

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40150
Summary Calendar

EKUNDAYO SADIQ
v.
IMMIGRATION AND NATURALIZATION
SERVICE

Petitioner,
Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(A 23 270 821)

(October 14, 1994)
Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Petitioner Ekundayo Sadiq ("Sadiq") seeks review of an order of deportation issued by the Board of Immigration Appeals ("BIA"). We affirm the decision of the BIA.

I. BACKGROUND

Sadiq is a 43 year-old native and citizen of Nigeria who entered the United States as a student on June 5, 1975. He subsequently married a U.S. citizen on November 4, 1978, and he

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

obtained lawful permanent resident status on July 27, 1979. The couple had one child, a son, who was born on November 6, 1977. Throughout the duration of their marriage, Sadiq, his wife, and his son resided with his wife's parents in Boston, Massachusetts. Tragically, on July 23, 1991, Sadiq's wife died.

On August 31, 1991, Sadiq travelled to Nigeria, and upon his return to the United States on September 18, 1991, he was apprehended by U.S. law enforcement officials for allegedly attempting to import heroin into the country. On March 20, 1992, Sadiq was convicted for the offense of importation of heroin in the United States District Court for the Eastern District of New York. The offense involved 823.1 grams of heroin, and Sadiq received a prison term of 41 months.

At his deportation hearing, Sadiq conceded his deportability, but applied for relief from deportation under section 212(c) of the Immigration and Nationality Act.¹ The Immigration Judge ("IJ") found Sadiq's testimony to be "essentially sincere and credible," and after noting that the heroin conviction was "the only adverse factor" in Sadiq's case, the IJ granted a waiver of deportability under section 212(c). The Immigration and Naturalization Service

¹ Section 212(c) provides in relevant part:

Aliens lawfully admitted for permanent resident [sic] who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General.

8 U.S.C. § 1182(c).

("INS") appealed, contending that the IJ erred in his conclusion that the favorable factors outweighed the negative considerations in Sadiq's case.

In a February 4, 1994 decision, the BIA sustained the appeal of the INS and ordered deportation of Sadiq to Nigeria. The BIA observed that the IJ failed to discuss the need for Sadiq to present "outstanding" or "unusual" equities in his case; moreover, the BIA found that Sadiq's only "outstanding" or "unusual" equity was his length of residence. Thus, the BIA concluded that "the respondent's length of residence does not outweigh his serious criminal misconduct, and the immigration judge's favorable exercise of discretion is not supportable."

II. STANDARD OF REVIEW

The BIA's denial of a section 212(c) petition for relief is reviewed under an abuse of discretion standard. See Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992). Such denial will be upheld "unless it is arbitrary, irrational, or contrary to law." Id.; accord Molenda v. INS, 998 F.2d 291, 293-94 (5th Cir. 1993). Because section 212(c) does not provide standards to govern the BIA's exercise of discretion, the Attorney General "has unusually broad discretion in granting and denying waivers." Molenda, 998 F.2d at 293; see also Ashby v. INS, 961 F.2d 555, 557 (5th Cir. 1992). Thus, as we noted in Ashby, "our scope of review is 'exceedingly narrow.'" 961 F.2d at 557.

III. ANALYSIS AND DISCUSSION

Section 212(c) provides discretionary relief from deportation for a permanent resident alien who has been lawfully domiciled in the United States for more than seven years. See Molenda, 998 F.2d at 295; Ashby, 961 F.2d at 557. A petitioner seeking relief under section 212(c) "bears the burden of demonstrating that his application merits favorable consideration." Diaz-Resendez, 960 F.2d at 495. Proper exercise of discretion requires a balancing of "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf." Molenda, 998 F.2d at 295 (quoting Matter of Marin, 16 Int. Dec. 581, 584 (BIA 1978)). Moreover, as the BIA has noted:

[A]s the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. Such a heightened showing is required when an alien has been convicted of a serious drug offense, particularly one relating to the trafficking or sale of drugs.

