Mississippi College Law Review

Volume 27
Issue 1 *Vol. 27 Iss. 1*

Article 10

2008

Banda-Ortiz v. Gonzales: A Catch-22 for the Twenty-First Century

Jared Carrubba

Custom Citation
27 Miss. C. L. Rev. 265 (2007-2008)

BANDA-ORTIZ V. GONZALES: A CATCH-22 FOR THE TWENTY-FIRST CENTURY

*Jared Carrubba**

I. INTRODUCTION

In *Banda-Ortiz v. Gonzales*,[1] the Court of Appeals for the Fifth Circuit created a circuit split by holding that an alien's timely filed motion to reopen removal proceedings ("motion to reopen") does not toll a previously granted voluntary departure period. Because of the structure of the statutes and regulations governing motions to reopen and voluntary departure, this holding created a Catch-22 for aliens subject to voluntary departure seeking relief in the form of a motion to reopen. In order to fully understand the implications of this holding, a brief introduction to the various concepts present in the case is necessary. United States immigration law provides that aliens not legally admitted into the country may have removal proceedings instituted against them in order to enforce their departure from the country.[2] Once an alien is found to be subject to removability, he or she may be allowed to depart the country voluntarily upon meeting certain requirements.[3] Furthermore, federal law provides that aliens subject to removability are allowed to file one motion to reopen removal proceedings in order to present new evidence not available at the time of the original hearing that would allow the alien to remain in the United States.[4]

This Note provides an overview of the origins and development of the law governing voluntary departure and motions to reopen. It then provides a detailed explanation of the majority and dissenting opinions in *Banda-Ortiz*. Additionally, it discusses how the majority, while attempting to address legitimate concerns, used flawed logic and reasoning to reach an incorrect conclusion. After explaining the possible implications of the decision, a solution is proposed that would better address the concerns of both the majority and dissenting opinions. Finally, this note discusses possible future consideration by the United States Supreme Court.

* The author thanks Gregory Bowman, Associate Professor of Law at Mississippi College School of Law, for his time and insightful guidance during the development and writing of this Note. I would also like to thank my fiance, Bethanie, for her continuous and unwavering support throughout this process as well as all other aspects of my law school career.

1. 445 F.3d 387, 391 (5th Cir. 2006).
2. 3 ANNA MARIE GALLAGHER, IMMIGRATION LAW SERVICE § 13:1 (2d ed. 2007).
3. *See* 8 U.S.C. § 1229c (2006).
4. 8 U.S.C. § 1229a(c)(7).

II. Facts and Procedural History

A. Background

In 1989, Sergio Banda-Ortiz entered the United States from Mexico, where he was a citizen.[5] He remained in the United States for eleven years without incident.[6] During his time in the United States, Banda-Ortiz had two children; he was employed and was never convicted of a crime.[7] In March 2000, Banda-Ortiz received a Notice to Appear from the Immigration and Naturalization Service charging him with removability for being present in the United States without being admitted or paroled.[8] After conceding removability, Banda-Ortiz applied for cancellation of removal based on a claim that leaving the United States would impose "exceptional and extremely unusual hardship"[9] on his adoptive parents and his older son.[10]

Banda-Ortiz applied in the alternative for voluntary departure.[11] To be eligible for voluntary departure as opposed to removal, Banda-Ortiz was required by statute[12] to establish by clear and convincing evidence that he had both the intent to leave the United States and the means to do so.[13] After considering the application, the immigration judge denied cancellation of removal but granted the request for voluntary departure.[14]

B. Appeals and Motions

Banda-Ortiz appealed the immigration judge's decision to the Board of Immigration Appeals ("BIA"), which affirmed the decision on August 22, 2002 granting Banda-Ortiz 30 days to voluntarily depart the country.[15] In compliance with statutory requirements,[16] the BIA's decision included a notice stating that Banda-Ortiz's failure to leave the country within the time period specified would result in, *inter alia*, ineligibility "for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act."[17] However, instead of leaving the country within the required time period, Banda-Ortiz filed a motion to reopen his removal proceedings for the purpose of presenting new evidence that his departure would result in undue hardship on his family.[18] The factual basis for his motion was that during the pendency of his

5. *Banda-Ortiz*, 445 F.3d at 388.
6. *Id.*
7. *Id.* at 393 (Smith, J., dissenting).
8. 8 U.S.C. § 1182(a)(6)(A)(i) (2006).
9. 8 U.S.C. § 1229b(b)(1)(D).
10. *Banda-Ortiz*, 445 F.3d at 388 (the opinion does not provide any further explanation about this claim).
11. *Id.*
12. 8 U.S.C. § 1229c(b)(1)(D) (2006).
13. *Banda-Ortiz*, 445 F.3d at 388.
14. *Id.*
15. *Id.*
16. *See* 8 U.S.C. § 1229c(d)(3).
17. *Banda-Ortiz*, 445 F.3d at 388 n.1.
18. *Id.* at 388; *see also* 8 U.S.C. § 1229a(c)(7) (permitting an alien to file one motion to reopen).

appeal to the BIA in the original proceeding, his younger son was born with medical conditions requiring constant attention that one doctor opined would not be available in Mexico.[19] The motion did not contain any request to stay removal, to toll the voluntary departure period, or to reinstate the voluntary departure period.[20] Despite the absence of such a request in the motion, the BIA granted the motion to reopen and remanded the case to the immigration judge for consideration of new evidence in support of his application for cancellation of removal.[21]

Following a hearing on the matter, the immigration judge held that statutory law[22] rendered Banda-Ortiz ineligible for cancellation of removal because he failed to timely depart the country while his motion was pending.[23] The BIA affirmed the decision, rejecting Banda-Ortiz's argument that his filing of the motion to reopen automatically tolled the voluntary departure period.[24] The BIA further held that it had erred in initially granting the motion to reopen.[25] Banda-Ortiz appealed the BIA's decision to The Court of Appeals for the Fifth Circuit.

III. Background and History of the Law

A. *Historical Development and the Enactment of the Illegal Immigration Reform and Immigrant Responsibility Act*

Before considering case law on the issue presented in *Banda-Ortiz*, it is important to have an understanding of the historical development of motions to reopen and voluntary departure, as well as the relationship between them. Most important to consider in the development of this area of immigration law is Congress' 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act[26] ("IIRIRA"), which created the seemingly inconsistent statutory scheme considered in the case law.

1. Origins of Motions to Reopen and Voluntary Departure

Motions to reopen removal proceedings have a long history in immigration law. Their basic purpose is to allow an alien a means to provide immigration authorities with new evidence not available at the former hearing that could allow the alien to remain in the United States.[27] The Immigration Bureau began hearing motions to reopen as early as 1916,[28]

19. *Id.* at 393 (Smith, J., dissenting).
20. *Id.* at 388 (majority opinion).
21. *Id.*
22. 8 U.S.C. § 1229c(d) (providing that an alien who voluntarily fails to depart the country within the specified time period is ineligible for cancellation of removal).
23. *Banda-Ortiz*, 445 F.3d at 388.
24. *Id.*
25. *Id.*
26. Pub. L. No. 104-208, 110 Stat. 3009 (1996).
27. Azarte v. Ashcroft, 394 F.3d 1278, 1283 (9th Cir. 2004).
28. *See* Chew Hoy Quong v. White, 244 F. 749 (9th Cir. 1917); *Ex parte* Chan Shee, 236 F. 579, 580 (N.D. Cal. 1916).

and were included in federal regulations in 1941.[29] While this regulatory scheme allowed aliens to file motions to reopen, it did not confer upon them a right to do so.[30] Also, the regulations limited neither the time period for filing, nor the allowed number of such motions.[31]

