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MUNOZ V. ASHCROFT, 339 F.3D 950 (9TH CIR. 2003)

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FACTS

Defendant Jose Didiel Munoz is a Guatemalan native whose mother unlawfully took him to the United States at the age of one, on or about January 1, 1980, and has since lived in the United States.[1] He attended school and established friendships in the United States.[2] Munoz's mother, stepfather, half-brother, and half-sister also live here.[3] Munoz's ties to Guatemala are minimal.[4] He does not know the identity of his biological father nor does he have knowledge of any family residing in Guatemala.[5] Since his arrival, Munoz has not visited Guatemala.[6]

Munoz applied for asylum to correct his illegal alien status when he reached eighteen years of age.[7] The Immigration and Naturalization Service (INS) denied his application for asylum and issued a Notice to Appear.[8] The INS charged Munoz with removability under the Immigration and Nationality Act[9] as an "alien present in the United States without having been admitted or paroled."[10] Munoz appeared before the Immigration Judge (IJ) and withdrew his application for asylum and withholding of removal upon counsel's advice.[11] The INS found the Illegal Immigration Reform and Immigrant Responsibility Act[12] (IIRIRA) deportation standards governed Munoz's hearing.[13] The Nicaraguan Adjustment and Central American Relief Act[14] (NACARA) did not govern Munoz's deportation hearing because he did not file for asylum before April 1, 1990.[15]

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1 Munoz v. Ashcroft, 339 F.3d 950, 952 (9th Cir. 2003).

2 *Id.* at 953.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101–1537 (2003).

10 Munoz v. Ashcroft, 339 F.3d 950, 953 (9th Cir. 2003) (citing Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(6)(A)(i) (2000)).

11 *Id.*

12 Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1997). Congress passed the act on September 30, 1996, and the act became effective on April 1, 1997. The purpose of the act was to amend provisions in the Immigration and Nationality Act. Provisions amended included the grounds for exclusion and deportation, border control, and removal procedures.

13 Munoz v. Ashcroft, 339 F.3d 950, 953 (9th Cir. 2003).

14 Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-1000, 111 Stat. 2160 (1997). This act amended the Illegal Immigration Reform and Immigrant Responsibility Act. The act created "special rule cancellation" and allowed certain aliens to qualify for pre-IIRIRA deportation standards.

15 *Munoz*, 339 at 955–56.

Under IIRIRA Munoz could not cancel his removal.[16] IIRIRA requires the applicant to meet "a 10-year continuous residency requirement, have good moral character, and establish that removal would result in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident parent, spouse, or child."[17] The IJ held Munoz satisfied the first two requirements under IIRIRA, but found that Munoz did not have a qualifying relative who would suffer extreme hardship due to his removal.[18] Munoz's mother unlawfully resided in the United States and thus did not qualify.[19] Although his stepfather was a citizen of the United States, he did not fall within the statutory meaning of "parent" because Munoz attained the age of eighteen before his mother and stepfather married.[20] Furthermore, Munoz's half-brother and half-sister could not be classified as qualifying relatives because only parents, spouses, or children qualified.[21] The IJ denied Munoz's request for cancellation of removal and ordered voluntary departure.[22]

Munoz appealed to the Board of Immigration Appeals (BIA), which affirmed the IJ's decision.[23] Munoz petitioned the United States Court of Appeals for the Ninth Circuit for review.[24] He argued that he had a substantive right to stay in the United States due to his lifetime residency and familial connections, that he received ineffective assistance of counsel, and that the NACARA deadline should be equitably tolled to comply with international law.[25]

HOLDING

The United States Court of Appeals for the Ninth Circuit held that Munoz's substantive due process rights were not violated, he did not receive ineffective assistance of counsel, and that the NACARA deadline was not subject to equitable tolling, even in the face of international law.[26]

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16 *Id.* at 953.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.* at 953–54.
21 *Id.* at 954.
22 *Id.*
23 *Id.*
24 *Id.* at 952.
25 *Id.*
26 *Id.* at 950.