Matter of Edwards, Int. Dec. 3134 (BIA 1990); accord Matter of Buscemi, 19 Int. Dec. 628 (BIA 1988); see Molenda, 998 F.2d at 295. The demonstration of unusual or outstanding equities, however, does not compel a favorable exercise of discretion. See Molenda, 998 F.2d at 295.

In exercising its wide discretion, the BIA considered the facts and circumstances involved, balancing the social and humane considerations in Sadiq's favor against the adverse factors.

Adhering to its prior decision in Marin,² the BIA specifically considered the following factors: Sadiq's long duration of residence in the United States, his relationship with his son, his son's age and living arrangement with his grandparents, Sadiq's assets in the U.S., his involvement in the community, his extensive family ties in Nigeria, and Sadiq's rehabilitative efforts.

In evaluating these factors, the BIA first found that "[t]he gravity inherent in [Sadiq's] crime mandates that he demonstrate unusual or outstanding equities to warrant consideration of a favorable exercise of discretion." In Sadiq's favor, the BIA found that his length of residence in the United States rose to the level of "unusual" or "outstanding." The BIA, however, also concluded that this equity did not outweigh Sadiq's importation of nearly two

² In Matter of Marin, 16 Int. Dec. 581, 584-85 (BIA 1978), the BIA listed the following factors as relevant to a section 212(c) consideration:

Adverse Factors Include: (a) the nature and underlying circumstances of the exclusion ground at issue; (b) the presence of additional significant violations of this country's immigration laws; (c) the existence of a criminal record and, if so, its nature, recency, and seriousness; and (d) the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country.

Favorable Factors Include: (a) the existence of substantial family ties within the United States; (b) residence of long duration in this country (particularly when the inception of residence occurred while the appellant was of young age); (c) evidence of hardship to the appellant and his family if deported; (d) service in the Armed Forces; (e) history of employment; (f) the existence of property or business ties; (g) evidence of value and service to the community; (h) rehabilitation, if a criminal conviction is at issue; and (i) other evidence of good moral character.

pounds of heroin, especially because Sadiq's son is near the age of adulthood, Sadiq's in-laws have raised his son since his wife's death, and Sadiq's in-laws have provided the majority of the child's support. Moreover, despite the rehabilitative strides made by Sadiq while incarcerated, the BIA noted that "[h]is crime is too serious and too recent for us to conclude that he has been rehabilitated, his good behavior in prison notwithstanding."

We reiterate that our review of the BIA's decision is severely limited. Accordingly, we conclude that the BIA sufficiently balanced the factors for and against the waiver of deportation.³

³ Despite Sadiq's contentions, the equities of his case are not as compelling as the equities present in Diaz-Resendez. In Diaz-Resendez, the petitioner was a 37-year U.S. resident with four dependent children still living in his home. See 960 F.2d at 494. One of the petitioner's children had special education needs, and the petitioner was the primary source of income for his family. See id. In addition, the petitioner's wife, who also resided in his home, had "a progressive and incurable medical condition causing spinal column disintegration." Id. Moreover, the court made much of the fact that "the very experienced trial judge" suspended all but four months of petitioner's jail sentence for possession of marihuana with intent to distribute. See id. These factors are not present in Sadiq's case.

Similarly, Sadiq's reliance on Matter of Buscemi is unavailing. In that case, it is true that the BIA found some outstanding equities in Buscemi's situation, just as the BIA found Sadiq's length of residence to be outstanding. See Matter of Buscemi, 19 Int. Dec. 628 (BIA 1988). Nevertheless, in Buscemi, the petitioner was still deported. As the BIA stated, "[e]ven considering the outstanding equities which [Buscemi] has been able to establish, we do not find that granting relief is warranted or in the best interests of this country." Id. Thus, even if the equities of Sadiq's case were precisely the same as the equities of Buscemi's case (which they are not), it would not indicate that the BIA has abused its discretion in denying Sadiq's request for section 212(c) relief.

IV. CONCLUSION

Because we find that the BIA did not abuse its discretion in denying Sadiq's request for section 212(c) relief, the decision of the BIA is AFFIRMED.