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Date and Time: Tuesday, September 26, 2017 11:39:00 AM CST

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[Raffington v. Cangemi](#)

United States Court of Appeals for the Eighth Circuit

December 15, 2004, Submitted ; February 4, 2005, Filed

No. 04-3672

Reporter

399 F.3d 900 *; 2005 U.S. App. LEXIS 1809 **

Sherneth Marcia Raffington, Petitioner-Appellant, v. Mark Cangemi, District Director, U.S. Immigration and Customs Enforcement, et al., Respondents-Appellees.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by [Raffington v. Cangemi, 2005 U.S. App. LEXIS 5925 \(8th Cir., Apr. 11, 2005\)](#)

Prior History: **[**1]** Appeal from the United States District Court for the District of Minnesota.

[Sherneth Raffington v. Mark Cangemi, 2004 U.S. Dist. LEXIS 21629 \(D. Minn., Oct. 6, 2004\)](#)
[Raffington v. Cangemi, 2004 U.S. Dist. LEXIS 21633 \(D. Minn., Oct. 18, 2004\)](#)

Disposition: Affirmed.

Core Terms

removal, deportation, district court, Immigration, suspension, proceedings, Torture, judicial review, frivolous, reopen

Case Summary

Procedural Posture

Petitioner, an alien in custody awaiting removal to Jamaica, appealed the United States District for the District of Minnesota's denial of her petition for habeas relief. Petitioner argued that the government was estopped to remove her because of its frivolous appeal of the immigration judge's grant of suspension of deportation. Petitioner also challenged the denial of her Convention Against Torture (CAT) claim.

Overview

The appellate court found petitioner's estoppel argument

unsound for several reasons. Petitioner did not appeal the Board of Immigration Appeals' denial of suspension of deportation to the appellate court. Under the immigration laws as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), an appeal to the court of appeals was the exclusive procedure for obtaining judicial review of removal orders. Petitioner did appeal the denial of her motion to reopen the removal proceedings to consider a new application for asylum or withholding of removal, but she did not raise the estoppel issue in that appeal. St. Cyr granted [28 U.S.C.S. § 2241](#) habeas review of an issue of law to an alien who had no right to judicial review under the IIRIRA. Petitioner cited no authority for the broader and more disruptive proposition that habeas relief was available for a claim that could have been raised on direct review of a removal order but was not. The appellate court agreed with the district court that the appeal by the Immigration and Naturalization Service was not frivolous. Finally, there was no evidence to suggest petitioner could obtain relief under CAT.

Outcome

The judgment of the district court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Procedure > Exclusivity

Immigration Law > Deportation & Removal > Judicial Review

Immigration Law > Asylum, Refugees & Related Relief > Restriction on Removal > General Overview

Immigration Law > Asylum, Refugees & Related Relief > Restriction on Removal > Administrative Proceedings

Immigration Law > Deportation & Removal > Administrative Appeals > Estoppel & Res Judicata

the enactment of this Act. IIRIRA § 309(c)(5), 110 Stat. 3009-627, set forth at 8 U.S.C.S. § 1101 note (Supp. II 1997).

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Suspension of Deportation

Administrative Law > Judicial Review > General Overview

Immigration Law > Judicial Proceedings > Judicial Review > Effect of Review

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Suspension of Deportation

Immigration Law > ... > Writs > Habeas Corpus > Jurisdiction

International Law > Treaty Formation > Treaty Ratifications

Immigration Law > Judicial Proceedings > Jurisdiction

International Law > Treaty Formation > General Overview

[HN1](#) Procedure, Exclusivity

Under the immigration laws as amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), an appeal to the court of appeals is the exclusive procedure for obtaining judicial review of removal orders. 8 U.S.C.S. § 1252(b). The habeas jurisdiction under [28 U.S.C.S. § 2241](#) was not repealed by IIRIRA.