Voluntary departure originated in the first quarter of the twentieth century as well. It was first mentioned in federal case law in 1923,[32] and voluntary departure provisions were first codified by Congress in 1940.[33] The purpose behind allowing aliens to voluntarily depart the United States was, and still is, to reduce governmental "costs associated with deporting individuals from the United States," and to provide "a mechanism for illegal aliens to leave the country without being subject to the stigma or bars to future relief that are part of the sanction of deportation."[34] Prior to the enactment of IIRIRA in 1996, the statute regulating voluntary departure[35] contained no time restriction on the period for which it could be granted, and "[i]n practice, voluntary departure was granted for generous periods of time."[36]

Because no rigid time limits were contained in the pre-IIRIRA statutes and regulations governing motions to reopen and voluntary departure, the interaction between the two was fairly simple. The common practice in the administrative agencies and courts was to extend the voluntary departure period freely "so that the BIA would have time to rule on [a motion to reopen] before the alien would have been required to depart."[37] As discussed in the next subsection, the rigid statutory time restrictions now in place for voluntary departure have made this practice virtually impossible, thus giving rise to the issue presented in *Banda-Ortiz* of whether filing a motion to reopen removal proceedings tolls the voluntary departure period.

---

29. *See* New Regulations Governing the Arrest and Deportation of Aliens, 6 Fed. Reg. 68, 71-72 (Jan. 4, 1941) (containing the first mention of motions to reopen in the Federal Register); *Azarte*, 394 F.3d at 1283.

30. *See Azarte*, 394 F.3d at 1283 (noting that the first statutory right for aliens to file a motion to reopen came in 1996).

31. *Id.*; *see also* New Regulations Governing the Arrest and Deportation of Aliens § 19.8(a), 6 Fed. Reg. 68, 71-72 (Jan. 4, 1941); 8 C.F.R. § 3.2 (1995); Socop-Gonzalez v. INS, 272 F.3d 1176, 1190 (9th Cir. 2001).

32. United States *ex rel.* Patton v. Tod, 292 F. 243, 244 (S.D.N.Y. 1923) ("arrangements were made for the execution of a new bond which was authorized by the Bureau July 15, 1915, guaranteeing the alien's *voluntary departure* without expense to the government at the expiration of the bond . . . .") (emphasis added).

33. *Azarte*, 394 F.3d at 1284.

34. *Id.*

35. 8 U.S.C. § 1254(e) (1995) (repealed 1996).

36. *Azarte*, 394 F.3d at 1284.

37. Kanivets v. Gonzales, 424 F.3d 330, 334-35 (3d Cir. 2005); *see also* AUSTIN T. FRAGOMEN JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7:4.6[A] (stating that prior to IIRIRA, courts often granted voluntary departure periods longer than 120 days and sometimes even for one to two-year periods for certain classes of aliens).

2. The 1996 Statutory Changes

In 1996, Congress enacted IIRIRA, thereby drastically altering the statutory landscape governing motions to reopen and voluntary departure.[38] One major change in the law came about because the Department of Justice expressed concern that aliens were abusing motions to reopen.[39] This concern resulted in Congress codifying the first statutory form of relief for motions to reopen, conferring upon aliens a statutory right to file a motion to reopen removal proceedings while at the same time imposing restrictions on aliens that were not present under the former regulatory scheme.[40] These restrictions, which remain in place today, limit the number of allowed motions to one and provide that the motion must be filed "within 90 days of the date of entry of a final administrative order of removal."[41] In addition to the new restrictions, the federal regulations implementing the statute provide that a motion to reopen will be deemed withdrawn if an alien departs the country after filing the motion.[42]

IIRIRA also changed statutory law provisions regarding voluntary departure. Specifically, the new law only allowed aliens to be granted a maximum of sixty days to depart the country, if granted at the conclusion of removal proceedings.[43] The new law also provided harsh penalties for aliens who failed to leave the country within the voluntary departure period.[44] The *Azarte* court noted that federal agencies have generally interpreted this deadline strictly.[45]

Thus, under the IIRIRA provisions, if an alien fails to depart prior to the expiration of the voluntary departure period, he is precluded from receiving an adjustment of status for ten years. On the other hand, if the alien leaves the country within the voluntary departure period, he withdraws any pending motion to reopen. This seemingly inconsistent interaction created a significant question concerning the effect motions to reopen had on voluntary departure periods. The common practice under the pre-IIRIRA statutes and regulations discussed above was no longer an option, as the new law severely limited the time period the BIA could grant to aliens eligible for voluntary departure. The new laws, however, contained

38. Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1170 (9th Cir. 2003); *see generally* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 48-56 (2006-2007) (generally discussing the new restrictions implemented with the 1996 statutory changes).

39. *Azarte*, 394 F.3d at 1283.

40. *Id.*; *see* 8 U.S.C. § 1229a(c)(6)(A) (1996); 8 C.F.R. § 3.2(c) (1997) (recodified as 8 C.F.R. § 1003.2(c) (2006)).

41. 8 U.S.C. § 1229a(c)(7) (2006).

42. 8 C.F.R. § 1003.2(d) (2006).

43. 8 U.S.C. § 1229c(b)(2) (2006).

44. *See id.* § 1229c(d) (providing that failure to timely depart will result in a monetary fine and bar violators from obtaining certain forms of relief).

45. *Azarte*, 394 F.3d at 1285; *see* 8 C.F.R. § 1240.26 (providing that "[i]n no event can the total period of time, including any extension exceed 120 days or 60 days," depending on when the immigration judge grants voluntary departure).

no mention of what effect, if any, motions to reopen should have on voluntary departure periods. Additionally, the Department of Justice explicitly stated it "has not adopted any position" on the issue.[46] Thus, this question was left for the courts to resolve.

B. Azarte v. Ashcroft*: The Ninth Circuit Answers*

The Ninth Circuit provided an answer to this question in 2005 when it decided *Azarte v. Ashcroft*.[47] Salvador and Celia Azarte illegally entered the United States from Mexico in 1987 and remained in the country for more than ten years.[48] They were charged with removability, and after a hearing and appeal, they were granted voluntary departure.[49] Seven days before expiration of the voluntary departure period, the Azartes filed a motion to reopen removal proceedings and requested a stay of removal; however, the BIA did not act on the motion until six months later.[50] The BIA, never reaching the merits of the motion, ruled that the Azartes were ineligible for cancellation of removal because they did not leave the country before expiration of the voluntary departure period.[51]

The Ninth Circuit reversed the BIA's decision and held that the motion to reopen and request for stay of removal tolled the voluntary departure period so that the BIA could consider the motion on the merits.[52] In so holding, the court overruled *Shaar v. INS*,[53] a pre-IIRIRA case, on the ground that the rationale behind that decision was no longer applicable after IIRIRA.[54] Specifically, the *Azarte* court noted that prior to the enactment of IIRIRA, there was no statutory right for an alien to file a motion to reopen.[55] The BIA's interpretation, the court said, precluded aliens afforded voluntary departure from exercising this statutory right to have their motion to reopen decided on the merits because the BIA would not ever realistically be able to rule on such a motion before expiration of the voluntary departure period.[56] In the court's view, the best way to give force to both the voluntary departure and motion to reopen statutes was to toll the voluntary departure period when an alien filed a motion to reopen "prior to the expiration of the voluntary departure period . . . at least when he requests a stay of removal."[57] The court went on to state that the BIA's

46. *Azarte*, 394 F.3d at 1285.
47. 394 F.3d 1278.
48. *Id.* at 1280.
49. *Id.*
50. *Id.* at 1280-81.
51. *Id.* at 1281.
52. *Id.* at 1289.
53. 141 F.3d 953 (9th Cir. 1998).
54. *Azarte*, 394 F.3d at 1286.
55. *Id.*
56. *Id.* at 1282.
57. *Id.* at 1288 (It is important to note that the court in *Azarte* did not decide the issue of whether a properly filed motion to reopen automatically tolled the voluntary departure period, although it noted that such an interpretation would be consistent with the legislative scheme).

interpretation would produce an absurd result, and it would be "nonsensical that Congress would have allowed aliens subject to voluntary departure to file motions to reopen but would have simultaneously precluded the BIA from issuing decisions on those motions."[58] Finally, the *Azarte* court concluded that if Congress had intended to deprive aliens granted voluntary departure of the right to relief in the form of motions to reopen, "we are confident it would have said so."[59]

Azarte was an important decision in the development of this area of immigration law. It established precedent in the Ninth Circuit, allowing aliens granted voluntary departure continued access to a form of relief historically available to them. Also, *Azarte* provided some guidance for other federal courts that would consider the issue.

