NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0102n.06

No. 18-3432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 13, 2020
DEBORAH S. HUNT, Clerk

SERGIO CALZADILLA-SANCHEZ, Petitioner, v. WILLIAM P. BARR, Attorney General, Respondent.	)	ON PETITION FOR REVIEW FROM THE UNITED STATES BOARD OF IMMIGRATION APPEALS

Before: BOGGS, GIBBONS and BUSH, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Sergio Calzadilla-Sanchez was served with a Notice to Appear before an immigration judge in November 2013. That notice did not include the exact date and time of his hearing but instead informed him that the date and time would be included in a separate notice. He was later notified of the date and time in a Notice of Hearing and subsequently applied for cancellation of removal. After a hearing, the immigration judge denied Calzadilla-Sanchez's request for cancellation, finding that he had failed to establish that he had been continuously present in the United States for ten years and that he had the necessary qualifying relatives. In the alternative, the immigration judge found that even if Calzadilla-Sanchez had the necessary qualifying relatives, he had not demonstrated that the children would experience exceptional and extremely unusual hardship in the event of his removal. The Board of Immigration Appeals affirmed.

On appeal, Calzadilla-Sanchez argues that the immigration judge lacked jurisdiction because of the allegedly defective Notice to Appear. Because Calzadilla-Sanchez was eventually sent a notice of the date and time of his hearing, the immigration court had jurisdiction to consider his removal. The immigration court has jurisdiction when the mandatory information, including date and time of the hearing, is provided in a notice of hearing issued after the allegedly defective NTA. *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314–15 (6th Cir. 2018).

On the merits, the immigration judge's finding that Calzadilla-Sanchez failed to demonstrate that his children would experience exceptional and extremely unusual hardship alone defeats Calzadilla-Sanchez's request for cancellation. We generally lack jurisdiction to reconsider that discretionary finding. Calzadilla-Sanchez argues that we can reverse that finding because his removal would violate his constitutional rights. But we do not believe his removal violates any constitutional rights.

Accordingly, we affirm the immigration judge's decision denying Calzadilla-Sanchez's request for cancellation because Calzadilla-Sanchez failed to demonstrate that a qualifying relative would experience exceptional and extremely unusual hardship in the event of his removal.

I.

At his removal hearing, Calzadilla-Sanchez testified that he re-entered the United States illegally in March 2002, (six months "after there was a problem with the towers," referring to the attacks on September 11, 2001), after returning to Mexico to see his wife and daughter. On November 7, 2013, the Department of Homeland Security ("DHS") served a Notice to Appear ("NTA") on Calzadilla-Sanchez in person. Calzadilla-Sanchez subsequently appeared before an immigration judge on November 25, 2013. After a 2015 change of venue to Memphis, Tennessee,

Calzadilla-Sanchez was sent a Notice of Hearing in his removal proceedings, which provided the date and time of his hearing before the immigration judge in Memphis.

During Calzadilla-Sanchez's hearings, there were discrepancies concerning when he first entered the United States. During the April 7, 2015, hearing in Memphis, Calzadilla-Sanchez testified that he first entered the country in February 1999. He also claimed at that same hearing that he has been in the United States since 1988. Additionally, Calzadilla-Sanchez was unable to provide his current address to the immigration court, though he disclosed that he was no longer living at the address provided in the application.

Calzadilla-Sanchez testified that he had worked for American Tile in the United States for thirteen years. He did not provide the name of his most recent employer, however, instead testifying simply that he worked "[f]or a company that works with classic tiles." He did not submit any evidence to corroborate his work history. Although he testified during the proceeding that he had tax returns in his truck, he did not have copies for the court or government. His attorney was seemingly unaware that Calzadilla-Sanchez had brought tax returns and told the court he "d[id]n't know how [Calzadilla-Sanchez] got the tax returns[.]" *Id.* at PageID 143. His attorney tried to direct the court's attention to the tax returns on redirect, but the immigration judge refused to admit or consider them because he failed to provide copies. The immigration judge explained that "there were not copies made for the court and no copies for the government and therefore the court declined to accept those documents that were not filed in accordance with the practice manual and did not have copies available to the court and the government." CA6 R. 6-2, Admin. R., Oral Dec., PageID 62.

