No. 08- 08-911 OCT 3 - 2008

IN THE
SUPREME COURT OF THE UNITED STATES

AGRON KUCANA,
Petitioner,
v.

MICHAEL B. MUKASEY, Attorney General
of the United States,
Respondent.

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. What is the scope of the jurisdictional stripping provision of 8 U.S.C. Section 1252(a)(2)(B)(ii) and whether the statute removes jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is Agron Kucana. The respondent is Michael B. Mukasey, the Attorney General of the United States. There are no corporate parties.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

CITATION OF OPINIONS AND ORDERS ENTERED IN THE CASE

Kucana v. Mukasey, 533 F.3d 534 (7th Cir. 2008)

Decision of the Board of Immigration Appeals, dated December 8, 2006 (unpublished)

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Seventh Circuit on July 7, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

8 U.S.C. Section 1252(a)(2)(B)(ii) states:

> (a)
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> * * *
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> (2) Matters not subject to judicial review
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> * * *
>
> (B) Denials of discretionary relief
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--
>
> * * *
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of

the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

STATEMENT OF THE CASE

The Board of Immigration Appeals [hereinafter "the Board"] had proper jurisdiction over petitioner's motion to reopen pursuant to 8 C.F.R. § 1003.2(a) because it had previously rendered a decision in the case and because the motion was based upon changed country conditions and material information that was not and cannot have been available in the course of the previous removal proceeding pursuant to 8 U.S.C. Section 1229a(c)(7)(C)(ii) and 8 C.F.R. 1003.2(c)(3)(ii).

Petitioner submits that the Court of Appeals had jurisdiction to hear his appeal pursuant to 8 U.S.C.§ 1252(a)(2)(B)(ii), but the Court of Appeals held to the contrary and that is the subject of this petition for certiorari.

Agron Kucana is a native and citizen of Albania. (JA 543). Petitioner entered the United States on July 12, 1995 on a B1/B2 visa. (JA 543). Petitioner applied for political asylum because of his political involvement in his native country. (JA 550). In 1990 and in the time leading up to the election of March 1992, Kucana was politically active, spoke out for democratic changes and political pluralism,

campaigned for the Albanian Democratic Party, and demonstrated against the government. (JA 270-73, 550-55) As a result, a number of times, Kucana was threatened, arrested and beaten. (JA 272, 274-76, 552, 556) On another occasion, petitioner's vehicle was forced off the road and down a mountain side. (JA 275, 556).

After the Democratic Party won the election of March 1992, Kucana continued to work for the party and continued to be politically active. (JA 278, 557). However, the party splintered into factions and Kucana realized that members of the former Communist secret police had influence within the newly empowered party. (JA 276, 279, 558).

In 1993, petitioner was riding a bicycle home from a party meeting when he was hit by a car which did not stop. (JA 279). Kucana believes that the act was politically motivated because the car had no license plate or identification marks. (JA 279).

In 1994, Kucana was held by the police for 20 hours and was beaten. (JA 280, 558). Later that year, petitioner was fired from his

job and removed from his post in the Democratic Party. (JA 280, 559).

In March 1995, petitioner was attacked at his home by 4 men dressed in black. (JA 559). When Kucana reported the incident, he was told that the police were unable to protect him because he had very influential enemies. (JA 559).

Two months later, Kucana received news that the Democratic Party was filing charges against him alleging that he was "agitating the party." (JA 281). He fled to Turkey after receiving a warrant for his arrest, but returned to Albania for his interview with the U.S. Embassy. (JA 282).

Petitioner entered the United States in July 1995 on a visitor visa. (JA 282, 543). The Department of Justice issued an order to show cause and served it on the petitioner in June 1996. (JA 609). Petitioner subsequently applied for political asylum and withholding of removal with the Executive Office for Immigration Review. (JA 282, 543-560).