C. *Other Circuits Fall in Line*

Azarte was decided in January, 2005. Later that year, both the Third and Eighth Circuits considered the issue of whether motions to reopen tolled the voluntary departure period. The Eighth Circuit's decision was handed down in May, 2005 in *Sidikhouya v. Gonzales*.[60] Youssef Sidikhouya entered the United States from Morocco on a visitor visa and failed to leave the country when it expired.[61] He was charged with removability in 2001.[62] He conceded removability, and the immigration judge granted voluntary departure.[63] He appealed this decision to the BIA, which affirmed the decision in 2004.[64] One day before the expiration of his voluntary departure period, Sidikhouya filed a motion to reopen and request for a stay of voluntary departure with the BIA to present evidence of his marriage to a United States citizen during the pendency of his appeal.[65] A month later, the BIA denied the motion based solely on grounds that Sidikhouya had overstayed his voluntary departure period.[66]

The Eighth Circuit reversed the BIA's decision in a per curiam opinion. The court relied primarily on the reasoning in *Azarte* and agreed with its holding that an alien "must be afforded an opportunity to receive a ruling on the merits of his timely filed motion to reopen . . . ."[67] However, Chief Judge Loken, although concurring in the judgment, did not agree with adopting *Azarte* as the law in the Eighth Circuit because of its "undeferential interpretation of the governing statutes and regulations . . . ."[68] He believed the proper approach would have been to defer ruling on the

58. *Id.* at 1288-89.
59. *Id.* at 1289.
60. 407 F.3d 950 (8th Cir. 2005).
61. *Id.* at 951.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Sidikhouya*, 407 F.3d at 952.
67. *Id.*
68. *Id.* at 953 (Loken, C.J. dissenting in part and concurring in the judgment).

issue until after the BIA expressed its "views as to its own procedural authority" to stay the voluntary departure period during the pendency of motions to reopen.[69]

Four months after the Eighth Circuit's decision in *Sidikhouya*, the Third Circuit considered the issue in *Kanivets v. Gonzales*.[70] Oleg Kanivets entered the United States in 1998, and after expiration of his authorized stay in 1999, he filed for asylum claiming that he suffered persecution in his home nation of Kyrgyzstan.[71] The immigration judge denied the application for asylum and granted voluntary departure.[72] The BIA affirmed the decision and granted Kanivets thirty days to depart the country.[73] Six days before the expiration of his voluntary departure period, Kanivets filed a motion to reopen and a request for a stay of removal.[74] Eight months later, the BIA denied the motion because Kanivets failed to leave the country before expiration of his voluntary departure period.[75]

The Third Circuit reversed and followed the lead of the Eighth and Ninth Circuits in holding that a timely filed motion to reopen tolls the voluntary departure period.[76] The court relied extensively on the reasoning in *Azarte* to reach its decision, and noted "the day that the motion [to reopen] was filed was the critical beginning point" to determine eligibility for relief, "rather than the date of adjudication."[77] One important aspect of *Kanivets* was that the court distinguished that case from its previous holding in *Reynoso-Lopez v. Ashcroft*,[78] in which the court had held that it had no power to extend the voluntary departure date.[79] The court stated that the situation presented in *Kanivets* was different than that in *Reynoso-Lopez* because it was tolling the voluntary departure period.[80] In making this distinction, the court implicitly recognized that tolling was a different form of relief than extending the departure period.

D. Barroso v. Gonzales*: The Ninth Circuit Extends* Azarte

Ten months after the Ninth Circuit decided *Azarte*, that court again addressed whether the voluntary departure period was tolled during the pendency of certain motions.[81] The procedural device in question in *Barroso* was a motion to reconsider[82] rather than a motion to reopen; however,

69. *Id.* at 953-54 (Loken, C.J. dissenting in part and concurring in the judgment).
70. 424 F.3d 330 (3d Cir. 2005).
71. *Id.* at 331.
72. *Id.* at 332.
73. *Id.*
74. *Id.*
75. *Id.* at 333.
76. *See Kanivets,* 424 F.3d at 336.
77. *Id.* at 335 (citing Barrios v. Att'y Gen. of the U.S., 399 F.3d 272 (3d Cir. 2005)).
78. 369 F.3d 275 (3d Cir. 2004).
79. *Kanivets*, 424 F.3d at 335.
80. *Id.*
81. Barroso v. Gonzales, 429 F.3d 1195, 1196 (9th Cir. 2005).
82. Motions to reconsider operate the same way as motions to reopen; however, rather than considering new evidence, a motion to reconsider alleges that an error of law or fact was made in the original proceeding. *See* 8 U.S.C. § 1229a(c)(6) (2006).

the court noted that "the motion to reconsider provision interacts with the voluntary departure provision in precisely the same way" as the motion to reopen provision.[83] The case presented the same basic procedural scheme found in the other cases. After affirming the immigration judge's denial of cancellation of removal, the BIA granted Barroso thirty days to depart the country.[84] Barroso filed a motion to reconsider on the last day of his voluntary departure period, and two and a half months later the BIA denied the motion on grounds that Barroso failed to leave the United States before the expiration of his voluntary departure period.[85] The one glaring difference between *Azarte* and *Barroso* was that, unlike the petitioners in the former case, Barroso failed to file a request to stay the voluntary departure period along with his motion to reconsider.[86] Thus, the court had to consider whether filing a motion to reopen/reconsider *automatically* tolled the voluntary departure period until disposal of the motion on the merits.

The *Barroso* court began its analysis by recognizing the "significant conundrum" presented by the provisions governing voluntary departure and motions to reopen/reconsider, and noted that the BIA's interpretation precluded aliens granted voluntary departure from receiving a ruling on the merits of their motions.[87] The court then proceeded to consider whether its recent decision in *Azarte* applied to the present case. *Azarte*, while not deciding on the issue of automatic tolling, observed "that automatically tolling the voluntary departure period upon filing of a motion to reopen 'would be consistent with the legislative scheme.'"[88] In support of this assertion, the *Barroso* court looked to the interim rule promulgated by the Department of Justice which, while not adopting a hard line stance on the effect of a motion to reopen on the voluntary departure period, set forth three possible solutions.[89] Two of the three proposed solutions included always tolling the voluntary departure period until after a decision on the merits of the motion.[90] The court considered these proposed solutions as evidence that the Government contemplated automatic tolling as a logical solution to determining the interaction between motions to reopen/reconsider and voluntary departure.[91]

The next step for the *Barroso* court in determining the applicability of *Azarte* was to discuss whether there were any possible bars to automatic tolling found in statutes or regulations. The court noted that the IIRIRA

83. *Barroso*, 429 F.3d at 1201 n.12.

84. *Id.* at 1200.

85. *Id.*

86. *Id.* at 1204.

