

1 UNITED STATES COURT OF APPEALS

3 FOR THE SECOND CIRCUIT

5 _____
August Term, 2002

7 (Submitted: February 18, 2003

Decided: September 13, 2004)

9 Docket No. 02-2702
11 _____

13
15 FRANQUIL CRUZ

Plaintiff-Appellant,

17 -v.-

19
21 TOM RIDGE, Secretary of the Department of Homeland Security

23 *Defendant-Appellee.*

25 _____
27 B e f o r e :

29 WINTER and B. D. PARKER,

31 *Circuit Judges*

33 DRONEY,

35 *District Judge.**

37 _____
Motion to dismiss for lack of appellate jurisdiction an appeal from an order of the United

*The Honorable Christopher F. Droney, of the United States District Court for the District of Connecticut, sitting by designation.

1 States District Court for the Western District of New York (Skretny, J.), which transferred to this
Court a petition pursuant to 28 U.S.C. § 2241 challenging a final order of removal by the
3 Immigration and Naturalization Service.

Granted.

5 ROBERT D. KOLKEN, Sacks and Kolken, *for Petitioner-Appellant.*

7 PAPU SANDHU, Senior Litigation Council, Office of Immigration Litigation, Civil
Division, Department of Justice, Washington, D.C. Robert D. McCallum, Jr.,
9 Assistant Attorney General, Civil Division (Emily Anne Radford (Assistant
Director), *for Respondent-Appellee.*

11 _____
PER CURIAM:

13 Tom Ridge, the Secretary of Homeland Security, moves to dismiss for lack of appellate
jurisdiction the appeal of Petitioner-Appellant Franquil M. Cruz from an order of the United States
15 District Court for the Western District of New York (Skretny, J.) transferring Cruz's amended
habeas corpus petition to this Court pursuant to 28 U.S.C. §1631. We grant the motion and dismiss
17 the appeal.

Cruz entered the United States without inspection by the INS in June 1995, and in April 1997
19 removal proceedings were commenced. [**Cruz, 2002 U.S. Dist. LEXIS 18582, at 3.**] In March
1998, the case proceeded to a hearing before an Immigration Judge, where Cruz conceded
21 removability. [**Id.**] The Immigration Judge ordered Cruz removed, but permitted him to leave
voluntarily. Cruz waived appeal but failed to depart during the voluntary departure period. He was
23 removed to Guatemala in September 1998. [**Id. at 3.**]

Upon returning to Guatemala, Cruz was allegedly attacked and tortured by four unidentified

1 individuals, and Cruz alleged that the attack constituted retaliation against him by members of the
Guatemalan National Revolutionary Unity (URNG), a leftist guerilla organization. [**Petitioner-**
3 **Appellant’s Opposition to Motion To Dismiss at 3.**] After the attack, Cruz fled Guatemala and, in
October 1998, again entered the United States without permission from the INS. *Id.* After he was
5 apprehended and the INS reinstated his 1995 deportation order, Cruz applied for a withholding of
removal under 8 U.S.C. § 1231(b)(3), contending that he feared continued persecution or torture if he
7 were returned to Guatemala, but the INS determined that he had failed to establish a reasonable basis
for such fear. [**Respondent-Appellee’s Motion to Dismiss (RAMD) at 2.**] After an unsuccessful
9 appeal before an Immigration Judge, his removal was scheduled.

Cruz then filed a Petition for a Writ of Habeas Corpus in the District Court. *See* 28 U.S.C. §
11 2241. The INS then moved pursuant to 28 U.S.C. § 1631¹ to transfer the petition to this Court, on
the ground that 8 U.S.C. § 1252(b)(1) lodges jurisdiction over appeals from immigration orders
13 exclusively in the courts of appeals.² [**Cruz, 2002 U.S. Dist. LEXIS 18582, at 7.**]

After the District Court transferred Cruz’s petition to this Court, the litigation (docket
15 number 02-4521) has proceeded as a petition to review the merits of the Immigration Judge’s

¹28 U.S.C. § 1631 provides for transfers to cure want of jurisdiction over a petition for review of an administrative action if (1) the transferor court lacks jurisdiction, (2) it is in the interests of justice, and (3) the petition for review could have been brought in the transferee court at the time it was filed.

² Section 1252 is part of Title II of the Immigration and Nationality Act, 8 U.S.C. §§ 1151-1363(a). The Act provides in part that “if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.” 8 U.S.C. 1231(a)(D)(5) (2004).

1 determination. Nevertheless, Cruz filed separate notice of appeal of the District Court’s order
transferring his habeas petition to this Court, and the INS has moved to dismiss it for lack of
3 appellate jurisdiction. [**RAMD at 3.**]

Generally, orders of the district courts are appealable only if they are final orders. *See* 28
5 U.S.C. § 1291; *Murphy v. Reid*, 332 F.3d 82, 83 (2d Cir. 2003). An order is “final” within the
meaning of section 1291 if it “ends the litigation on the merits and leaves nothing for the court to do
7 but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). This Court has
repeatedly held that transfer orders are not appealable because they are interlocutory rather than final
9 orders. *Michael v. INS*, 48 F.3d 657 (2d Cir. 1995) (transfer pursuant to 28 U.S.C. § 1406(a) is an
interlocutory order); *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 176 (2d Cir. 2000) (a
11 “transfer order is an interlocutory order that is not immediately reviewable by appeal”).

Cruz does not seriously contend that the transfer order was final. Instead he argues that it is
13 subject to review under the collateral order doctrine, which permits appeals from non-final orders
which (1) “conclusively determine the disputed question,” (2) “resolve an important issue completely
15 separate from the merits of the action,” and (3) be “effectively unreviewable on appeal from a final
judgment.” *Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir. 1999) (quoting *Coopers & Lybrand v.*
17 *Livesay*, 437 U.S. 463, 468 (1978)).

But it is now well-settled in this Circuit that transfer orders under section 1631 are not
19 collateral. In *Murphy*, we held that an order transferring a habeas corpus petition under section 1631
from a district court to a court of appeals was not appealable because the issue was “effectively
21 reviewable” by the transferee circuit court. 332 F.3d at 84. Because Cruz can contest this court’s
jurisdiction in his pending review petition, the district court’s transfer order is effectively reviewable,

1 not collateral. Accordingly, we dismiss the appeal for lack of appellate jurisdiction.