[HN3](#) Administrative Law, Judicial Review

As ratified by the United States, the Convention Against Torture (CAT) is a non-self-executing treaty, which means there is no direct right of action for violation of the treaty, only for violation of any domestic law implementing the treaty. The relevant statute provides that implementation of CAT shall be in accordance with nonreviewable agency regulations, and that judicial review of the denial of CAT relief must be as part of the review of a final order of removal. Foreign Affairs Reform and Restructuring Act of 1998, § 2242(d), Pub. L. No. 105-277, 112 Stat. 2681-761, 2681-822, set forth at 8 U.S.C.S. § 1231 note; [8 C.F.R. § 208.18\(e\)](#).

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Cancellation of Removal

Immigration Law > Deportation & Removal > Administrative Appeals > General Overview

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Suspension of Deportation

Immigration Law > Asylum, Refugees & Related Relief > Restriction on Removal > Administrative Proceedings

Immigration Law > Asylum, Refugees & Related Relief > Restriction on Removal > General Overview

[HN2](#) Relief From Deportation & Removal, Cancellation of Removal

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), modified the suspension-of-deportation criteria by enacting a "stop-time" rule which bars an alien from accruing time toward the continuous presence requirement after service of a "notice to appear." § 240A(d)(1), codified at [8 U.S.C.S. § 1229b\(d\)\(1\)](#). The statute applied this new rule to notices to appear issued before, on, or after the date of

Immigration Law > Deportation & Removal > Judicial Review

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Suspension of Deportation

Immigration Law > ... > Writs > Habeas Corpus > General Overview

Immigration Law > ... > Writs > Habeas
Corpus > Jurisdiction

[HN4](#) **Restriction on Removal, Administrative Proceedings**

An alien who has no right to judicial review of her removal order under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 may seek habeas review of the Board of Immigration Appeal's denial of Convention Against Torture relief.

Immigration Law > ... > Writs > Habeas
Corpus > General Overview

[HN5](#) **Writs, Habeas Corpus**

Habeas is not a substitute for direct appeal.

Civil Procedure > Judgments > Relief From
Judgments > Newly Discovered Evidence

Immigration Law > Deportation & Removal > Relief
From Deportation & Removal > Suspension of
Deportation

[HN6](#) **Relief From Judgments, Newly Discovered Evidence**

Congress has granted the Immigration and Naturalization Service exclusive authority to implement the Convention Against Torture.

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For MARK CANGEMI, District Director, U.S. Immigration and Customs Enforcement (ICE), Respondents-Appellees: Lonnie F. Bryan, Asst. U.S. Attorney [COR LD NTC usa], Joan DeCoursin Humes [COR LD NTC usa], U.S. ATTORNEY'S OFFICE, Minneapolis, MN.

THOMAS RIDGE, Secretary, Department of Homeland Security, Respondents-Appellees: Lonnie F. Bryan, Asst. U.S. Attorney [COR LD NTC usa], Joan

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For JOHN ASHCROFT, United States Attorney General, Respondents-Appellees: Lonnie F. Bryan, Asst. U.S. Attorney [COR LD NTC usa], Joan DeCoursin Humes [COR LD NTC usa], U.S. ATTORNEY'S OFFICE, Minneapolis, MN.

Judges: Before LOKEN, Chief Judge, JOHN R. GIBSON and HANSEN, Circuit Judges.

Opinion by: LOKEN

Opinion

[*901] LOKEN, Chief Judge.

Sherneth Raffington, an alien in custody awaiting removal to Jamaica, appeals the district court's ¹ denial of her petition for a writ of habeas corpus. Raffington argues **[**2]** that the government is estopped to remove her because of its frivolous appeal of the Immigration Judge's grant of suspension of deportation, and that the district court erred in failing to consider the merits of her belated claim for relief under the Convention Against Torture. We granted the government's motion to expedite the appeal and now affirm.

These proceedings have a long history that we will briefly summarize. Raffington reentered the United States illegally in April 1988. The Immigration and Naturalization Service ² initiated deportation proceedings (now called removal proceedings) in October 1994. Raffington conceded deportability and applied for suspension of deportation. The Immigration Judge ("IJ") granted suspension of deportation in December 1996, and the INS appealed. In September 2001, the Board of Immigration Appeals sustained the appeal and denied Raffington's application for suspension of deportation, **[**3]** concluding that Raffington was not eligible for suspension because she did not satisfy the seven-year continuous presence requirement.