87. *Id.* at 1200-01.

88. *Id.* at 1205 (quoting Azarte v. Ashcroft, 394 F.3d 1278, 1288 n.20 (9th Cir. 2005)).

89. *Barroso*, 429 F.3d at 1205.

90. *See Barroso*, 429 F.3d at 1205 (referencing Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,325-26 (Mar. 6, 1997) (interim rule)).

91. *Barroso*, 429 F.3d at 1205.

statutes and regulations contained no provisions concerning tolling the voluntary departure period, and specifically, that the provisions did not require an alien to file a request to stay the voluntary departure period.[92] Although the regulations did limit the court's ability to extend the voluntary departure period.[93] Instead, the court held that "automatic tolling does not *extend* the amount of time granted for voluntary departure" by adding more time to the departure period; it simply stops the clock from running.[94] The court therefore concluded that there were no statutory or regulatory bars to automatically tolling the voluntary departure period.[95]

Based on the foregoing analysis, the court concluded that not only did *Azarte* apply to Barroso's case, but that it required automatic tolling of the voluntary departure period during the pendency of a motion to reopen/reconsider.[96] The court held that *Azarte* required the BIA to grant any request for a stay of the voluntary departure period accompanying a motion to reopen/reconsider so that the alien would be afforded his statutory right to have the motion heard on the merits.[97] Since the BIA could not deny such a request, the court held that requiring an alien to file the request "would amount to nothing more than an empty procedural requirement that would simply place an additional bureaucratic burden on aliens who in any event often have difficulty following the complex procedural requirements of our immigration laws."[98] Consequently, the court concluded that the BIA abused its discretion by denying the motion to reconsider because the voluntary departure period was automatically tolled when Barroso filed his motion.[99]

IV. INSTANT CASE

Judge Garza wrote the majority opinion in *Banda-Ortiz*,[100] in which Judge Jolly joined.[101] Judge Smith dissented and filed a separate opinion.[102]

A. Majority Opinion

1. Jurisdiction and Overview of Statutory Scheme

After reciting the factual and procedural posture of the case, Judge Garza began Part II of the opinion by setting forth the court's jurisdiction to review the BIA's denial of Banda-Ortiz's motion to reopen and stating

92. *Id.* at 1205-06.
93. *See* 8 C.F.R. § 1240.26(f) (2006).
94. *Barroso*, 429 F.3d at 1206 (emphasis in original).
95. *Id.*
96. *Id.* at 1207.
97. *Id.*
98. *Id.*
99. *Id.* at 1208.
100. 445 F.3d 387, 391 (5th Cir. 2006).
101. *Id.*
102. *Id.* at 391.

that the court reviews for abuse of discretion.[103] He then stated that the case concerned "the interaction of several statutory provisions and an administrative regulation concerning voluntary departure and motions to reopen,"[104] and proceeded to give a brief overview of the statutes at issue in the case.[105] Judge Garza then restated the BIA's holding that Banda-Ortiz was ineligible for cancellation of removal because he remained in the United States after the expiration of the voluntary departure period.[106]

2. Automatic Tolling

The main issue presented in the case was whether a timely filed motion to reopen removal proceedings tolled Banda-Ortiz's voluntary departure period.[107] Banda-Ortiz argued that filing such a motion did toll the voluntary departure period, despite the statutory scheme laid out by the court.[108] He argued that the statute and regulation created a Catch-22 because if he left the country during the voluntary departure period, his motion would have been withdrawn pursuant to 8 C.F.R. § 1003.2(d); however, if he remained in the country after expiration of the voluntary departure period, he would be ineligible for cancellation of removal pursuant to 8 U.S.C. § 1229c(d).[109] Banda-Ortiz relied on *Azarte* to support this argument, stating that it would be nonsensical for Congress to allow an alien the right to file a motion to reopen when that motion would be withdrawn when the alien adheres to the voluntary departure order.[110]

The court rejected this argument, holding that such a result would be contrary to the purpose of allowing an alien to elect voluntary departure.[111] The court first explained the nature of voluntary departure, stating that it "is the result of an agreed-upon exchange of benefits between an alien and the Government."[112] Next, the court outlined the various benefits voluntary departure provides to the alien, including "1) the ability to choose his own destination point; 2) the opportunity to put his affairs in order without fear of being taken into custody; 3) freedom from extended detention while

103. *Id.* at 388 (citing Zhao v. Gonzales, 404 F.3d 295, 303 (5th Cir. 2005)).

104. *Id.*

105. The specific statutes cited were 8 U.S.C. § 1229c(a)(1) (2006) (allowing the Attorney General to permit an alien to voluntarily leave the United States); 8 U.S.C. § 1229c(b)(2) (2006) (providing that voluntary departure period shall not exceed 60 days); 8 U.S.C. § 1229c(d) (2006) (setting forth the penalties for an alien who fails to voluntarily depart the country within the specified time); 8 U.S.C. § 1229a(c)(6)(A) (2006) (allowing an alien to file one motion to reopen proceedings); 8 U.S.C. § 1229a(c)(6)(C)(i) (2006) (providing motion to reopen must be filed within 90 days of the date of the final administrative order); 8 C.F.R. § 1003.2(d) (2006) (providing that the departure of an alien from the United States while a motion to reopen is pending constitutes a withdrawal of the motion).

106. *Banda-Ortiz*, 445 F.3d at 389.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 389-390.

112. *Banda-Ortiz*, 445 F.3d at 389.

the Government prepares for his removal; 4) avoidance of the stigma of forced removal; and 5) continued eligibility for an adjustment of status."[113]

The court then explained that these benefits are not free; they come with a cost to the alien because voluntary departure "exposes him to civil fines and renders him ineligible for certain forms of relief if he does not timely depart."[114]

The court then explained that the benefits provided to an alien who elects voluntary departure furthered one of the purposes behind the statute, which is to alleviate the use of Government money and resources on removing the alien from the country.[115] The court relied on *Ballenilla-Gonzalez v. INS*[116] for the proposition that the purpose is not furthered and the benefit to the Government is lost if the alien does not leave the country within the specified time period and the Government becomes involved in further, costly proceedings.[117] Finally, the court concluded its rejection of Banda-Ortiz's argument by stating that he was seeking "the opportunity to litigate to the last without bearing the attendant costs [and] the chance of winning outright, plus benefits the law offers to those who avoid litigation through voluntary departure."[118]

The court then switched gears and attacked Banda-Ortiz's argument from another angle, stating the remedy he sought was incompatible with limits placed on the length of the period of voluntary departure and the authority to extend such a period.[119] The court quoted a statute[120] and a regulation[121] which seem to place a cap on the voluntary departure period at 60 days that could not be met if filing a motion to reopen automatically tolled the voluntary departure period.[122] The court then questioned whether the judiciary even had the power to extend the period and implied that such power was more properly placed in the executive.[123]

Banda-Ortiz argued that this conclusion was incorrect because Congress did not exclude aliens electing voluntary departure from filing a motion to reopen removal proceedings.[124] The court rejected this argument stating that an alien who has elected voluntary departure may file a motion to reopen removal proceedings so long as it does not interfere with the

113. *Id.* at 389-90.

114. *Id.* (citing 8 U.S.C. § 1229c(d) (2006)).

115. *Id.* at 390.

116. 546 F.3d 515, 521 (2d Cir. 1976) (the court declined to extend the departure period for consideration of a frivolous appeal).

117. *Banda-Ortiz*, 445 F.3d at 390.

118. *Id.* (quoting Alimi v. Ashcroft, 391 F.3d 888, 892 (7th Cir. 2004)).

119. *Id.*

120. 8 U.S.C. § 1229c(b)(2) (2006) ("Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days").