ANALYSIS

Munoz argued he had a substantive right to remain in the United States because he resided in the United States his entire life and his family and friends live in the United States.[27] The court of appeals, however, held that Munoz had no substantive right to remain in the United States.[28] According to the court, the legislative branch has long encompassed the sovereign power to "expel or exclude" aliens from the United States.[29] Relief from deportation is a privilege created by Congress under its broad power to expel or exclude aliens.[30] Any denial of such discretionary relief is not a violation of due process because it is a privilege created by Congress.[31] An alien cannot contest denial of cancellation of deportation on due process grounds because an alien does not have a substantive right to remain in the United States.[32]

Munoz also claimed he received ineffective assistance of counsel. As defined by the court, "ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."[33] To meet the standard, the petitioner must show that counsel performed deficiently and that prejudice resulted from that deficiency.[34] Prejudice is proven when counsel's deficient performance may have affected the outcome of the proceedings.[35] Munoz contended that his attorney's advice to withdraw his asylum application "ineptly cost him his chance to gain asylum."[36]

The court stated that it was not unreasonable for the attorney to ask Munoz to drop his application for asylum.[37] "To qualify for asylum, an applicant must demonstrate past persecution or a well-founded fear of persecution on account of one or more characteristics: 'race, religion, nationality, membership in a particular social group, or political opinion.'"[38] The court found that Munoz did not present evidence demonstrating past

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27 *Id.* at 954.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.* (citing Hernandez-Mezquita v. Ashcroft, 239 F.3d 1161, 1165 (9th Cir. 2002)).
33 *Id.* at 954–55 (citing Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999)).
34 *Id.* at 955.
35 *Id.* (citing *Ortiz*, 179 F.3d at 1153)).
36 *Id.* at 954.
37 *Id.* at 955 (stating that "[i]f Munoz's asylum application had merit, it might well have been unreasonable and prejudicial for his attorney to pressure him to drop it").
38 *Id.* (citing 8 U.S.C. § 1101(a)(42); Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999)).

persecution or a well-founded fear of persecution.[39] Having found counsel's assistance to be effective, the court found no prejudice at his deportation hearing.[40]

Munoz argued that pre-IIRIRA standards should have governed his deportation hearing.[41] He argued that the NACARA cutoff date should have been equitably tolled for aliens who were children and could not apply for asylum before the cutoff date.[42] Munoz analogized equitable tolling with ineffective assistance of counsel and prisoner's rights, arguing he should not be penalized for circumstances beyond his control.[43]

The court first discussed Congress's reasons for creating NACARA and its implications.[44] The court said that Congress passed NACARA because of "concerns about massive deportations of longterm residents from Honduras, Nicaragua, El Salvador, and Guatemala with the passage of IIRIRA."[45] Congress wanted to amend IIRIRA and permit certain aliens to challenge deportation measures under the less stringent pre-IIRIRA standard.[46]

Guatemalans who applied for asylum prior to April 1, 1990, or entered the United States prior to December 1, 1990, and registered for American Baptist Churches settlement benefits on or before December 31, 1991 were eligible to apply for special rule cancellation.[47] An alien subject to special rule cancellation had to show that he had resided in the United States for 10 years and that he was of good moral character, but he did not have to demonstrate that a qualified relative would suffer extreme hardship upon his removal.[48] Under the pre-IIRIRA standard, Munoz would more than likely not be deported.[49]

The court acknowledged that with federal statutes of limitation, it is presumed that filing deadlines are subject to equitable tolling.[50] A statute is a statute of limitation when the deadline is based on the date on which the claim accrued.[51] The court stated, however, that NACARA is not a statute of

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39 *Id.*

40 *Id.*

41 *Id.* at 956.

42 *Id.*

43 *Id.*

44 *See id.* at 955–56.

45 *Id.* at 955.

46 *Id.* at 956.

47 *Id.*

48 *Id.*

49 *Id.* (stating that "[f]or Munoz, who has over twenty years of residency in the United States and good moral character (so far as the record before us indicates), special rule cancellation would likely make all the difference").

50 *Id.* at 957–58 (citing Socop-Gonzalez v. INS, 272 F.3d 1176, 1188 (9th Cir. 2001)).

51 *Id.* at 957 (citing Iacono v. Office of Pers. Mgmt., 974 F.2d 1326, 1328 (Fed. Cir. 1992)).

limitation but rather a statute of repose and therefore, the statute is not subject to equitable tolling.[52] A statute of repose is a "fixed, statutory cutoff date, usually independent of any variable, such as a claimant's awareness of a violation."[53] The court cited two cases to support its proposition that NACARA is a statute of repose rather than a statute of limitation.[54]

The court cited *Weddel v. Sec'y of HHS*,[55] which involved the Vaccine Act that states a party vaccinated before the statute's effective date had until a specific date to file a petition for benefits.[56] The *Weddel* court found that the Act was a statute of repose because the statute "cut off a cause of action at a certain time irrespective of the time of accrual of the cause of action."[57] The court also cited *Iacono v. Office of Personnel Management*,[58] involving the Civil Service Retirement Spouse Equity Act of 1984, to show that NACARA is a statute of repose.[59] The Act required widows to file for spousal annuity benefits before a specific date.[60] The court in this case found the Act to be a statute of repose because it has an "endpoint of [a] definite time period in which Congress would permit a specific class of potential annuitants to file applications."[61] Because NACARA was a statute of repose, as supported by case law, the court found equitable tolling to be an impossibility in Munoz's case.[62]