Raffington did not appeal the BIA's decision. Instead,

¹The Honorable John R. Tunheim, United States District Judge for the District of Minnesota.

²The agency was renamed the Bureau of Immigration and Customs Enforcement after its transfer to the Department of Homeland Security.

she filed an application for asylum or withholding of removal and moved to reopen the case and remand to the IJ to consider this new application. The BIA denied that motion, concluding that Raffington failed to present a prima facie case that she will be persecuted upon her return to Jamaica on account of membership in a social group. Raffington appealed the denial of her motion to reopen. We affirmed. [Raffington v. INS, 340 F.3d 720 \(8th Cir. 2003\)](#).

After Raffington was taken into custody pursuant to a warrant of removal, she petitioned for habeas corpus relief. The district court denied relief, concluding that **[*902]** the INS had a good faith basis to appeal the IJ's grant of suspension **[**4]** of deportation and that Raffington's attempt to assert a claim under the Convention Against Torture ("CAT") in her reply brief was untimely. Raffington moved to reopen the case to present her CAT claim. The district court denied leave to file a motion for reconsideration because "there is no evidence to suggest that Raffington could obtain relief under the Convention." She appeals both orders. The district court granted a stay pending appeal because removal is likely to cause irreparable injury and Raffington "raises a substantial question as to whether her Convention Against Torture claim has been adequately adjudicated."

1. The Estoppel Claim. Raffington argues that the government is estopped to remove her because the INS appeal of the IJ's order granting suspension of deportation was frivolous. This contention is unsound for many reasons. First, Raffington did not appeal the BIA's denial of suspension of deportation to this court. [HN1](#) ³ Under the immigration laws as amended by IIRIRA, an appeal to the court of appeals is the exclusive procedure for obtaining judicial review of removal orders. See 8 U.S.C. § 1252(b). Raffington did appeal the denial of **[**5]** her motion to reopen the removal proceedings to consider a new application for asylum or withholding of removal, but she did not raise the estoppel issue in that appeal. We recognize "that habeas jurisdiction under [\[28 U.S.C.\] § 2241](#) was not repealed by . . . IIRIRA." [I.N.S. v. St. Cyr, 533 U.S. 289, 314, 150 L. Ed. 2d 347, 121 S. Ct. 2271 \(2001\)](#). But [St. Cyr](#) granted [§ 2241](#) habeas review of an issue of law -- legislative retroactivity -- to an alien who had *no* right to judicial review under IIRIRA. Raffington cites no authority for the broader and more disruptive proposition

³The *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat 3009-546.

that habeas relief is available for a claim that could have been raised on direct review of a removal order but was not. The case on which she bases her estoppel claim, [Otarola v. INS, 270 F.3d 1272 \(9th Cir. 2001\)](#), involved direct review of a final order of removal.

Second, we agree with the district **[**6]** court that the INS appeal was not frivolous. [HN2](#) ⁴ IIRIRA modified the suspension-of-deportation criteria by enacting a "stop-time" rule which bars an alien from accruing time toward the continuous presence requirement after service of a "notice to appear." § 240A(d)(1), codified at [8 U.S.C. § 1229b\(d\)\(1\)](#). The statute applied this new rule to "notices to appear issued before, on, or after the date of the enactment of this Act." [IIRIRA § 309\(c\)\(5\), 110 Stat 3009-627, set forth at 8 U.S.C. § 1101 note \(Supp. II 1997\)](#). After enactment, the INS argued that the stop-time rule should apply to orders to show cause as well as to notices to appear, and that the effective date of the rule was the date of enactment, not six months later like most other IIRIRA provisions. The IJ rejected this position and granted Raffington suspension of deportation, concluding that the stop-time rule did not apply during the six-month grace period. Raffington argues the IJ's decision was correct when issued and the INS should not have appealed it, as a divided panel of the Ninth Circuit ruled in [Otarola, 270 F.3d at 1275-76](#), relying on an earlier Ninth **[**7]** Circuit decision. With due respect, we disagree with the panel majority in [Otarola](#). The INS was well within its authority in pursuing this issue before the BIA despite a contrary Ninth Circuit decision. **[*903]** Within months of the IJ's decision in this case, the BIA issued an en banc decision agreeing with the INS's interpretation of the new statute. [In re N-J-B-, 21 I. & N. Dec. 812 \(1997\)](#). Later that year, Congress amended the statute to validate the [N-J-B-](#) decision, which ended the controversy in the agency's favor. See [Nicaraguan Adjustment and Central American Relief Act \("NACARA"\) § 203, Pub L. No. 105-100, 111 Stat. 2193, 2196 \(1997\)](#), set forth at 8 U.S.C. § 1101 note; [Afolayan v. I.N.S., 219 F.3d 784, 787-88 \(8th Cir. 2000\)](#). In these circumstances, the INS decision to appeal the IJ's decision was not frivolous.