121. 8 C.F.R. § 1240.26(f) (2006) ("In no event can the total period of time, including any extension, exceed . . . 60 days as set forth in [8 U.S.C. § 1229c(b)(2)]").

122. *Banda-Ortiz*, 445 F.3d at 390.

123. *Id.* (citing 8 C.F.R. § 1240.26(f) (2006)).

124. *Id.* at 391; *see* 8 U.S.C. § 1229a(c)(7).

alien's voluntary departure date and that an interpretation requiring automatic tolling was incorrect.[125]

B. *Judge Smith's Dissent*

Judge Smith began his dissent by chastising the majority for creating a circuit split "unnecessarily" on what he considered to be an important issue of immigration law.[126] It was his view that Congress could not have intended for the majority to reach the result it did.[127] Judge Smith explained in Part I that the Fifth Circuit was the fourth appellate circuit to consider the issue of whether a timely filed motion to reopen tolls the voluntary departure date and that it was the first to hold that it did not.[128] His view was that the majority's holding could not overcome the "'high hurdle' of preserving the uniformity of the circuits."[129]

Judge Smith continued in Part I stating that the majority, in reaching its conclusion, erred in relying almost exclusively on provisions governing voluntary departure to determine Congress' intent instead of looking also to provisions concerning motions to reopen.[130] He believed this narrow view taken by the majority caused it to erroneously rely on two principal arguments and reach an incorrect conclusion.[131] Judge Smith believed the correct interpretation of Congress' intent was found in the Ninth Circuit's decision in *Azarte*,[132] and that Congress never suggested that the nature of an alien's departure from the country has any bearing on that alien's right to file a motion to reopen removal proceedings.[133] Judge Smith objected to the majority looking at the departure statute in isolation and argued that the *Azarte* court was correct in looking to other statutes as well and concluding that Congress did not intend to preclude aliens electing voluntary departure from being able to file a motion to reopen.[134]

Judge Smith then argued that the time table implemented by Congress for filing a motion to reopen was incompatible with the majority's holding.[135] The statute governing motions to reopen grants aliens the right to

125. *Banda-Ortiz*, 445 F.3d at 391.

126. *Id.* at 391 (Smith, J., dissenting).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Banda-Ortiz*, 445 F.3d at 391. Judge Smith framed the majority's arguments as "first, that it is sensible for aliens who receive the benefits of voluntary departure to incur the costs associated with not leaving the country in a timely fashion, and second, that courts have no authority to extend the voluntary departure period beyond the sixty days authorized by statute."

132. Azarte v. Ashcroft, 394 F.3d 1278, 1289 (9th Cir. 2005) (holding tolling was necessary to "avoid creating an incompatibility in the statutory scheme, to implement a workable procedure for motions to reopen in cases in which aliens are granted voluntary departure, and to effectuate the purposes of the two statutory provisions.").

133. *Banda-Ortiz*, 445 F.3d at 392 (Smith, J., dissenting).

134. *Id.*

135. *Id.* at 393.

file a motion to reopen "within 90 days of the date of entry of a final administrative order of removal."[136] Under the majority's holding, however, an alien granted voluntary departure would have a maximum of 60 days to leave the country, at which point, any pending motion to reopen would be withdrawn.[137] In Judge Smith's view, Congress' grant of 90 days to file a motion to reopen made little sense "if, in a substantial number of cases, the order of removal itself would result in forfeiture of the motion."[138] He argued such a result would put Banda-Ortiz in the untenable position of choosing between leaving the country and forfeiting his motion to reopen, or remaining in the country beyond the expiration of the departure period only to have his motion denied as a result of his failure to leave the country.[139]

Judge Smith considered the majority's ruling "particularly harsh" when viewed in light of the fact that only aliens who have exhibited good behavior are eligible for voluntary departure.[140] He illustrated this argument by pointing out that Banda-Ortiz was employed and had never been convicted of a crime and the circumstances upon which he based his motion to reopen did not arise until after the original proceeding—in which he was granted voluntary departure—was on appeal.[141] Judge Smith also used this example to illustrate that the only means by which an alien can introduce new evidence not available at the time of the original removal proceeding is through a motion to reopen, and that this type of situation was precisely why Congress granted aliens a right to file such a motion.[142]

Judge Smith's final argument in Part I of his dissent was that tolling was compatible with all of Congress' objectives in IIRIRA, as opposed to the majority's holding, which he argued could not accord with due process.[143] In his view, tolling would "preserve[ ] the right of all removable aliens to file a single, good-faith motion to reopen after a final adjudicative order of the BIA," and would allow aliens eligible for voluntary departure to seek such relief "without fear of surrendering other avenues of procedural relief."[144] Judge Smith stated that this interpretation would not undermine the time limits placed on voluntary departure because the total amount of time allotted still would not exceed sixty days and potential for abuse would be kept in check by the limits placed on motions to reopen.[145]

136. 8 U.S.C. § 1229a(c)(7)(C)(i) (2006).

137. *See* 8 C.F.R. § 1003.2(d) (2006) (stating any departure from the United States subsequent to the filing of a motion to reopen "shall constitute a withdrawal of such motion").

138. *Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 393-94, n.7. Judge Smith argued that to hinge the outcome of a motion to reopen on whether the BIA could hear the motion before expiration of the voluntary departure period violated due process because a "system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 434-35 (1982).

144. *Banda-Ortiz*, 445 F.3d at 394.

145. *Id.*

In Part II of his dissent, Judge Smith argued that part of the reason the majority reached the conclusion it did was because it believed it lacked the authority to toll the voluntary departure period.[146] He argued that of the four cases the majority relied on to reach this conclusion,[147] three were decided by the Third and Ninth Circuits, which subsequently adopted the approach proffered by Banda-Ortiz.[148] Judge Smith further argued that *Ngarurih*, the fourth case the majority cited, was not inconsistent with holding for Banda-Ortiz because the main rationale behind the Fourth Circuit's holding in that case was that "the court could continue to hear the merits of a petition for review even after the alien had left the country" under 8 U.S.C. § 1252.[149] Thus, Judge Smith argued that *Ngarurih* presented a different situation than that found in *Banda-Ortiz* because, unlike the asylum application at issue in that case, federal regulations preclude an appellate court from considering a motion to reopen after the alien leaves the country.[150]

Judge Smith then argued that the court's strict reliance on 8 U.S.C. § 1229c(b)(2) and 8 C.F.R. § 1240.26(f) "proves both too much and too little in this case."[151] He argued that the strict reading proved too much because it questioned the longstanding practice of tolling the voluntary departure period.[152] He argued that the strict reading proved too little because the court was "faced with conflicting legislative commands," thus, some damage to the statutory text was inevitable.[153] He continued stating that the motion to reopen statute[154] confers a right to file the motion on all aliens and does not exclude those granted voluntary departure.[155] Based on this rationale, Judge Smith concluded that "the panel majority's decision carves out an exception to the motion-to-reopen statute that its text cannot bear."[156]

Judge Smith concluded his dissent by stating his belief that the court should have deferred to "the accumulated wisdom of our sister circuits," or at least adhered to the principle of construing ambiguities in immigration

146. *Id.*

147. The four cases the majority cited were Reynoso Lopez v. Ashcroft, 369 F.3d 275, 280 (3d Cir. 2004) ("[U]nder IIRIRA, the executive branch, not the judiciary, is given the sole authority to determine when an alien must depart."); Ngarurih v. Ashcroft, 371 F.3d 182, 194 (4th Cir. 2004) (holding that the court of appeals may not toll the voluntary departure period during judicial review); Garcia v. Ashcroft, 368 F.3d 1157, 1159 (9th Cir. 2004) (holding that the court of appeals lacks authority to grant a motion for stay of the voluntary departure period filed after that period has expired); Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1172 (9th Cir. 2003) ("It is executive rather than judicial officers who decide when an alien must depart"); *see Banda-Ortiz*, 445 F.3d at 390 n.3.

