

No. 23-929

In The
SUPREME COURT OF THE UNITED STATES

Hugo Abisai Monsalvo Velazquez,

Petitioner,

v.

Merrick B. Garland, Attorney General

Respondent.

Amicus Brief in Support of Petitioner
Reversal Warranted

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Interests of Amicus Curiae, Thomas Fuller Ogden

I know neither party nor have any financial stake. I am a member of this Court's bar and, since 2014, recognized by the California bar as one of less than two hundred lawyers designated Certified Appellate Law Specialist. I have been involved in numerous federal appellate matters, many involving immigration. I have also probably spent thousands of hours in immigration court matters. I file this brief to assist the Court to view the issue pragmatically.¹

Summary of Argument

The 10th Cir. affirmed the BIA's determination petitioner's motion to reopen was untimely. The reason is because the mandatory voluntary departure time of 60 days is supposedly set in stone. 8 USC s.1229c(b)(2). If that is true, then the Court needs to consider that ECAS² automatically extends filing deadlines for system outages. The BIA rules, however, would deem filing to occur on the first non-outage day. As attorneys are mandatory ECAS filers, they would be unfairly trapped during an outage with an expiring voluntary departure. Between ECAS, EOIR, BIA, and

¹ No counsel for any party authored this brief in whole or in part and no entity or person, aside from Thomas Fuller Ogden, made any monetary contribution intended to fund the preparation or submission of this brief.

I also note, I am an inactive solicitor (Eng., Wales, and Ireland). I concur with petitioner's research into English common law. Those rationales on deadline extension still guide UK courts. I emphasize this in a footnote as this brief makes a different point.

² ECAS is the "EOIR Courts & Appeals System." It is the immigration court's equivalent of PACER.

the 10th Cir., there are serious contradictions that an FRCP deadline extension approach easily solves.

Argument.

For unplanned ECAS outages, the rules say:³

If EOIR's electronic filing application is unavailable due to an unplanned system outage on the last day for filing in a specific case, then **the filing deadline will be extended to the first day that the electronic filing application becomes accessible that is not a Saturday, Sunday, or federally recognized legal holiday.**

For planned outages within five days:

Any planned system outage announced five or fewer business days prior to the start of the outage will be treated as an unplanned outage.

As to how system outages are determined:

EOIR maintains sole discretion to determine whether an unplanned outage occurred. EOIR will maintain an online log of EOIR ECAS outages that will be publicly available.⁴

Since February 2022, the undersigned counts 26 unplanned outages logged. The undersigned counts eight planned outages occurring within five days of notice. Since February 2022, ECAS has extended immigration filing deadlines around 35 times by local rule. Given the hundreds of thousands of filings occurring on ECAS, it is almost certain an alien with

³ See, ECAS Rules at page 4 at:

<https://www.justice.gov/eoir/page/file/1300086/dl?inline>

⁴ECAS planned/unplanned outage log here:

<https://www.justice.gov/eoir/ecas-outage-log>

voluntary departure had no issues filing a motion to reopen after 60 days, due to unplanned outage, despite it now running afoul of the 10th Cir.'s rule.

BIA Practice Manual r. 3.1(a)(1) states, “an electronic filing that is accepted by the Board or an immigration court will be deemed filed on the date it was submitted. See 8 C.F.R. § 1001.1(dd).” This contradicts ECAS’s extension rule. So, a BIA judge could reject an ECAS filing claiming the outage extension rule does not trump the BIA Practice Manual even though, oddly, ECAS is that judge’s fiefdom. To add a further wrinkle, according to BIA Practice Manual r. 3.1(6), “Electronic filing through ECAS is mandatory for attorneys...”

Imagine an attorney who got retained by someone up against a voluntary departure deadline. This is common. She drafts a motion to reopen and attempts to efile the motion on the last day of her client’s voluntary departure period. To attorney’s shock, an unplanned outage to ECAS is happening. Attorney is momentarily comforted based on reading the ECAS deadline extension rule.

Despite ECAS’s assurance the attorney is safe, however, her heart falls to her stomach as she reads the BIA Practice Manual and concludes the BIA might impose r. 3.1(a)(1) and deem the motion to reopen filed on the date ECAS is running again, that will certainly occur after her client’s voluntary departure period has expired. Knowing the conundrum, attorney cancels her son’s birthday party that evening, and prints up the motion to reopen to attempt to paper file it with EOIR before her client’s voluntary departure period

ends that day. Attorney is greeted by the EOIR filing clerk who says, “sorry, you’re a mandatory efiler and cannot paper file in this case.” What next occurs is client fires attorney and retains new counsel who will certainly open satellite litigation claiming ineffective assistance of counsel, for missing a filing date, which will then further drain court and bar resources.

Conclusion

Petitioner should prevail. Between the EOIR, ECAS, BIA, and 10th Cir. there is simply too much confusion in the procedures. While the 10th Cir. has a sound academic basis in its decision, the fact is those arguments are anachronistic in the tech driven world we now live in where IT outages are going to occur. 8 USC s. 1229c was drafted at a time efilng was not contemplated. The 10th Cir. and BIA’s rule is unworkable in a modern court. If efficiency is the goal with efilng systems, then issues the hypo exemplifies should never occur. If the 10th Cir. stands, however, there will be many issues. All issues arising from the hypothetical above are cured by affirming petitioner and making the filing rules similar to the FRCP. Is it really that big a problem a noncitizen’s period of voluntary departure is extended a couple of days to protect against such resource draining chaos?

Respectfully Submitted,

Thomas Ogden

Thomas Ogden, Esq.