Munoz contended the NACARA deadline should be equitably tolled to comply with international laws concerning the protection of children.[63] The court countered that "[i]n enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law, so long as the legislation is constitutional."[64] The court further stated that in cases in which the statute does conflict with international law, the statute should be interpreted so as not to conflict with international law as long as the meaning of the statute is not distorted.[65] For purposes of argument, the court assumed that there was an international law that protected children in Munoz's position.[66] The court decided that the statute could not be reasonably construed to follow international law without

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52 *Id.*
53 *Id.*
54 *See id.*
55 Weddel v. Sec'y of HHS, 100 F.3d 929, 930–32 (Fed. Cir. 1996).
56 Munoz v. Ashcroft, 339 F.3d 950, 957 (9th Cir. 2003) (citing *Weddel*, 100 F.3d at 930–32).
57 *Id.*
58 Iacono v. Office of Pers. Mgmt., 974 F.2d 1326 (Fed. Cir. 1992).
59 *Munoz*, 339 F.3d at 957.
60 *Id.* (citing *Iacono*, 974 F.2d at 1326).
61 *Id.*
62 *Id.*
63 *Id.* at 957–58.
64 *Id.*
65 *Id.*
66 *Id.*

altering the meaning of the statute.[67] The court said that the statute's language showed that Congress intended for the cutoff date to be final.[68] If the statute's deadline were to be extended the cutoff date may last until March 31, 2009, a result contrary to Congressional intent.[69]

CONCLUSION

Aliens in Munoz's position are faced with a troubling dilemma. Even though their entry into the United States is not voluntary, they may suffer the consequences of being present in the United States unlawfully for an extended period of time. Upon removal, these aliens will not be able to gain admission in to the United States for another ten years,[70] though the aliens have spent their entire lives to date in the United States, have familial connections only in this country, and no connections to their native country. The Munoz court added a section titled "Observation" to the end of its ruling, which acknowledges this unfairness.[71] According to the court, a minor alien who involuntarily entered the United States illegally and has since resided in the United States his entire life should not be required to return to his native country.[72] The court suggested that Congress take proper action to rectify this injustice.[73]

Congress could amend the act to allow minor alien children who unlawfully enter the United States involuntarily to qualify for the less stringent pre-IIRIRA standards concerning deportation, thus making it easier for the aliens to remain in the United States. However, Congress may find this amendment too broad for immigration purposes. The extensive statutory scheme of the Immigration and Nationality Act exemplifies Congress's intent to be highly selective as to which aliens shall be admitted to the United States, given leave to remain in the country, or deported.[74]

To account for this concern, Congress could amend readmission standards for minor children who unlawfully entered the United States involuntarily. The section of primary concern is § 1182.[75] Section 1182(a)(9)(B)(i)(II) says that an alien who "has been unlawfully present in the United States for one year or more, and who again seeks admission

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67 *Id.*

68 *Id.*

69 *Id.*

70 *See* 8 U.S.C. § 1182(9)(B)(i)(II) (2003).

71 Munoz v. Ashcroft, 339 F.3d 950, 958–59 (9th Cir. 2003). It is important to note that this section had no bearing on the actual holding of the case.

72 *Id.*

73 *Id.* at 959.

74 *See generally* 8 U.S.C. §§ 1101–1537 (2003).

75 *See generally* 8 U.S.C. § 1182 (2003) (discussing the readmission of aliens after removal).

within 10 years of the date of such alien's departure or removal from the United States, is inadmissible."[76] Congress can create an exception to this provision. The exception could allow minor children, who involuntarily entered the United States and subsequently received an order to depart, to apply for readmission immediately following the deportation proceeding. The child would be allowed to remain in the United States until a decision has been made as to whether the child must leave. The threshold for readmission should be low and should take into consideration the extensiveness of the child's connections to the United States. Factors such as regular school attendance, existence of a permanent household, and contact with relatives in native country should be considered.

Congress should not permit a statutory scheme that fails to recognize a distinct class of aliens, minor aliens, who enter the United States involuntarily. When such aliens are expelled from the country, they suffer extreme hardship in being forced to leave the only home they have ever known. Although Congress has a compelling interest in the regulation of immigrants, the government's interest is not a justification to deport those who entered the United States involuntarily as minors and resided in the country as productive citizens their entire lives.

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[76] 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2003).