148. *Banda-Ortiz*, 445 F.3d at 394 (Smith, J., dissenting); *see* Kanivets v. Gonzales, 424 F.3d 330 (3d Cir. 2005); Azarte v. Ashcroft, 394 F.3d 1278 (9th Cir. 2004); *see also* Barroso v. Gonzales, 429 F.3d 1195 (9th Cir. 2005).

149. *Banda-Ortiz*, 445 F.3d at 394 (Smith, J., dissenting) (citing *Ngarurih*, 371 F.3d at 192-93).

150. *Id.* (citing 8 C.F.R. § 1003.2(d) (2006)).

151. *Id.* at 395.

152. *Id.*

153. *Id.*

154. 8 U.S.C. § 1229a(c)(7) (2006).

155. *Banda-Ortiz*, 445 F.3d at 395 (Smith, J., dissenting).

156. *Id.*

statutes in favor of the alien since it would promote a fair result for aliens and avoid creating a circuit split.[157]

V. ANALYSIS

A. *Subsequent Decisions*

In the time between the date when *Banda-Ortiz* was decided and this writing in March 2007, two other federal circuits have ruled on the issue. Three months after *Banda-Ortiz*, the Eleventh Circuit decided *Ugokwe v. U.S. Attorney General*.[158] The BIA denied the petitioner's motion to reopen based on her failure to depart the country before the expiration of the voluntary departure period.[159] After considering *Azarte*, *Sidikhouya*, and *Kanivets*, the court discussed the Fifth Circuit's decision in *Banda-Ortiz* and Judge Smith's dissent.[160] The court concluded from its survey of the cases that the Third, Eighth, and Ninth Circuits, along with Judge Smith in his dissent in *Banda-Ortiz*, had reached the correct conclusion concerning the interaction between voluntary departure and motions to reopen.[161] It also provided that it could not, "as did the Fifth Circuit, exclusively focus on the voluntary departure standards and ignore the motion to reopen provisions," because doing so would create an exception to 8 U.S.C. § 1229a(c)(7) which grants *all* aliens a statutory right to file one motion to reopen.[162] Therefore, the Eleventh Circuit held that a timely filed motion to reopen tolls the voluntary departure period while the motion is pending.[163]

The Fourth Circuit entered the mix on August 18, 2006 when it decided *Dekoladenu v. Gonzales*.[164] Like the Fifth Circuit, the court in *Dekoladenu* declined to follow *Azarte* and held "both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits."[165] The main rationale behind the court's holding was that cannons of statutory construction required the more specific voluntary departure provision, available to only some aliens, to control over the more general motion to reopen provision available to all aliens.[166] Under this approach, the smaller class of aliens granted voluntary departure would have to abide by the shorter time limits established in the voluntary departure statute.

The court recognized that this approach would preclude aliens granted voluntary departure from receiving a ruling on the merits on their motions to reopen; however, it concluded that "[b]ecause voluntary departure is a

157. *Id.* at 396 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).
158. 453 F.3d 1325 (11th Cir. 2006).
159. *Id.* at 1327.
160. *Id.* at 1330.
161. *Id.*
162. *Id.* at 1330-31 (emphasis added).
163. *Id.* at 1331.
164. 459 F.3d 500 (4th Cir. 2006).
165. *Id.* at 504.
166. *Id.* at 505.

privilege that is only available to a subset of removable aliens, it is neither 'absurd' nor 'nonsensical' to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen."[167] To hold otherwise, the court stated, would make the time limits imposed for voluntary departure meaningless because aliens granted voluntary departure could simply file a motion to reopen and toll the voluntary departure period.[168]

B. Analysis of the Majority Opinion and Judge Smith's Dissent

The overarching concern behind the holding in *Banda-Ortiz* seems to be the majority's view that any benefit derived from tolling the voluntary departure period upon the filing of a motion to reopen is outweighed by the potential for abuse. The majority's holding addresses legitimate concerns; however, the rationale used to buttress its conclusion is based on weak legal foundation.

The majority reasons that tolling the departure period would undermine the "exchange of benefits between an alien and the Government" present in voluntary departure.[169] In its view, if the alien was allowed to remain in the country and have his motion to reopen heard, then the benefit to the Government of a quick departure by the alien would be lost.[170] This reasoning, however, ignores decades of tradition in which courts granted voluntary departure for generous periods of time that allowed aliens to remain in the country during the pendency of a motion to reopen.[171] Thus, the Government historically has not considered the benefit of voluntary departure to be lost by allowing an alien to stay in the country and have his or her motion to reopen heard on the merits.

The majority's "benefit" analysis is further undermined by current practices that allow the alien to remain in the country during the time that his appeal to the BIA is pending.[172] Indeed, in the instant case, Banda-Ortiz remained in the country awaiting appeal for six months after the immigration judge's initial grant of voluntary departure.[173] The majority, however, did not object to this accepted practice. Therefore, the majority's conclusion that the benefit of a speedy departure is lost to the Government

167. *Id.* at 506.

168. *Id.*

169. Banda-Ortiz v. Gonzales, 445 F.3d 387, 389 (5th Cir. 2006).

170. *Id.* at 390.

171. *See* Azarte v. Ashcroft, 394 F.3d 1278, 1284; AUSTIN T. FRAGOMEN JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7:4.6[A] (stating that prior to IIRIRA, courts often granted voluntary departure periods longer than 120 days and sometimes even for one to two-year periods for certain classes of aliens.)

172. *See In re* Villegas Aguirre, 13 I. & N. Dec. 139, 140 (BIA 1969) (holding that a timely appeal "tolls the running of the voluntary departure authorization").

173. *Banda-Ortiz*, 445 F.3d at 395 n.11 (Smith, J., dissenting).

during the pendency of a motion to reopen is nonsensical because the majority fails to make a similar objection to the long standing practice of allowing the alien to remain in the country during his appeal of the immigration judge's order.

Judge Smith's dissent presents a good argument supporting the contention that Congress did not intend to deprive aliens granted voluntary departure of the right to file motions to reopen. He points out that the statute governing the motions grants the right to file to *all* aliens without consideration to the nature of departure.[174] The statute provides that "*[a]n* alien may file one motion to reopen proceedings,"[175] and that the motion must be filed "within 90 days of the date of entry of *a final administrative order* of removal."[176] Congress' failure to limit the availability of a motion to reopen to aliens subject to certain types of final administrative orders is evidence that it did not intend to preclude aliens granted voluntary departure from pursuing such relief.

The majority's argument is not without merit, though. The fact that Congress, with the enactment of IIRIRA, chose to severely limit the time period for which an alien could be granted voluntary departure is evidence that it wanted to ensure a speedier exit from the country by aliens granted voluntary departure. This evidence is somewhat weakened, however, by the Department of Justice's interim rule addressing "the effect of a motion or appeal to the Immigration Court, BIA, or a federal court on any period of voluntary departure already granted," which states that a possible option is to toll the departure period while the motion is pending.[177] The DOJ's consideration of tolling as a possible answer is an indication that Congress did not intend to deprive aliens granted voluntary departure of the right to file a motion to reopen. The interim rule is far from conclusive, however, as it explicitly states that the DOJ "has not adopted any position" regarding the effect of a motion to reopen on a previously granted period for voluntary departure.[178] In fact, the interim rule also seems to lend support to the majority's conclusion as it lists "no tolling of any period of voluntary departure" as one of the three possible solutions for resolving the problem.[179]

It is important to note, though, that the interim rule speaks not only to the tolling effect of motions to reopen on the voluntary departure period, but also to an appeal from an initial grant of voluntary departure.[180] Thus,

174. *Banda-Ortiz*, 445 F.3d at 392 (Smith, J., dissenting) (emphasis added).

