FILED
United States Court of Appeals
Tenth Circuit

September 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAJESH KUMAR,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 22-9533
(Petition for Review)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **EID**, Circuit Judges.

Petitioner Rajesh Kumar appealed to the Board of Immigration Appeals ("BIA") after an immigration judge ("IJ") denied his motion to reopen his removal proceedings. The BIA dismissed the appeal. In his petition to this court, Mr. Kumar contends the BIA should have reopened the proceedings sua sponte. Because we lack jurisdiction to review the agency's denial of sua sponte relief, we dismiss the petition for review.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

Mr. Kumar, a native and citizen of India, fled India and unlawfully entered the United States in October 2018. On November 7, 2018, the Department of Homeland Security initiated removal proceedings against him. On December 19, 2018, Mr. Kumar appeared without counsel before an IJ. He conceded removability but requested additional time to submit an asylum application, citing his inability to speak English and claiming he feared persecution and torture by an opposing political party. The IJ granted a continuance, but Mr. Kumar did not file an asylum application before the next hearing on January 15, 2019.

At the January 15 hearing, Mr. Kumar requested another continuance so he could retain counsel.[1] The IJ denied Mr. Kumar's request for a continuance, found that he had abandoned his asylum application, and ordered his removal to India. Mr. Kumar did not appeal the removal order to the BIA, and the order became final on February 14, 2019. He did not file a motion to reopen before the 30-day deadline and remained in the United States.

On August 31, 2020—more than 19 months after his removal order issued and long past the deadline to file a motion to reopen—Mr. Kumar filed a motion to reopen his proceedings under 8 C.F.R. § 1003.23(b)(4)(i), requesting an exception to the filing deadline based on a material change in country conditions. The IJ denied Mr. Kumar's

[1] There is no transcript or other evidence of this request for an additional continuance, but the Government does not contest that Mr. Kumar requested it.

motion to reopen because (1) it was untimely, (2) he did not show changed country conditions sufficient to warrant an exception, and (3) he did not establish "exceptional and compelling circumstances that justify *sua sponte* reopening." A.R. at 33-35.

Mr. Kumar appealed to the BIA, arguing the IJ erred in evaluating his evidence purportedly showing a material change in country conditions. He also asked the BIA to reopen his proceedings sua sponte under 8 C.F.R. § 1003.2(a), asserting his initial hearings violated his due process right to a full and fair hearing because the IJ refused to grant him a second continuance to retain counsel and file his asylum application.[2] The BIA dismissed the appeal. It agreed with the IJ's determination that Mr. Kumar had not shown changed country conditions and also found his case did not present exceptional circumstances warranting sua sponte reopening. In particular, the BIA "disagree[d] with the respondent's claim that he was denied due process when the Immigration Judge deemed his application abandoned and denied his request for an additional continuance." *Id.* at 3.

Mr. Kumar then filed this petition for review, challenging only the BIA's decision not to sua sponte reopen his case.

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[2] Mr. Kumar asked the agency to exercise its sua sponte authority to reopen his removal proceedings, which we have treated as a request to sua sponte reopen proceedings. *See, e.g.*, *Berdiev v. Garland*, 13 F.4th 1125, 1134-35 (10th Cir. 2021).

II. **DISCUSSION**

The BIA may reopen a case "at any time . . . on its own motion." 8 C.F.R. § 1003.2(a) (2020).[3] We generally lack jurisdiction to consider whether the BIA should have sua sponte reopened removal proceedings because "we have no meaningful standard against which to judge the BIA's exercise of its discretion." *Belay-Gebru v. INS*, 327 F.3d 998, 1001 (10th Cir. 2003).

