

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-5137 &
93-4168
Summary Calendar

MICHAEL ROBERT FREDERICK WAKEFIELD,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an order of the
Immigration and Naturalization Service
(A14 437 375)

(June 28, 1993)

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:*

Michael Robert Frederick Wakefield was found deportable by an Immigration Judge (IJ). Wakefield appealed the decision of the IJ to the Board of Immigration Appeals (the Board), which dismissed the appeal. Over one year after the Board's decision, Wakefield moved the Board to reopen his case and to stay his deportation. The Board denied both motions, and Wakefield now petitions this

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

court for review. We grant review and find, first, that we lack jurisdiction to review Wakefield's claims regarding the order of deportation of the Board; we do, however, affirm the decision of the Board denying Wakefield's motion to reopen his case.

I

Wakefield, a forty-five year old native of England and citizen of Great Britain, entered the United States in 1966 as a lawful permanent resident. Wakefield was convicted in 1982 of unlawful possession of a prohibited weapon, a short-barreled firearm. For this offense Wakefield was initially placed on probation, but probation was later revoked and Wakefield was ordered to serve from two to ten years in prison and pay a fine of \$1,000.00. Wakefield was also separately convicted of possession of marijuana, and pursuant to this conviction the INS initiated deportation proceedings. This proceeding, however, was terminated; instead, the INS issued a superseding Order to Show Cause charging Wakefield with two separate deportation grounds based on both the firearm and the marijuana possession convictions. Wakefield's deportation was sought pursuant to section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), as an alien convicted of a crime relating to controlled substances,¹ and pursuant to section 241(a)(14) of the

¹This section has been recodified as 8 U.S.C. § 1251(a)(2)(B)(ii).

Act, 8 U.S.C. § 1251(a)(14), as an alien convicted of possessing or carrying a firearm in violation of any law.²

At his deportation proceeding Wakefield admitted that he was deportable as charged but sought to apply for relief from deportation pursuant to section 212(c) of the Act, 8 U.S.C. § 1182(c), as a seven-year domiciliate. The INS opposed this, arguing that Wakefield was ineligible for relief under section 212(c) because of his firearm conviction. After concluding that Wakefield was indeed eligible for such relief, the IJ nevertheless found that Wakefield was undeserving of this extraordinary relief. Wakefield appealed to the Board, which dismissed his appeal on August 16, 1991. Wakefield did not appeal this decision.

Over one year later, on October 20, 1992, Wakefield filed a motion for a stay of deportation and to reopen his case pursuant to 8 C.F.R. § 3.2. The Board initially denied the motion for a stay,³ and on November 25, 1992, denied Wakefield's motion to reopen his case. Wakefield now petitions this court for review of the decision of the Board.

²This section has been recodified as 8 U.S.C. § 1251(a)(2)(C).

³Wakefield also appeals the Board's denial of a stay, which is not a final order of deportation reviewable by this court. The INS therefore filed a motion to dismiss this appeal for lack of jurisdiction. This motion was carried with the case, and Wakefield's appeal of the denial of a stay has now been consolidated with this case. We do not address this issue, however, because "[a] stay can be requested but its denial is not an appealable order." Ramirez-Osorio v. INS, 745 F.2d 937, 940 (5th Cir. 1984).

II

On appeal, Wakefield argues that the decision of the Board affirming the IJ's finding of deportability denies him equal protection of the law. Before addressing the merits of Wakefield's claim, we must first address the jurisdictional issue presented in this case. The INS argues that this court lacks jurisdiction to review the decision of the Board dated August 16, 1991. The deadline for filing a petition for review under section 106(a)(1) of the Act is ninety days from the date of the Board's decision, the final deportation order. 8 U.S.C. § 1105a(a)(1). Because the final Board decision was dated August 16, 1991, the INS argues that Wakefield was required to file his petition for review to this court by November 14, 1991. In view of this failure, the INS argues that this court lacks jurisdiction to consider his claims regarding the decision of the Board.⁴