Calzadilla-Sanchez testified that he and Cecelia Nolasco had three children born in the United States, ages seven, ten, and thirteen. He testified that he financially supported these three

children by providing $600 per month. However, the immigration judge found that he "offered very little in the way of proof that he is in fact . . . these three children's father." Although Calzadilla-Sanchez provided copies of the children's birth certificates, the certificates do not list him as the father. He was unable to provide a clear reason why he was not so identified.

Although they are not married, Calzadilla-Sanchez had previously lived with Nolasco, the mother of his alleged children, at some unspecified point before the immigration proceeding. Calzadilla-Sanchez moved out after he was detained during a roadblock in Mississippi for driving under the influence, which he testified took place in 2014. Although the police department could not find a record of the 2014 DUI arrest, the county jail had a record of an arrest in 2013 that matched his first name and birthdate. Calzadilla-Sanchez therefore has not lived with the Nolasco since 2013 or 2014. He did not ask her to testify on his behalf, although he submitted her affidavit, asserting that he is the father of three of her children, all of whom were born in the United States. Calzadilla-Sanchez testified that he does not "keep a relationship with her anymore."

Calzadilla-Sanchez remains married to a woman in Mexico, who lives with their adult daughter. He still supports both of them financially. He testified that he last saw his wife and daughter in 2001, when he returned to Mexico. When asked why he remained married to her, he testified that this was so that "everything that [Calzadilla-Sanchez] has in Mexico [will] be for her and [his] daughter." Calzadilla-Sanchez is unsure if he could live with his wife and daughter if he returned to Mexico.

The government argued that Calzadilla-Sanchez failed to establish exceptional and extremely unusual hardship because "[h]is children have no serious medical issues," and "are good students," and because Calzadilla-Sanchez "does not live with the children" and "is having conflicts with the mother." *Id.* at PageID 149.

After the hearing, the immigration judge found that Calzadilla-Sanchez's "testimony was consistent, but implausible." CA6 R. 6-2, Admin. R., Oral Dec., PageID 64. The court found that Calzadilla-Sanchez had failed to meet his burden of demonstrating both that (1) he had lived in the United States continuously for ten years before the filing of the NTA and (2) that he had the necessary qualifying relatives, i.e. that Nolasco's three children were his.

The immigration judge also found that, even if Calzadilla-Sanchez had the necessary qualifying relatives, he had not demonstrated that the children would experience exceptional and extremely unusual hardship in the event of his removal. The court found that the potential hardship was "not substantially different from the hardship that would result in any father being removed from the United States who had children in the United States." *Id.*

On appeal, the Board "affirm[ed] the Immigration Judge's determination that [Calzadilla-Sanchez] ha[d] not established his 10-year continuous physical presence in the United States." CA6 R. 6-2, Admin. R., BIA Decision, PageID 3. The Board found that Calzadilla-Sanchez had not adequately argued that he had established a continuous physical presence and had instead relied on the government's alleged concession in its closing argument before the immigration judge. The Board likewise affirmed the immigration judge's determination that Calzadilla-Sanchez had failed to provide evidence of qualifying relatives. Finally, the Board found no clear error in the immigration judge's factual findings concerning whether the children would experience an exceptional and extremely unusual hardship if Calzadilla-Sanchez were returned to Mexico. Calzadilla-Sanchez timely filed this petition for review.

II.

Calzadilla-Sanchez argues that the immigration judge did not have jurisdiction because the November 7, 2013, Notice to Appear did not include the date and time of the proceeding, instead

explaining that the proceeding would take place "on a date to be set at a time to be set." CA6 R. 6-2, Admin. R., Notice to Appear, PageID 226-27. According to Calzadilla-Sanchez, the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)—in which the Court held that a Notice to Appear that did not designate the specific time or place of a removal proceeding did not trigger the INA's "stop-time rule"—implies that an NTA that does not include the date and time of a hearing divests the immigration judge of jurisdiction. Because the Supreme Court's holding was explicitly narrow and because it has long been established in the Sixth Circuit, as well as other courts of appeals, that an NTA may leave the date and time to be set, so long as a separate notice indicates the precise date and time, Calzadilla-Sanchez's argument is without merit. The immigration judge was correct in exercising jurisdiction over the proceeding.