We do, however, have jurisdiction to consider whether the BIA correctly determined that it lacked discretion to reopen a removal proceeding sua sponte. *Reyes-Vargas v. Barr*, 958 F.3d 1295, 1300 (10th Cir. 2020). But once the BIA exercises its discretion, we lack jurisdiction to review the agency's determination of whether the case should be reopened. *See id.*

Mr. Kumar argues "[t]he BIA refused to exercise its *sua sponte* authority to reopen proceedings based explicitly on the legally erroneous conclusion that [he] failed to establish that his due process rights were violated during the removal proceeding." Pet. Br. at 17. He contends "[t]he record shows that the Immigration Judge's conduct

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[3] The Department of Justice amended this regulation to allow the BIA to reopen proceedings sua sponte "solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service"; "[i]n all other cases, the Board may only reopen . . . pursuant to a motion filed by one or both parties." 8 C.F.R. § 1003.2(a) (eff. Nov. 14, 2022); *id.* (eff. Feb. 11, 2022, to Nov. 13, 2022); *id.* (eff. Jan. 15, 2021, to Feb. 10, 2022). But a federal court enjoined implementation of the amended regulation nationwide. *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 937, 940-41, 980 (N.D. Cal. 2021); *see Berdiev*, 13 F.4th at 1138 n.6. We therefore apply the regulation in effect in November 2020, when Mr. Kumar requested the BIA to sua sponte reopen his removal proceedings.

violated [his] right to a fair proceeding and violated BIA standards that are specifically promulgated to protect such right" by denying him a continuance when he "invoked his right to counsel and requested a continuance to be allowed to retain counsel to assist him in completing his application for relief." *Id.* at 10-11. Relying on *Reyes-Vargas*, Mr. Kumar asks us to "remand the present motion to the Board to appropriately consider whether the violation of his due process rights constitutes exceptional circumstances that warrant *sua sponte* reopening." *Id.* at 17.[4]

Mr. Kumar's reliance on *Reyes-Vargas* is misplaced. In *Reyes-Vargas*, we exercised jurisdiction when the BIA mistakenly asserted that the IJ lacked jurisdiction to sua sponte reopen the petitioner's removal proceedings after his departure from the United States. 958 F.3d at 1302, 1304-06. "*Reyes-Vargas* stands only for the proposition that we have jurisdiction to correct the BIA's misperception that the agency lacks discretion to reopen." *Olivas-Melendez v. Wilkinson*, 845 F. App'x 721, 730 (10th Cir. 2021) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).

Mr. Kumar has not asserted that the BIA misunderstood its jurisdiction to reopen proceedings. Instead, he contends the BIA incorrectly found there was no due process

[4] Because Mr. Kumar relies solely on *Reyes-Vargas*, we do not consider the possibility of other sources of jurisdiction. *See Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1275 (10th Cir. 2011) ("It is the appellant's burden, not ours, to conjure up possible theories to invoke our legal authority to hear her appeal."); *see also Siloam Springs Hotel, L.L.C. v. Century Surety Co.*, 906 F.3d 926, 931 (10th Cir. 2018) ("[W]e presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction.").

rights violation in the January 2019 proceedings. Whether or not this argument has merit, the BIA did not say it *could not* reopen Mr. Kumar's proceedings. Rather, it said it *would not* exercise its discretion to reopen because it was "unpersuaded" by Mr. Kumar's arguments and "disagree[d] with [his] claim that he was denied due process when the Immigration Judge deemed his application abandoned and denied his request for an additional continuance." A.R. at 8.

Thus, even if Mr. Kumar is correct that "the BIA relied on a legally erroneous conclusion that [he] was not denied due process during the prior proceedings," Pet. Br. at 10, *Reyes-Vargas* does not support his argument that we should review the BIA's evaluation of his due process claim. Because Mr. Kumar does not allege any agency "misperception" of its "discretion to reopen," *Olivas-Melendez*, 845 F. App'x at 730, his claim does not fall under the narrow *Reyes-Vargas* exception. We therefore lack jurisdiction to consider Mr. Kumar's claim that the BIA should have exercised its discretionary power to sua sponte reopen his case. !

III. **CONCLUSION**

We dismiss the petition for lack of jurisdiction.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge