UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4499
Summary Calendar

MICHAEL BRIGHT,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(A26 087 916)

(November 19, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

On April 3, 1985, Michael Bright, a citizen of Pakistan, entered the United States on a nonimmigrant visitor's visa authorizing him to remain until October 2, 1985. Unfortunately Bright overstayed his welcome and remained beyond this date. On

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

October 25, 1985, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause why Bright should not be deported.

At his deportation hearing held on April 23, 1986, Bright admitted he was not a citizen or national of the United States but requested an indefinite continuance until new procedural rules for the conduct of hearings were published by the newly created Executive Office of Immigration Review. The immigration judge denied Bright's requested continuance and found him to be deportable. Accommodatingly enough, the judge granted Bright's request for voluntary departure for a period of 90 days.

Two days after the hearing, Bright appealed the judge's order to the Board of Immigration Appeals ("Board"). Bright asserted that the judge erred by denying his requested continuance and conducting the hearing under the existing INS rules in violation of the Administrative Procedure Act. Bright did not challenge the grounds for his deportability, claim that he was entitled to any relief from deportation, or allege that his hearing before the immigration judge was prejudicial or unfair. Bright requested oral argument and 30 days to file his brief. Due to certain professional and personal circumstances allegedly beyond his control, Bright's attorney failed to file a brief or request an extension.

On August 20, 1987, the Board dismissed Bright's appeal, concluding it was frivolous and filed for the sole purpose of delay. The Board found that the immigration judge had properly

conducted the hearing in accordance with the Immigration and Nationality Act and title eight of the Code of Federal Regulations. It further noted that in as much as Bright did not file a brief, he failed both to demonstrate how this was error and allege that he was prejudiced in any manner by the hearing as conducted. The Board did not renew Bright's voluntary departure.

On October 30, 1987, Bright filed with the Board a motion to reconsider its dismissal and, for the first time, a brief in support of his appeal. He also petitioned this court to review the Board's dismissal of his appeal.

On February 22, 1988, this court affirmed the Board's dismissal of Bright's appeal. Bright v. INS, 837 F.2d 1330 (5th Cir. 1988). We held that the immigration judge's application of the then existing rules was not error and that Bright's claim that he was prejudiced and deprived of a meaningful hearing because of their application lacked any merit. Id. at 1331-2.

On April 9, 1988, Bright married Jill Colby Bright, a United States citizen. Four days later, Jill Colby Bright filed an "immediate relative" petition under 8 U.S.C. § 1154(a), claiming that Bright was entitled to immediate relative status. The Brights also challenged the constitutionality of 8 U.S.C. § 1154(h)[1], as amended by § 5 of the Immigration Marriage Fraud Amendment of 1986,

[1] Section 162(b)(5) and (6) of The Immigration Act of 1990, Pub.L. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.) redesignated former subsection (h) as (g).

Pub.L. No. 99-639, 100 Stat. 3537, 3543 (1986)[2], which stated in part:

> [A] petition may not be approved to grant an alien immediate relative status ... by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending regarding the alien's right to remain in the United States], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

8 U.S.C. §§ 1154(h), 1255(e)(2) (1986).

The district court granted the defendants' motion for summary judgment, and this court affirmed the judgment on December 13, 1990. Bright v. Parra, 919 F.2d 31 (5th Cir. 1990). We held that the above provision is the result of a policy decision by Congress, that it does not violate the fundamental rights of a United States citizen to marry and reside in this country, and that it is not a procedural provision, and thus, procedural due process is not required. Id. at 33-4. This court stated that Jill Colby Bright could still petition for immediate relative status for her alien husband but that they must wait for two years while her alien husband leaves the country. Id. at 33.

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[2] The Immigration Marriage Fraud Amendment of 1986 also created subsection (e), paragraphs (1) and (2) of 8 U.S.C. § 1255 which provide in part:

> An alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending regarding the alien's right to remain in the United States], may not have the alien's status adjusted [to that of an alien lawfully admitted for permanent residence].

8 U.S.C. § 1255(e)(1), (2) (1986).

A few weeks before this court rendered its decision affirming the district court's judgment, Congress enacted the Immigration Act of 1990, Pub.L. 101-649, 104 Stat. 4978, on November 29, 1990. One of the effects of the Immigration Act was to amend 8 U.S.C. § 1255 (e) by adding paragraph (3) which states in part:

> Paragraph (1) and [former section 1154(h)] of this title shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's entry as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 1154(a) of this title or 1184(d) of this title with respect to the alien spouse or alien son or daughter.

8 U.S.C. § 1255(e)(3) (1990).

On January 24, 1991, Bright filed a motion to reopen his case to apply for an adjustment of status under the newly created paragraph (3) of 8 U.S.C. § 1255(e). On November 21, 1991, the Board entered an order denying both Bright's motion to reopen and his October 30, 1987 motion to reconsider the Board's August 20, 1987 dismissal of Bright's appeal .

The Board denied Bright's motion to reconsider because the motion raised only the same issue Bright raised before, on direct appeal, which both the Board and this court had previously found to be without any merit. The Board denied Bright's motion to reopen his case for two reasons. First, it found that Bright had failed to comply with the requirements of 8 C.F.R. § 3.8(a) which dictates what a movant must include in his motion to reopen. Second, the

Board overruled the motion in the exercise of its discretion. The Board considered Bright's conduct to militate against the favorable exercise of its discretion. The conduct relied upon by the Board included Bright's failure to depart the country after the expiration of his nonimmigrant's visitor's visa, Bright's failure to depart the country during the three month voluntary departure period granted to Bright after the immigration judge had found him to be deportable, Bright's filing of what the Board considered to be a frivolous appeal of the deportation order for the sole purpose of delay, and Bright's failure to depart the country after the deportation order had become final, upon the dismissal of his appeal. Additionally, the Board found that Bright's marriage to a United States citizen was not a weighty factor for the Board to consider because the marriage was entered into after his deportation order had become final.

On February 21, 1992, Bright filed a motion to reopen and reconsider the Board's November 21, 1991 decision denying Bright's earlier motions to reopen and reconsider. On April 13, 1992, the Board entered an order denying the motion and adopting its November 21, 1991 decision.

Bright appeals the Board's April 13 order, arguing that the Board's denial of his motion to reopen to apply for adjustment of status constitutes an abuse of discretion.

OPINION

The Board's denial of a motion to reopen will be overturned only if this court finds the Board's decision amounts to an abuse

of discretion. Oscuchukwu v. INS, 744 F.2d 1136, 1141 (5th Cir. 1984). The determinative issue is not whether Bright has met the statutory requirements for an adjustment of status, rather, the issue is whether the Board abused its broad discretion in denying his motion to reopen. INS v. Rios-Pineda, 471 U.S. 443, 449 (1985). In this regard, the denial of a motion to reopen will be upheld unless it was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group. Achacoso-Sanchez v. INS, 779 F.2d 260 (7th Cir. 1985); Williams v. INS, 773 F.2d 8,9 (1st Cir. 1985); Balani v. INS, 669 F.2d 1157, 1161 (6th Cir. 1982).

Bright has the burden proving that the Board abused its discretion in denying his motion based upon the circumstances presented in this particular case. Yahkpua v. INS, 770 F.2d 1317, 1321 (5th Cir.1985). In light of the circumstances presented and the Board's abundant discretion, Bright failed to carry his burden. Id. As we stated in Yahkpua, "We lack the power, even if we thought it kindly, to substitute our views for those of the Board's." Id.

For these reasons, we AFFIRM the decision of the Board of Immigration Appeals and DISMISS this petition for review.