Kucana's asylum application was proceeding when he failed to appear for a hearing and was ordered deported in absentia

by the Immigration Judge on October 9, 1997. (JA 268). Kucana's attorney submitted a timely motion, with supporting affidavits, to reopen explaining that Kucana had missed his hearing because he slept through his alarm and arrived shortly after the Immigration Judge ordered him deported in absentia. (JA 242, 244, 245). That motion to reopen was denied and he appealed to the Board. (JA 135, 139-147, 253). On May 7, 2002, the Board affirmed and dismissed petitioner's appeal. (JA 134-135).

On June 22, 2006, petitioner filed a second motion to reopen with the Immigration Judge based on new evidence of a change in country conditions and the fact that he was now the beneficiary of an approved 1-130 immediate relative petition filed by his mother. (JA 48-51; 105). Petitioner contended that as a supporter of democracy and of free markets, he would be in danger of being beaten or murdered, as a result of how conditions in Albania have deteriorated. *Kucana v. Mukasey*, 533 F.3d 534, 535-36 (7th Cir. 2008). Included with the motion to reopen was an affidavit and report from Professor Bernd Fischer, a professor of Balkan history

and chair of the department of history at Indiana University Purdue University Fort Wayne and a scholar on modern Albanian society and politics. (JA 108-109).

In summary, Fischer explained that while the 2005 elections brought the Democratic Party back into power, the elections were marred by violence against political activists of most major parties, and the Socialist Party still controls the presidency, most of the municipalities, and has significant influence on the police and the court system. (JA 113). Fisher concluded that Kucana's fears of returning to Albania are well-founded, as political henchmen and groups associated with organized crime and the old regime continue to flourish, often protected by high-ranking officials, while the police are poorly trained, underpaid, extremely brutal, and have been known to carry out violence against political enemies. (JA 114-15). Although a 2005 State Department report indicates that Albania is safe, Fischer cited numerous international reports to the contrary. (JA 120-21).

This motion to reopen was denied on August 22, 2006, and petitioner appealed to

the Board. (JA 2-12, 40-41). On December 8, 2006, the Board denied petitioner's appeal on the basis that Kucana failed to demonstrate changed country circumstances in Albania. (JA 1-2). The Board held that the Immigration Judge did not have jurisdiction over the second motion to reopen. (JA 2). Successive motions to reopen can be filed directly with the Board and, the Board treated Kucana's filing as such a motion. *Kucana v. Mukasey*, 533 F.3d 534, 536 (7th Cir. 2008). However, with a dissent and a concurrence, dubitante, the Seventh Circuit held that it lacked jurisdiction to hear the appeal under 8 U.S.C. Section 1252(a)(2)(B)(ii). *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008). Four members of the court dissented from the denial of a rehearing en banc. *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008).

REASONS FOR ALLOWING THE WRIT

I. Certiorari Should Be Granted Because The Seventh Circuit's Expansive Interpretation Of The Jurisdictional Stripping Provision Of 8 U.S.C. Section 1252(a)(2)(B)(ii) Conflicts With Supreme Court Precedent, Conflicts With Every Other Circuit Which Has Considered The Issue, And Conflicts With The Position Of The Department Of Justice.

In this case, the Seventh Circuit held that Section 242(a)(2)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. Section 1252(a)(2)(B)(ii), strips federal courts of jurisdiction to review the Board of Immigration Appeals' [hereinafter "the Board"] denial of an alien's motion to reopen, where the Board's discretion is specified by regulation, rather than by statute. *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008).

It did so despite the language of Section 1252(a)(2)(B)(ii) which strips jurisdiction only where the administrative decision "is specified under this subchapter to be in the discretion of

the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title." The subchapter itself does not specify that an alien's motion to reopen is in the discretion of the Attorney General or the Security of Homeland Security. Thus, the Seventh Circuit's holding is contrary to the "long standing principle of construing any ambiguities in deportation statutes in favor of the alien." *Dada v. Mukasey*, 128 S.Ct. 2307, 2318 (U.S.,2008), quoting *Ins v. St. Cyr*, 533 U.S. 289, 320, 121 S.Ct. 2271, 150 L.Ed2d 347 (2001), quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed2d 4334 (1987).

