinion denying a petition for review of a decision of the Board of Immigration Appeals by deleting a sentence that had reinstated the Board's authorization of voluntary departure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A7) is reported at 354 F.3d 706. The orders of the Board of Immigration Appeals (Pet. App. A14-A15) and the immigration judge (Pet. App. A16-A18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2004. The petition for a writ of certiorari was filed on July 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 8 U.S.C. 1229c, the Attorney General (now the Secretary of Homeland Security[1]) has the discretion to permit an alien found to be removable from the United States to depart voluntarily no later than 60 days after the conclusion of removal proceedings, provided that certain eligibility requirements are satisfied. Failure to depart within the prescribed period subjects an alien to a civil penalty of up to $5000 and renders the alien ineligible for several types of immigration relief for a period of ten years. 8 U.S.C. 1229c(d). The implementing regulation states that the authority to extend the voluntary-departure period specified by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) rests "only" with certain officials of DHS, 8 C.F.R. 1240.26(f), and 8 U.S.C. 1252(a)(2)(B)(i) provides that no court shall have jurisdiction to review a judgment "regarding the granting of relief under * * * [8 U.S.C.] 1229c."

2. Petitioner is a native of Ethiopia who entered the United States in September 1991 on a student visa but remained beyond the date of its expiration. In 1997, petitioner applied for asylum, claiming that she would be persecuted in Ethiopia because of her political opinions and ethnicity. Finding her claim not to be credible, an IJ denied asylum and ordered her removed to Ethiopia. In the same order, which was issued on July 31, 1998, the IJ granted petitioner's application for volun-

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[1] On March 1, 2003, the Immigration and Naturalization Service ceased to exist as an agency within the Department of Justice and its functions were transferred to the newly formed Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)).

tary departure, on the condition that she post a bond in the amount of $2500 and depart the United States by August 31, 1998. A.R. 50-70, 315-321, 678; Pet. App. A16-A18.

The BIA affirmed the IJ's decision without opinion, Pet. App. A14-A15, but permitted petitioner "to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director." *Id.* at A14. The BIA's order, which was issued on July 9, 2002, informed petitioner that she would be subject to a civil penalty and would be ineligible for certain relief under the immigration laws for a period of ten years if she failed to depart "within the time period specified, or any extensions granted by the district director." *Id.* at A15.

3. The court of appeals denied petitioner's petition for review. Pet. App. A8-A13. It rejected petitioner's constitutional challenge to the BIA's streamlined review procedure (*id.* at A9-A10) and found that the IJ's denial of her asylum application was supported by substantial evidence (*id.* at A10-A12). In the final sentence of its initial opinion, the court *sua sponte* "reinstate[d] [petitioner's] previously granted voluntary departure period under terms and conditions prescribed by the BIA." *Id.* at A13.

The court of appeals' opinion was filed on December 30, 2003. Pet. App. A8. Shortly thereafter, petitioner asked DHS to extend the deadline for voluntary departure to April 26, 2004. *Id.* at A21-A22. On January 30, 2004, DHS granted petitioner's request. *Id.* at A23-A25.

On March 5, 2004, the government filed a petition for panel rehearing, asking the court to reconsider its reinstatement of voluntary departure. Resp. Pet. for Panel

Reh'g 3-11. The court granted the petition and "file[d] a substituted opinion deleting the last full sentence of the [original] opinion." Pet. App. A1. In all other respects, the substituted opinion (*id.* at A2-A7) was identical to the original opinion.

ARGUMENT

Petitioner asks the Court to grant certiorari to decide whether a court of appeals may reinstate an administrative order allowing an alien found to be removable to depart the United States voluntarily. Pet. 10-20. The petition should be denied. The question on which review is sought was not decided by the court of appeals in this case; the question has been answered the same way by every court of appeals to consider it; and, because petitioner apparently left the country by the extended departure date set by DHS, the question in this case is moot.

1. In its petition for rehearing, the government asked the court of appeals either to "permit the parties to fully brief and argue the reinstatement issue" or to "amend its decision to eliminate the grant of voluntary departure." Resp. Pet. for Panel Reh'g 11. The court granted only the latter relief: it "file[d] a substituted opinion deleting the last full sentence of the [initial] opinion." Pet. App. A1. The opinion of which petitioner seeks review thus does not address the question presented in her certiorari petition, much less hold that a court of appeals lacks the authority to reinstate voluntary departure. This Court ordinarily "do[es] not decide in the first instance issues not decided below," *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999), and there is particular reason to follow that practice in a case, like this one, in which a question not decided below is the only one presented in the petition.

2. Reasoning that the relevant statutes and regulations give officials in the Executive Branch the exclusive authority to set the date by which an alien must voluntarily depart, the Third Circuit, the Fourth Circuit, and the Eighth Circuit (in a decision postdating the decision below) have all concluded that a court of appeals has no power to reinstate an order of voluntary departure.[2] Contrary to petitioner's suggestion (Pet. 4-5, 15-16), neither the First Circuit nor the Ninth Circuit has reached a contrary conclusion. The Ninth Circuit has in fact rejected the position advanced by petitioner, see *Zazueta-Carrillo* v. *Ashcroft*, 322 F.3d 1166, 1173 (2003) (courts lack power to "extend[] voluntary departure beyond the period specified by the executive officers"), and the First Circuit has declined to decide the issue, see *Khalil* v. *Ashcroft*, 370 F.3d 176, 180 (2004) ("not[ing] but not decid[ing]" whether court lacks authority to reinstate order of voluntary departure). There is thus no conflict in the circuits on the question presented in the petition.

3. The court of appeals filed its initial opinion on December 30, 2003, Pet. App. A8, and filed its amended opinion, which deleted the sentence reinstating voluntary departure, on April 28, 2004, *id.* at A2. On January

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[2] See *Reynoso-Lopez* v. *Ashcroft*, 369 F.3d 275, 280 (3d Cir. 2004) ("because Congress has not provided statutory authority for appellate courts to reinstate * * * the voluntary departure period prescribed by an IJ or the BIA, this Court lacks jurisdiction to reinstate [an alien's] voluntary departure period"); *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 193 (4th Cir. 2004) ("a court of appeals lacks jurisdiction to entertain a request to reinstate voluntary departure"); *Rife* v. *Ashcroft*, 374 F.3d 606, 614 (8th Cir. 2004) ("our jurisdiction to grant this voluntary departure relief was eliminated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996").

30, 2004, a month after the court filed its initial opinion and nearly three months before the court amended its opinion, petitioner obtained from DHS an extension of her voluntary-departure date to April 26, 2004, *id.* at A23, and the certiorari petition states that she left the United States by that date, see Pet. 9. If that is so, then, contrary to petitioner's contention, she will not be "subject to a ten-year bar to re-entry," Pet. 5, because that bar applies only when an alien fails to depart "within the time period specified" by the IJ or BIA, 8 U.S.C. 1229c(d), or "extend[ed]" by DHS, 8 C.F.R. 1240.26(f). See Pet. App. A15 (BIA order) (warning petitioner of consequences of failure to depart "within the time period specified, or any extensions granted by the district director"). Because, on the basis of petitioner's representation, her rights are unaffected by whether the court of appeals had the authority to reinstate voluntary departure, the question presented in the petition is moot. This Court is "not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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