IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4655

LYNDEN LOCKSLEY FRASER,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A35 684 842)

(April 1, 1994)

Before KING and WIENER, Circuit Judges, and ROSENTHAL,[*] District Judge.

PER CURIAM:[**]

Petitioner-Appellant Lynden Locksley Fraser, a native and

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[*] District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

citizen of Jamaica, has petitioned this court to review an order of the Board of Immigration Appeals (BIA) in connection with Fraser's deportation. On appeal he argues that the BIA abused its discretion in denying relief from deportation under § 212(c) of the Immigration and Nationality Act[1] (the Act) as well as the action of the BIA in approbating the order of deportation in the instant proceedings which, Fraser insists, should have been barred by res judicata or collateral estoppel. Finding no reversible error by the BIA on any basis urged by Fraser, we deny his petition for review.

Fraser is a native and citizen of Jamaica who entered the United States as an immigrant in 1977. In 1987 he received a suspended sentence and probation for a state drug violation in Louisiana, and in 1990 pleaded guilty in federal court to violating 21 U.S.C. § 1843(b), use of a communication facility to facilitate a felony. He served eight months in federal prison for that offense, plus additional time in Louisiana because the federal offense was committed while he was on probation from the state offense, thereby revoking his probation.

In September 1992 the INS issued a show cause order against Fraser, charging that he was deportable. The show cause hearing was held in December 1992 before Immigration Judge Wiegand. On the basis of res judicata or collateral estoppel, Fraser moved to have the deportation proceedings against him dismissed, asserting that in a previous deportation proceeding before Immigration Judge Duck

[1] 8 U.S.C. § 1182(c).

the INS had failed to prove deportability and was thus barred from attempting to do so again.

Crucial to the instant appeal is the evidence adduced before Judge Wiegand in support of Fraser's affirmative defenses of res judicata and collateral estoppel. Fraser submitted only a single page "check-box" summary of Judge Duck's Order dated August 19, 1992, disclosing nothing more than that the immigration judge (IJ) had terminated proceedings and that both Fraser and the INS had waived appeal. Unfortunately for Fraser, nothing else about the earlier proceeding was apparent from the form and no other evidence was adduced. In fact, Judge Wiegand specifically inquired whether Fraser had any other evidence to submit in support of his motion to dismiss to which question counsel for Fraser responded in the negative. The hearing was then adjourned to give the INS time within which to respond (Fraser had also moved for a change of venue and for a continuance in order to gather more documentary support for an application for relief of deportation).

In January 1993, Judge Wiegand denied Fraser's motion to dismiss. Judge Wiegand indicated that he had personally verified through a record check that the earlier proceedings before Judge Duck were in fact terminated. The proceedings before Judge Wiegand were adjourned for a week; upon resumption of which Fraser admitted the facts of his nationality and criminality. After evidence of Fraser's conviction was entered in the record, Judge Wiegand determined that Fraser was subject to deportation. Fraser applied for relief from deportation under § 212(c) of the Act, and a

hearing thereon was held in February 1993. Judge Wiegand denied a request for relief and ordered deportation. Fraser timely appealed to the BIA.

Although the BIA modified Judge Wiegand's order,[2] it dismissed Fraser's appeal. In so doing the BIA made the following pronouncement:

> In the present case we know very little of what happened in the immigration court on August 19, 1992. We do not know if the deportation issue was litigated on the merits, or if proceedings were terminated for some other reason. No basis exists, on the information in the present record file, for applying the doctrine of res judicata and/or collateral estoppel.

We review the decision of the BIA, not the decision of the immigration judge.[3] We review de novo the BIA's determination concerning applicability of res judicata of a second deportation proceeding.[4] The standard by which we review factual determinations of the BIA is the so-called substantial evidence test.[5] Thus we will reverse the BIA on factual findings only if the evidence of the record would compel a reasonable factfinder to reach a different conclusion.[6]

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[2] The BIA modified the decision of the immigration judge to the extent the BIA found that Fraser's residence in the United States since 1977 constituted "an unusual or outstanding equity."