We most recently addressed this issue in Pierre v. INS, 932 F.2d 418 (5th Cir. 1991). In that case, we adopted the approach of the D.C. Circuit expressed in Attoh v. INS, 606 F.2d 1273 (D.C. Cir. 1979), stating that this approach "best merges the traditional understanding of a 'final order' with the special concerns that arise in the context of deportation orders." Pierre, 932 F.2d at 421. In Attoh, the D.C. Circuit partially adopted the approach of the Ninth Circuit presented in Bregman v. INS, 351 F.2d 401, 402-03

⁴So sure is the INS of its argument that it has not even addressed, in the alternative, the merits of Wakefield's claims.

(9th Cir. 1965). Under Bregman, if a motion to reopen is filed within six months (or, as amended, ninety days) of the final order of deportation and a petition to the court of appeals is filed within six months (or now ninety days) of the denial of the motion to reopen, the Circuit Court has jurisdiction to review both the denial of the motion to reopen and the final order of deportation. In Attoh, the D.C. Circuit adopted this approach "only insofar as it implicitly recognizes that intervening good faith petitions for administrative relief may toll or suspend the running of the time period." Attoh, 606 F.2d at 1276 n. 15. After Pierre, we now follow this approach to determine if we have jurisdiction.

Applying Pierre to the facts before us, it is obvious that if Wakefield had filed his petition for review to this court within ninety days of the date of the Board's August 16, 1991 deportation order, we would not be addressing this jurisdictional question. Furthermore, if within that ninety-day time period Wakefield had, in good faith, filed a motion to reopen his case, then the time period for appeal to this court would have been tolled and we would have jurisdiction to consider both the original decision of the Board and its denial of Wakefield's motion to reopen, if a petition for judicial review had been filed within ninety days of the date of the Board's denial. Wakefield, however, did nothing for over one year. It was not until October 20, 1992--more than fourteen months after the Board's decision--that Wakefield decided to ask the Board to reopen his case. Because Wakefield did not in good

faith ask the Board to reopen his case within ninety days from its August 16, 1991 order of deportation, we are without jurisdiction to review his claims regarding the Board's order of deportation.

III

The only issue timely raised by this appeal, and over which we have jurisdiction, is whether the Board abused its discretion in refusing to reopen Wakefield's case. An alien's motion to reopen deportation proceedings is not granted unless it appears to the Board that evidence sought to be offered is material and that it was not available and could not have been discovered or presented at the original hearing. 8 C.F.R. § 3.2. Furthermore, motions to reopen must "state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 3.8(a). The Board's determination of whether an alien has met the regulatory requirements for reopening is reviewed by this court under the abuse of discretion test. Ogbemudia v. INS, 988 F.2d 595, 600 (5th Cir. 1993).

In Wakefield's motion to reopen, he states only that he experienced emotional trouble after returning from a tour of duty in Korea; that the United Kingdom is a "strange country" to him; and that he was not afforded legal counsel at his deportation hearing. The Board denied Wakefield's motion to reopen, stating that Wakefield had failed to follow the regulatory requirements. Specifically, the Board found that Wakefield had neither alleged new facts to be proved nor supported them by affidavits or other

evidentiary materials as required. We have no trouble concluding that the Board did not abuse its discretion in denying Wakefield's motion to reopen his case. All the information contained in Wakefield's motion to reopen could have been presented to the Board at the original hearing. Furthermore, Wakefield failed to support his motion with affidavits or any other evidence. As such, the Board properly denied Wakefield's motion to reopen his case.

IV

In conclusion, we find that we are without jurisdiction to review Wakefield's claims relating to the Board's deportation order. We do conclude, however, that the Board did not abuse its discretion in denying Wakefield's motion to reopen his case. Accordingly, the Board's denial of Wakefield's motion to reopen is

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