Third, even if the INS had filed a frivolous (but ultimately successful) appeal of the IJ's decision, this would not constitute the sort of "affirmative misconduct" that might estop the government to enforce the immigration laws as enacted by Congress. See [United States I.N.S. v. Hibi, 414 U.S. 5, 7-9, 38 L. Ed. 2d 7, 94 S. Ct. 19 \(1973\)](#). **[**8]**

2. The CAT Claim. Raffington argues that the district

court erred in refusing to consider her request for relief under the CAT because that claim has never been adjudicated on the merits. At the outset, we seriously doubt whether this claim is even cognizable in habeas. [HN3](#)⁴ As ratified by the United States, the CAT is a non-self-executing treaty, which means there is no direct right of action for violation of the treaty, only for violation of any domestic law implementing the treaty. The relevant statute provides that implementation of CAT shall be in accordance with nonreviewable agency regulations, and that judicial review of the denial of CAT relief must be "as part of the review of a final order of removal." *Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA")* § 2242(d), *Pub. L. No. 105-277, 112 Stat. 2681-761, 2681-822*, set forth at 8 U.S.C. § 1231 note; see [8 C.F.R. § 208.18\(e\)](#).

Following the Supreme Court's decision in *St. Cyr*, four circuits have held that [HN4](#)⁴ an alien who has no right to judicial review of her removal order under IIRIRA may seek habeas review of the BIA's denial of CAT relief.⁴ We are inclined **[**9]** to agree with those decisions. But here, Raffington had a right to judicial review of her removal order. Her application for asylum and withholding of removal raised the CAT issue by stating that she feared torture because, "I will not be allowed medical treatment [in Jamaica]. And to me that is tantamount to torture because it will ultimately cause my death." But in moving to reopen her removal proceedings, she argued only asylum issues. She did not object when the agency denied that motion without discussing the CAT issue, and she did not raise that issue when she appealed to this court. As [HN5](#)⁴ habeas is not a substitute for direct appeal, as [HNG](#)⁴ Congress has granted the agency exclusive authority to implement the CAT, and as Raffington failed to present any newly discovered evidence to the district court, habeas relief should not be available.

[10]** The district court did not consider these threshold issues. Rather, the court denied Raffington's motion for leave to raise a belated CAT claim because that claim "is too speculative to warrant further proceedings. The Court has reviewed the entire record in this case and there is no evidence to suggest that Raffington could obtain relief under the Convention." After careful review of the record, we agree. **[*904]**

Though Raffington may not have access to the same level of public and private mental health care in Jamaica as in the United States, that does not constitute torture within the meaning of the governing CAT regulations. See [8 C.F.R. §§ 1208.16\(c\)\(2\), 1208.18\(a\)\(1\)-\(2\)](#).

The judgment of the district court is affirmed.

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⁴ See [Singh v. Ashcroft, 351 F.3d 435 \(9th Cir. 2003\)](#); [Ogbudimkpa v. Ashcroft, 342 F.3d 207 \(3d Cir. 2003\)](#); [Saint Fort v. Ashcroft, 329 F.3d 191 \(1st Cir. 2003\)](#); [Wang v. Ashcroft, 320 F.3d 130 \(2d Cir. 2003\)](#).