

FILED

Koci v. Mukasey, Nos. 04-71718, 04-73586

MAR 19 2008

PAEZ, J., concurring in part¹ and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Binding precedent requires that Koci's petition for review of the BIA's order denying his motion to reopen (No. 04-73586) be granted. *See Grigoryan v. Mukasey*, No. 05-77020, --- F.3d ----, 2008 WL 307455 (9th Cir. Feb. 5, 2008) (per curiam). Because *Grigoryan* compels a holding that the BIA abused its discretion by failing to presume prejudice from the ineffective assistance of Koci's former counsel, I must respectfully dissent.²

An alien claiming ineffective assistance of counsel in removal proceedings must normally establish prejudice by showing that "counsel's performance was so inadequate that it may have affected the outcome of the proceedings." *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (per curiam). However, in cases where counsel's error is so fundamental as to "entirely deprive[the alien] of meaningful review, she is entitled to a presumption of prejudice." *Grigoryan*, -- F.3d at ----, slip op. at 1707. Although the Government may rebut this presumption, "it is not rebutted if a petitioner demonstrates a plausible ground[] for

¹ I concur in the majority's denial of petition No. 04-71718.

² In a Rule 28(j) letter dated December 17, 2007, Koci requested relief under an earlier version of *Grigoryan* which was published on November 19, 2007. That version of *Grigoryan* was withdrawn and superseded by the February 5, 2008 opinion, but the minor revisions are immaterial for purposes of this case.

relief on her underlying claim.” *Id.*; accord *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006). In *Grigoryan*, we clarified that the presumption of prejudice “may arise from counsel’s failure to file a timely notice of appeal or petition for review, *his failure to file a brief to the BIA* or this court, or his filing of a boilerplate brief.” --- F.3d at ----, slip op. at 1707 (emphasis added).³

Here, it is undisputed that Koci’s prior counsel “fail[ed] to file a brief to the BIA.” Moreover, it is clear that the BIA did not presume prejudice, but rather denied Koci’s ineffective-assistance-of-counsel claim because Koci “failed to demonstrate that his prior counsel’s failure to file an appellate brief . . . prejudiced him.” This was error and an abuse of the BIA’s discretion. *See Grigoryan*, --- F.3d at ----, slip op. at 1708 (“The BIA abused its discretion when it failed to presume prejudice from former counsel’s actions and instead required Grigoryan to demonstrate that she suffered prejudice.”). Under these circumstances, where the BIA has applied an erroneous legal standard, we may proceed in the following manner: (1) if it is clear from the record whether or not the petitioner is entitled to relief, we may apply the proper prejudice standard and either remand to the BIA

³ The facts in *Grigoryan* involved the filing of a “boilerplate brief . . . almost devoid of specific references to Grigoryan’s case.” --- F.3d at ----, slip op. at 1700. However, even if *Grigoryan*’s reference to “failure to file a brief to the BIA” is technically dicta, it is clear that *Grigoryan* must control the instant case. If the presumption of prejudice is applied where counsel filed a boilerplate brief, *a fortiori* it must be applied where counsel filed no brief at all.

with instructions to grant the motion to reopen, *see id.* (“Because Grigoryan has established plausible grounds for relief, her presumption of prejudice is not rebutted.”), or deny the petition on the grounds that the petitioner has presented no plausible grounds for relief; (2) if it is not clear whether the petitioner is entitled to relief under the proper prejudice standard, we must remand to the BIA for application of the proper standard in the first instance. *Cf. INS v. Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam).

While failing to acknowledge the BIA’s legal error in applying the wrong prejudice standard, the majority cites *Grigoryan* without persuasively distinguishing it. The court notes that the BIA “addressed Koci’s direct appeal on the merits,” but, in *Grigoryan*, prejudice was presumed notwithstanding the fact that the BIA denied the appeal on the merits. *See Grigoryan*, --- F.3d at ----, slip op. at 1700. In fact, regardless of whether the issues summarily raised in Koci’s notice of appeal were addressed “on the merits” in the BIA’s one-paragraph order denying relief, *Grigoryan* compels the conclusion that Koci was “deprived of meaningful appellate review” by his counsel’s failure to file a brief arguing those issues. *Id.* at ----, slip op. at 1704. As a result, Koci is entitled to a presumption of prejudice which “is not rebutted if [he] demonstrates a plausible grounds for relief on h[is] underlying claim.” *Id.* at ----, slip op. at 1708.

In light of the record, I would hold that Koci did not “demonstrate[] plausible grounds for relief” on his claims for asylum or withholding of removal under the INA, but did demonstrate plausible grounds for relief on his CAT claim. Accordingly, I would remand to the BIA with instructions to grant Koci’s motion to reopen in part and to address his CAT claim on the merits. *See id.*

Because I conclude that the result reached by the majority in this case cannot be reconciled with *Grigoryan*, I respectfully dissent.