Additionally, the Seventh Circuit's decision must be considered in the context of the "strong presumption in favor of judicial review of administrative action." *Ins v. St. Cyr*, 533 U.S. 289, 298, 121 S.Ct. 2271, 150 L.Ed2d 347 (2001).

Kucana overruled the Seventh Circuit's prior decision in *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005) and led four members of the Seventh Circuit to conclude:

> This new holding of the Supreme Court [*Dada v. Mukasey*] should make us pause, take a deep breath and consider anew whether we really want to take the Circuit down a path so contrary to the manifest intent of Congress and to the Supreme Court's understanding of that intent. If we take such a course, our decision will no doubt warrant close scrutiny by the Supreme Court. *See* Sup. Ct. R. 10. *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc.

"The Supreme Court has analogized motions to reopen to motions under the Federal Rule of Civil Procedure 60(b), *see Stone v. INS*, 514 U.S. 386, 405 (1995)." *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc. A motion to reopen "is a judicial creation later codified by federal statute." *Dada v. Mukasey*, 128 S.Ct. 2307, 2315 (U.S.,2008). The Illegal Immigration

Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (IIRIRA or the Act) "transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien." *Dada v. Mukasey*, 128 S.Ct.2307, 2316 (2008).

"[T]he Supreme Court has characterized motions to reopen as an 'important safeguard' designed to 'ensure a proper and lawful disposition.'" *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2318 (2008).

Thus, at issue are both an important procedural safeguard, as well as the broader question of whether the jurisdiction stripping provision should be limited to its express terms or whether regulations should be read into the statute, as the Seventh Circuit has done.

The Seventh Circuit's holding places it in "a minority with the minority, giving the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that

Congress intended to strip [courts] of [their] jurisdiction." *Kucana v. Mukasey*, 533 F.3d 534, 540 (7th Cir. 2008), Cudahy, J. dissenting.

Most courts of appeal hold that there is jurisdiction to review the denial of motions to reopen because the jurisdiction stripping provision of the statute only applies where there the basis of a discretionary decision is an express statutory provision, not merely a regulation. *Singh v. Mukasey*, 536 F.3d 149, 153-54 (2d Cir. 2008); *Miah v. Mukasey*, 519 F.3d 784, 789, n.1 (8th Cir. 2008); *Jahjaga v. Attorney General of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zafar v. U.S. Attorney General*, 461 F.3d 1357, 1361 (11th Cir. 2006); *Manzano-Garcia v. Gonzales*, 413 F.3d 462, 466 (5th Cir. 2005); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004). The Tenth Circuit also takes the position that jurisdiction exists to review the Board's denial of an alien's motion to reopen. *Thongphilack v. Gonzales*, 506 F.3d 1207, 1209-10 (10th Cir. 2007).

The majority in *Kucana* acknowledged that its decision was contrary to the Department of Justice's position that Section

1252(a)(2)(B)(ii) "does not cover decisions not to reopen." *Id.*, 533 F.3d at 537. Thus, both the petitioning alien and the government agreed that the court had jurisdiction to decide the merits of the appeal.

Given the importance of the procedural safeguard involved, the significance of the proper approach to interpreting the jurisdiction stripping statute, and the Seventh Circuit's conflict with at least seven other circuits and the government, and opinions of the Supreme Court, this case merits being heard by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A-- ORDER OF THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT, DECIDED JULY 7,2008

No. 07-1002.
United States Court of Appeals,
Seventh Circuit.

Agron KUCANA, Petitioner,
v.
Michael B. MUKASEY, Attorney General of the United States, Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

Argued Dec. 6, 2007.
Decided July 7, 2008.

Before EASTERBROOK, Chief Judge, and CUDAHY and RIPPLE, Circuit Judges.

EASTERBROOK, *Chief Judge.* Agron Kucana, a citizen of Albania, entered the United States as a business visitor in 1995 and did not leave when his visa expired. He applied for asylum but, when he did not appear at the hearing in the fall of 1997, he was ordered removed *in absentia.* He soon filed a motion to reopen, contending that he