175. 8 U.S.C. § 1229a(c)(7)(A) (2006) (emphasis added).

176. *Id.* § 1229a(c)(7)(C)(i) (emphasis added).

177. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,325-26 (Mar. 6, 1997) (interim rule); *see* Barroso v. Gonzales, 429 F.3d 1195, 1205 (9th Cir. 2005) (stating that interim rule is the best guidance to determining the tolling effect of motions to reopen); *Azarte*, 394 F.3d at 1288 n.20 (citing the interim rule for the proposition that "automatic tolling would be consistent with the legislative scheme").

178. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,326

179. *Id.*

180. *Id.* at 10,325-26.

any support the interim rule could provide to the majority's conclusion is undermined by the fact that Banda-Ortiz's initial grant of voluntary departure was tolled during the time his appeal to the BIA was pending.[181] This begs the question of why the departure period should be tolled for an appeal—a procedural mechanism seeking review of previously decided issues—but not for a motion to reopen, which seeks consideration of new evidence not available at the time of the first proceeding. The majority opinion makes no attempt to answer this important question, and thus, it uncovers a flaw in the court's rationale.

In reaching its conclusion, the majority relied heavily on statutory language providing that the voluntary departure period cannot exceed a period of sixty days.[182] The majority stated that tolling the departure period "would effectively extend the validity of [Bana-Ortiz's] departure period well beyond the sixty days that Congress has authorized."[183] However, the procedural background in *Banda-Ortiz* directly contradicts this conclusion. As previously noted, Banda-Ortiz remained in the country awaiting appeal for six months after being granted voluntary departure, yet the departure period was still valid after the BIA issued its decision. Judge Smith recognized this problem and observed in his dissent that by requiring such a strict reading of the statutory language, the majority's holding "calls into question a long standing practice" of tolling the voluntary departure period during the pendency of an appeal to the BIA and also "put[s] in jeopardy [the alien's] right to any review of the IJ's decision."[184]

The majority's rationale is also open to criticism in that it characterizes tolling as an extension of time. However, the two terms are not synonymous. The Ninth Circuit correctly noted in *Barroso* that "tolling does not *extend* the amount of time granted for voluntary departure."[185] Rather, tolling is defined as "stop[ping] the running of" a period of time, while extension is defined as "[a] period of additional time to take an action."[186] Judge Smith agreed with this interpretation and noted that "[i]t is the very *nature* of tolling to suspend the period of time provided by statute for certain, actions, when the circumstances of the case require."[187] He viewed tolling the departure period as necessary to preserve Banda-Ortiz's statutory right to file a motion to reopen and that doing so "prevent[s] the creation of a legal Scylla and Charybdis that will inevitably lead to the denial of

181. *See Banda-Ortiz*, 445 F.3d at 395 n.11 (Smith, J., dissenting) (stating that the sixty day departure period granted by the immigration judge was tolled for six months until the BIA issued its decision).

182. *Id.* at 390 (majority opinion); *see* 8 U.S.C. 1229c(b)(2) (2006); 8 C.F.R. § 1240.26(h) (2006).

183. *Banda-Ortiz*, 445 F.3d at 390.

184. *Id.* at 395 (Smith, J., dissenting).

185. Barroso v. Gonzales, 429 F.3d 1195, 1206 (9th Cir. 2005) (emphasis in original); *see also* Kanivets v. Gonzales, 424 F.3d 330, 335 (3d Cir. 2005) (holding that extending the voluntary departure period presents a different situation than does tolling).

186. *Barroso*, 429 F.3d at 1206; BLACK'S LAW DICTIONARY 1246, 495 (Abridged 8th ed. 2005).

187. *Banda-Ortiz*, 445 F.3d at 395 (Smith, J., dissenting) (emphasis in original).

meritorious claims."[188] This interpretation presents a better reasoned analysis than does the majority opinion.

Despite its flaws, the majority opinion does raise legitimate concerns about the potential for abuse that would arise following a holding that motions to reopen do toll the voluntary departure period. Indeed, the majority's holding is far more sound when applied to situations where an alien has attempted to abuse his statutory right by filing a frivolous motion to reopen in an attempt to remain in the country beyond the period of time granted for voluntary departure. In such situations, the benefit to the Government would be lost because it would have to expend time and resources on hearing a frivolous motion and the subsequent removal of the alien after denial of the motion.[189] Herein lies the main weakness of Judge Smith's dissent. While the majority opinion fails to consider the injustice that will be served by depriving aliens granted voluntary departure of the right to present new evidence, the dissent fails to consider the potentially substantial increase in cost to the Government incurred as a result of aliens abusing motions to reopen to prolong their stay in the country. Judge Smith argued that Congress addressed this problem by "regulating [the] quantity, quality, and timeliness" of motions to reopen.[190] While this assertion may be true, aliens are still afforded the right to file one motion to reopen, and Judge Smith fails to offer an adequate solution for curbing potential abuse of that right. Thus, the dissent, while providing a better analysis than the majority, fails to provide a fully adequate solution.

C. *Implications of the Decision*

One effect of the holding in *Banda-Ortiz* is that it unfairly punishes aliens who are granted voluntary departure. The majority stated that these aliens still have a right to file a motion to reopen and have their motion heard "so long as it does not interfere with the agreed upon voluntary departure date or the Government's interest in the finality of an alien's voluntary departure."[191] However, the *Azarte* court correctly noted that such a result is a near impossibility because "[i]n practice, it takes the BIA more than a month and often many months or even years to issue a decision."[192] Thus, despite the majority's contrary view, the holding in *Banda-Ortiz* effectively deprives aliens granted voluntary departure of a statutory right to

188. *Id.*

189. *See* 8 U.S.C. § 1229c(c) and (d)(1)(B) (2006) (providing that an alien cannot be granted voluntary departure a second time after being previously permitted to so depart).

190. *Banda-Ortiz*, 445 F.3d at 392 (Smith, J., dissenting).

191. *Id.* at 391 (majority opinion).

192. Azarte v. Ashcroft, 394 F.3d 1278, 1284 (9th Cir. 2005); *see* Dep't of Justice, *Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedure*, Aug. 23, 2002, http://www.usdoj.gov/opa/pr/2002/August/02_eoir_489.htm (providing that as of February 2002, there were more than 56,000 cases pending before the BIA, and of those, 10,000 had been pending for three years or more); *Banda-Ortiz*, 445 F.3d at 393 n.5 (Smith, J. dissenting) (stating that a ruling on the merits of a motion to reopen before expiration of the voluntary departure period "will be unlikely, given the fact that, as of September 30, 2004, there were 33,544 cases pending appeal before the BIA, of which 6,059 had been pending from 2003 or earlier").

have a motion to reopen heard and decided on the merits. Judge Smith characterized this result as "particularly harsh" because it "operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure."[193] Indeed, the result leaves the alien with no means to offer the BIA new evidence not available in the original proceeding that could possibly allow the alien to remain in the country. This hardly seems fair when one considers that aliens whose actions have rendered them ineligible for voluntary departure can exercise their statutory right to pursue relief in the form of a motion to reopen.

