



AMERICAN IMMIGRATION LAW FOUNDATION

DADA V. MUKASEY Q & A **PRELIMINARY ANALYSIS AND APPROACHES TO CONSIDER**

June 17, 2008

The Supreme Court's decision in *Dada v. Mukasey*, No. 06-1181, 554 U.S. ___ (June 16, 2008), addresses the interplay between the voluntary departure provision, INA § 240B, and the motion to reopen provision, INA § 240(c)(7). The INA permits a person to file a motion to reopen within 90 days of the final administrative order of removal. However, individuals with voluntary departure usually must depart within 30 or 60 days or risk being ineligible for suspension of deportation, adjustment of status, change of status, registry, and voluntary departure for ten years. Additionally, after a person departs, the government deems a motion to reopen withdrawn. Because the government generally does not adjudicate motions to reopen before the voluntary departure period expires, individuals granted voluntary departure who then become eligible for relief following the final order may have no means to pursue this relief.

The Supreme Court's decision in *Dada* recognized the tension between the motion to reopen and voluntary departure provisions and sought to safeguard the right to file a motion to reopen. Therefore, the Court said that individuals must be permitted to withdraw their voluntary departure request before the period expires. The Supreme Court, however, disagreed with several circuit courts that previously had held that the voluntary departure period is tolled (stops running) during the pendency of a motion to reopen.

This Practice Advisory offers *preliminary* analysis about the potential impact of *Dada* on individuals' cases and suggestions about immediate steps to take. Because AILF is issuing this advisory the day after the Court announced its decision, readers are cautioned to check for new cases, legal developments, and updates to this advisory over the next weeks and months.

AILF's Practice Advisories are intended for use by lawyers and do not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

1. What did the Supreme Court hold in *Dada*?

The Supreme Court held:

- Voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. In reaching this conclusion, the Court rejected the government’s position that a person granted voluntary departure knowingly surrenders the opportunity to seek reopening. By allowing withdrawal prior to the expiration of voluntary departure, the Court’s decision sought to safeguard the statutory right to file a motion to reopen.
- The voluntary departure period does not automatically toll when a motion to reopen is filed. The Court’s decision resolves a circuit split. Four courts had found that the filing of a motion to reopen automatically tolls the voluntary departure period:
 - Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005)
 - Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005)
 - Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005)
 - Ugokwe v. United States Att’y Gen.*, 453 F.3d 1325 (11th Cir. 2006)
 Three courts concluded that the voluntary departure period is not tolled:
 - Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006), *petition for cert. pending*, No. 06-1252 (filed Mar. 22, 2007)
 - Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007)
 - Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007) (pet. for reh'g filed Oct. 15, 2007)

A full case summary is available on AILF’s Supreme Court Update webpage at http://www.ailf.org/lac/supremecourt_112806.shtml.

2. If my client was granted voluntary departure and wants to reopen his or her case, what can he or she do?

Keep in mind, the Court’s decision only affects individuals who filed or plan to file their motions to reopen before their voluntary departure period expires. The decision allows individuals to unilaterally withdraw their requests for voluntary departure. Therefore, individuals who wish to file a motion to reopen can withdraw their voluntary departure and avoid the consequences of overstaying the voluntary departure period if the motion to reopen is not adjudicated before the expiration of the period.

It is unclear from the decision whether the filing of a motion to reopen will be construed as a request to withdraw the voluntary departure. However, the Court noted that the government has issued a proposed regulation that construes the filing of a motion to reopen during the voluntary departure period as an automatic termination of the voluntary departure grant,¹ and that the proposed regulation “warrants respectful consideration.” Nonetheless, until it is clear how the government and the courts are going to interpret this decision, individuals may consider explicitly requesting withdrawal of voluntary

¹ See 72 Fed. Reg. 67674 (Nov. 30, 2007) available at <http://www.aila.org/content/default.aspx?docid=23939>.

departure when they file a motion to reopen prior to the expiration of the departure period.

In addition, keep in mind, without voluntary departure, a person is subject to an order of removal. Therefore, individuals who withdraw their voluntary departure may want to file a motion to stay their removal during the pendency of the motion to reopen.

3. How will *Dada* affect a client whose case is in a circuit that previously held that voluntary departure tolled during the pendency of the motion to reopen? (Third, Eighth, Ninth, and Eleventh Circuits)

At this early stage, it is unclear how the government and the courts will interpret the decision and what effect it will have on cases in the Third, Eighth, Ninth, and Eleventh Circuits. However, if an individual's case was reopened prior to *Dada*, we think the change in law should not affect your client. Contact AILF at clearinghouse@ailf.org if the government seeks reconsideration of a previously granted motion to reopen based on *Dada*.

The following suggestions presume that the client did not seek withdrawal of voluntary departure explicitly in the initial motion to reopen. If your client did explicitly seek withdrawal, you may advise the IJ or BIA of this fact, and this former withdrawal request should put your client's case squarely within the holding of *Dada*. (In *Dada*, the petitioner requested withdrawal of voluntary departure when he filed his motion to reopen.)