[3] Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993).

[4] Medina v. INS, 993 F.2d 499, 502 (5th Cir. 1993).

[5] 8 U.S.C. § 1105a(a)(4); see Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992).

[6] INS v. Elias-Zacarias, ____ U.S. ____, 112 S.Ct. 812, 815, 817, 117 L. Ed. 2d 38 (1992).

We review denial of § 212(c) relief by the BIA for abuse of discretion.[7] As we will not reverse unless we find the decision of the BIA to be "arbitrary, irrational, or contrary to law,"[8] our review is "exceedingly narrow."[9]

In his appellate brief and his oral argument to this court, Fraser's counsel devoted considerable time and energy to the question whether res judicata and collateral estoppel apply to deportation hearings, insisting that both concepts are applicable and questioning Judge Wiegand's refusal to grant relief based on those affirmative defenses. Fraser's efforts and energies are thus misdirected. As noted, we do not review the actions of the immigration judge but those of the BIA. And any reasonable reading of the above-quoted statement of the BIA confirms that the BIA in this case was not holding that res judicata and collateral estoppel are unavailable, merely that the record before the BIASQthe same one we reviewSQis too deficient to form the basis of a res judicata or collateral estoppel holding.

The transcript of the hearing before Judge Duck was not before Judge Wiegand or the BIA during the second set of deportation proceedings. Under 8 U.S.C. § 1105a(a)(4), a petition for review to this court

> shall be determined solely upon the administrative record upon which the

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[7] Molenda v. INS, 998 F.2d 291, 293-94 (5th Cir. 1993).

[8] Villarreal-San Miguel v. INS, 975 F.2d 248, 250 (5th Cir. 1992).

[9] Ashby v. INS, 961 F.2d 555, 557 (5th Cir. 1992).

> deportation order is based and the Attorney-General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.

The government correctly contends that, as the "supplemental record" which Fraser filed with this court was not part of the "administrative record upon which the deportation order" of the BIA was based, we cannot take the supplemental record into account when considering Fraser's petition for review. Quite simply, Fraser failed to meet his burden of persuasion during the second deportation hearing to establish the applicability of his res judicata or collateral estoppel defenses.[10]

Fraser obviously could havesQand perhaps should havesQintroduced the "supplemental record" before Judge Wiegand as evidence of the res judicata grounds of the motion to dismiss. Fraser might have sought to offer an affidavit from Judge Duck detailing his decision if the transcript from the first deportation hearing was unavailable. Before us though he offers no explanation for not submitting the "supplemental record" or any other supporting evidence to Judge Wiegand or to the BIA.

Even when we assume, arguendo, that res judicata and collateral estoppel <u>are</u> applicable in the instant case, the BIA's denial of Fraser's motion to dismiss on such grounds is fully supported by the evidence of recordsQmore accurately, the absence

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[10] <u>See</u> <u>In re Braniff Airways, Inc.</u>, 783 F.2d 1283, 1289 (5th Cir. 1986) ("The party seeking to assert that an issue was already adjudicated upon bears the burden of proving that contention, particularly where the record is ambiguous or confusing.").

of evidence in the recordsQbefore the BIA. Given that we review the work of the BIA and not the IJ, we do so on the basis of the administrative record. As such we discern no error by the BIA in denying Fraser's motion to dismiss.

As for the BIA's decision to deny § 212(c) relief, our abuse of discretion standard of review constrains us to uphold that ruling. The BIA based its decision on Fraser's failure to convince the BIA of his rehabilitation from a life of crime and drugs. The reasoning expressed by the BIA satisfies us that the denial of discretionary relief is not "arbitrary, irrational, or contrary to law,"[11] particularly given our "exceedingly narrow" standard of review of such decisions by the BIA.[12]

For the foregoing reasons, Fraser's petition for review is DENIED.

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[11] Villarreal-San Miguel, 975 F.2d at 250.

[12] See Ashby, 961 F.2d at 557.