Another possible consequence of *Banda-Ortiz* is that one of the majority's main objectives will be undermined when the holding is put into practice. The majority recognized that two of the main purposes of voluntary departure are to reduce the costs to the Government and spare administrative and judicial resources.[194] The rationale is that if the alien is granted voluntary departure, he leaves the country on his own cost and the Government does not have to spend time and money on removing him. However, the court, in attempting to achieve this result, may have shot itself in the proverbial foot with its holding. For example, as Judge Smith noted, the majority's decision has the possibility to cause aliens charged with removability to "hesitate before requesting voluntary departure because of the now-heightened risk that a successful request will result in the automatic denial of all forms of discretionary relief."[195] Thus, if aliens are not requesting voluntary departure, then the Government must use its monetary, administrative, and judicial resources to conduct further proceedings and to subsequently remove the alien from the country. In this scenario, the majority's holding becomes counterintuitive because the end result actually increases governmental costs rather than having the desired effect.[196]

D. Proposed Solution

The problem with the majority and dissenting opinions in *Banda-Ortiz* is that they both attempt to establish a bright line rule for their respective sides of argument that would be applied in every case concerning the interaction between motions to reopen and voluntary departure. This approach, however, invariably injures one of the parties to the proceeding. If the majority's rule is applied and the voluntary departure period is never tolled upon the filing of a motion to reopen, then aliens with meritorious claims would be injured in that they would be precluded from presenting new evidence that may make them eligible for an adjustment of status.[197]

193. *Banda-Ortiz*, 445 F.3d at 393 (Smith, J., dissenting).

194. *Id.* at 390 (majority opinion).

195. *Id.* at 396 (Smith, J., dissenting).

196. Benson, *supra* note 38, at 40, suggests that eliminating or limiting forms of relief (as the majority does in *Banda-Ortiz*) increases the alien's incentive to fight harder to remain in the country.

197. *See* Banda-Ortiz v. Gonzales, 445 F.3d 387, 395 (5th Cir. 2006) (Smith, J. dissenting) (stating that failure to toll the voluntary departure period "will inevitably lead to the denial of meritorious claims"); Azarte v. Ashcroft, 394 F.3d 1278, 1289 (9th Cir. 2005) ("Preventing aliens from receiving

On the other hand, if the dissent's rule is applied and the voluntary departure period is always tolled, then the Government would be injured by having to expend time and resources on hearing frivolous motions to reopen filed by aliens attempting to abuse this avenue of relief.[198]

A solution that would avoid these problems is to determine the tolling effect of a motion to reopen on a case by case basis. In this scenario, the immigration judge or BIA would only toll the voluntary departure period upon a finding that the motion to reopen has merit. This does not mean that the alien necessarily has to prevail on the motion, just that the motion is based upon new factual evidence that was not available or could not have been discovered at the time of the original proceeding.[199] However, if upon consideration of the motion, the immigration judge or BIA determines that the motion is frivolous, then the voluntary departure period will not be tolled and the alien will be subject to the penalties set forth in the statute. This proposed solution would require more work than would a categorical rule. Nonetheless, it seems to be the best way to ensure a fair result for both the alien and the Government.

E. Possibility of Consideration by the Supreme Court

As previously noted, *Banda-Ortiz* was the first post-IIRIRA case to hold that a motion to reopen does not toll the voluntary departure period, thereby creating a circuit split among the Federal Courts of Appeals. As of March 2007, the circuits were split 4-2 in favor of tolling the voluntary departure period during the pendency of a timely filed motion to reopen. This split is extremely significant in that aliens subject to voluntary departure that are located in the Third, Eighth, Ninth, and Eleventh Circuits are afforded a statutory right that is denied to those aliens of the same status located in the Fourth and Fifth Circuits. Therefore, the issue presented in *Banda-Ortiz* seems to be one that the Supreme Court is likely to address sooner rather than later because of the current disparate treatment of the same class of aliens that is entirely dependent upon location. Furthermore, addressing this issue in a timely manner would allow the Court to resolve an emerging circuit split to ensure that a uniform standard is applied to all aliens that are granted voluntary departure.

If and when the Supreme Court ultimately elects to decide the issue of whether the voluntary departure period is tolled upon the timely filing of a motion to reopen, the likely outcome will depend heavily on the Court's approach to statutory interpretation. The Court has two competing legal

decisions on their motions to reopen would eliminate all possibility of redress if their circumstances changed. If Congress had desired such a draconian result, we are confident it would have said so."); *cf.* Benson, *supra* note 38, at 39 (stating that by focusing "on the number of removals or on the speed of adjudication," Congress, agencies, and courts fail "to fully acknowledge the human lives involved").

198. *See* Dekoladenu v. Gonzales, 459 F.3d 500, 506 (4th Cir. 2006) (providing that if motions to reopen tolled the voluntary departure period, then aliens "would have a strong incentive to file a [frivolous] motion to reopen in order to delay their departure").

199. *See* 8 C.F.R. § 1003.2(c)(1) (2006).

theories to choose from—formalism and realism.[200] If the Court takes a formalistic approach to interpreting the statutory language, then it will almost certainly side with the majority opinion in *Banda-Ortiz* and the Fifth Circuit. This is because formalism would require a strict application of § 1229c(b)(2)'s sixty day limitation on voluntary departure considering neither the surrounding factual context of the particular case nor the lives that will be affected by a strict application of the law. On the other hand, if the Court employs the broader realistic approach, then it would likely reach the same result as Judge Smith and the Third, Eighth, Ninth, and Eleventh Circuits. This is because when considering the interaction of voluntary departure and motions to reopen in light of social interests and public policy, the Court would most likely raise the same concerns addressed by Judge Smith in his dissent.

The best guidance to determining which approach the Supreme Court is likely to choose is to look to the Court's previous holdings. In *Ruckelshaus v. Monsanto Co.*,[201] the Court held "where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"[202] This holding appears to preclude the Court from proceeding under a formalistic approach because so doing would make the voluntary departure statute and the motion to reopen statute unable to co-exist as currently written, at least with respect to aliens granted voluntary departure. This conclusion is further supported by the fact that it has long been the position of the Court that "[r]epeals by implication are not favored."[203] Thus, it appears likely, if and when the Supreme Court considers the issue presented in Banda-Ortiz, that it will take a broader, more realistic approach than did the Fifth Circuit in order to preserve the full power of the current statutory scheme.

VI. CONCLUSION

In attempting to guard against potential abuse of motions to reopen by aliens subject to voluntary departure, the Fifth Circuit's holding in Banda-Ortiz put aliens with meritorious claims in a Catch-22 leaving them without any avenue to exercise their statutory right to have their motions decided on the merits. The court left its decision open to criticism by failing to explain why motions to reopen should be treated differently than an appeal

200. Formalism is "[t]he theory that law is a set of rules and principles independent of other political and social institutions." BLACK'S LAW DICTIONARY (8th ed. 2004); *see* Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 12 (stating formalism is the theory "that the law generally is, and should be, unresponsive to particular factual contexts and circumstances," and laws are "indifferent to what we have come to see as either the needs of society or the purposes that law might serve."). Realism on the other hand, is "[t]he theory that law is based, not on formal rules or principles, but instead on judicial decisions that should derive from social interests and public policy." BLACK'S LAW DICTIONARY (8th ed. 2004); *see* Wetlaufer, *supra* this note, at 20 (stating that realism is the theory "that the law is an institution that should evolve in ways that are responsive to the changing (factual) needs of the society it serves").

201. 467 U.S. 986 (1984).

202. *Id.* at 1018 (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-134 (1974)).

203. *Ex parte* Yerger, 75 U.S. 85, 105 (1868).

filed subsequent to a grant of voluntary departure. The dissenting opinion, while better reasoned and reaching a sounder result, still left something to be desired because of its failure to provide any governmental safeguard against frivolous motions to reopen. The conclusion to be drawn from Banda-Ortiz is that a bright line rule cannot be used to satisfy both the alien's and the Government's competing interests. Such a task is better left to a case-by-case analysis.