If the motion to reopen is pending or on appeal, your client may argue that the initial motion should be construed as a request to withdraw the voluntary departure period. The government also may take this position, as it is consistent with its proposed regulation, providing for automatic termination of the voluntary departure grant upon the filing of a motion to reopen filed during the voluntary departure period. *See* 72 Fed. Reg. 67674 (Nov. 30, 2007) available at <http://www.aila.org/content/default.aspx?docid=23939>. As mentioned above, the Court noted that the proposed regulation “warrants respectful consideration.”

However, the government and the courts may ultimately conclude (1) that the initial motion to reopen was not a request to withdraw voluntary departure and (2) that the tolling ended on the date the Supreme Court issued *Dada* (June 16, 2008). As a precautionary measure, individuals may consider filing protective requests to withdraw voluntary departure.² Presumably, such requests would be filed with the adjudicatory body (IJ or BIA) that currently has or last had jurisdiction (if the case is on review at the circuit court) over the case.

² Even if a person files a protective request to withdraw, this would not preclude an argument that the initial filing of the motion to reopen constituted a request to withdraw voluntary departure.

Be aware of the time remaining on the voluntary departure period. If the courts ultimately hold that the tolling ended on the date the Supreme Court issued *Dada*, an individual's voluntary departure period may begin running again on that date (June 16, 2008). For example, if in the Ninth Circuit, an individual filed a motion to reopen on day 20 of a 30-day voluntary departure period, his or her voluntary departure period may have ten days remaining as of June 16, 2008. If practicable, individuals may want to file any protective requests to withdraw within that remaining voluntary departure period. If the government adopts the position stated in its proposed voluntary departure regulation, and construes the filing of a motion to reopen as termination of voluntary departure (or if the courts so construe the filing of a motion to reopen), such protective requests will have been unnecessary. In the meantime, filing such requests may be prudent. If the voluntary departure period has run out, individuals may consider making a request to withdraw voluntary departure nunc pro tunc to the date of filing the motion to reopen.

In addition, as mentioned previously, without voluntary departure, a person is subject to an order of removal. Therefore, individuals who withdraw their voluntary departure request may want to file a motion to stay their removal during the pendency of the motion to reopen.

4. How will *Dada* affect a client whose case is in a circuit that previously held that voluntary departure did not toll during the pendency of the motion to reopen or had not addressed this issue? (First, Second, Fourth, Fifth, Sixth, Seventh, and Tenth)

Three circuits – the First, Fourth, and Fifth – have said that a pending motion to reopen does not toll the voluntary departure period. In the circuits that have not addressed this issue, the IJs and BIA generally followed the BIA decision *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), which rejected tolling.

The following suggestions presume that the client did not seek withdrawal of voluntary departure explicitly in the initial motion to reopen. If your client did explicitly seek withdrawal, you may advise the IJ or BIA of this fact, and this former withdrawal request should put your client's case squarely within the holding of *Dada*. In *Dada*, the petitioner requested withdrawal of voluntary departure when he filed his motion to reopen.

- A) Individuals with pending motions to reopen: Those individuals whose voluntary departure period *has not expired* may want to consider requesting withdrawal of their voluntary departure request. If the voluntary departure period *has expired*, individuals may argue that the initial motion to reopen should be construed as a request to withdraw the voluntary departure request. (See discussion above in 2 and 3.) In addition, individuals may consider making an explicit request to withdraw voluntary departure nunc pro tunc to the date of filing the motion to reopen.

B) Individuals with motions to reopen denied for overstaying the voluntary departure period, no court of appeals cases pending: The BIA has recognized that a significant change in the law may warrant reconsideration. Individuals may consider filing a motion to reconsider based on *Dada* making the arguments described above for individuals with pending motions.

C) Individuals with motions to reopen denied for overstaying the voluntary departure period, court of appeals cases pending: Individuals may consider filing a motion to remand to the BIA based on *Dada*. If the court of appeals already has issued an adverse decision, individuals could consider filing a petition for rehearing (if within rehearing period) or a motion to withdraw the mandate if the mandate already has issued.

5. Does the Supreme Court's decision affect stays of voluntary departure granted by the circuit courts?

No. The Supreme Court in *Dada* noted that “some courts of appeals have found that they may stay voluntary departure pending consideration of a petition for review on the merits.” However, the Court stated that the issue was not presented in the case and therefore, the Court would not address it in this decision. Moreover, the Court's analysis focused on the interplay between two statutory provisions, INA § 240(c)(7) (motion to reopen) and INA § 240B(b) (voluntary departure), and therefore did not implicate the provisions governing the circuit court's authority to issue stays of voluntary departure.

Nonetheless, the government may construe some of the Court's language regarding tolling as supporting arguments against the circuit court's authority to grant stays of voluntary departure. Of course it will be some time before the courts address whether to change their position in light of *Dada*. Individuals may want to take into account that the circuit courts may reconsider their case law regarding stays of voluntary departure and take appropriate steps in anticipation of this.