Where the Board affirms an immigration judge's decision, while providing its own comments, this court reviews both the initial immigration judge's decision as well as the Board's opinion. *Guillory v. Lynch*, 630 F. App'x 556, 563 (6th Cir. 2015) (citing *Hachem v. Holder*, 656 F.3d 430, 434 (6th Cir. 2011)). This court reviews issues of subject matter jurisdiction *de novo*. *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 630 (6th Cir. 2006) (applying *de novo* review when determining subject matter jurisdiction over an appeal from BIA's denial of voluntary departure).

"Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). The regulation, however, makes no reference to what the charging document must include to initiate removal proceedings under 8 U.S.C. § 1229a; the regulation simply requires that the charging document "must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed." *Id.* It is otherwise required, in a statute that does not pertain to jurisdiction, that "[i]n removal

proceedings under section 1229(a) of this title, written notice . . . shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying . . . (G)(i) [t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1).

In this circuit, "service of an NTA that indicates that the date and time of a hearing will be set in the future, followed by a successful service of a separate notice specifying the precise date and time of the hearing, satisf[ies] the notice requirements[.]" *Herrera-Orozco v. Holder*, 603 F. App'x 471, 473–74 (6th Cir. 2015); *see also Beltran-Rodriguez v. Holder*, 530 F. App'x 464, 465 (6th Cir. 2013) ("The BIA also properly determined that the alleged deficiencies in the notices to appear did not deprive the IJ of jurisdiction because the petitioners were subsequently notified in writing of the time and date of the hearing.").

Calzadilla-Sanchez argues that the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), effectively overruled this precedent. In that case, the Court considered "[t]he narrow question" of whether an NTA that did not specify the time and place at which the proceedings were to be held triggered the stop-time rule. *Pereira*, 138 S. Ct. at 2110, 2113. Under the "stop-time" rule, the period of time in which a noncitizen is deemed to have lived continuously in the United States ends when the noncitizen is served with an NTA. 8 U.S.C. § 1229b(d)(1). The Court relied upon the relation of § 1229b(d)(1), which provides the stop-time rule, and its reference to § 1229(a), discussed above, which provides the notice requirements. The Court found that "based on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, 'specif[ies]' the 'time and place' of the removal proceedings." *Pereira*, 138 S. Ct. at 2114.

Unlike the "stop-time" rule, there is no cross-reference to § 1229(a) in the regulation governing the jurisdiction of an immigration judge. *See* 8 C.F.R. § 1003.14. This court has already considered and rejected the argument that *Pereira* implicitly overruled this court's precedents permitting two-step notice, holding that "jurisdiction vests with the immigration court where . . . the mandatory information about the time of the hearing is provided in a Notice of Hearing issued *after* the NTA." *Hernandez-Perez*, 911 F.3d at 314–15 (internal citation omitted and emphasis added); *see also Santos-Santos v. Barr*, 917 F.3d 486, 490 (6th Cir. 2019) (holding that *Pereira* did not divest courts of jurisdiction to consider removal proceedings after an NTA failed to include the relevant date and time because *Pereira* concerned the stop-time rule and addressed two statutory provisions that do not pertain to jurisdiction); *Leonard v. Whitaker*, 746 F. App'x 269, 269 (4th Cir. 2018) (holding that *Pereira* does not extend to the issue of whether an NTA that failed to specify a hearing date and time was defective such that an immigration judge would lack jurisdiction); *United States v. Perez-Arellano*, 756 F. App'x 291, 294 (4th Cir. 2018) ("Simply put, *Pereira* did not address the question of an immigration judge's jurisdiction to rule on an alien's removability, and it certainly does not plainly undermine the jurisdiction of the . . . removal proceeding."). Therefore, the immigration judge was correct to assume jurisdiction over Calzadilla-Sanchez's removal proceeding. We likewise have jurisdiction.

III.

Under § 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1), the Attorney General may cancel the removal of a nonpermanent resident if the alien: (1) has been continuously physically present in the United States for ten years preceding the date of the application; (2) has been a person of good moral character during that period of time; (3) has not been convicted of certain offenses; and (4) establishes that his removal would cause exceptional

and extremely unusual hardship to a spouse, parent, or child who is a United States citizen or permanent resident.

The immigration judge found that Calzadilla-Sanchez failed to establish that he had been continuously present in the United States for ten years; that he had the necessary qualifying relatives; and that, assuming that the children he claimed were in fact qualifying relatives, that his removal would cause his children to experience exceptional and extremely unusual hardship. Any one of these findings defeats Calzadilla-Sanchez's request for cancellation.

The government argues that we are without jurisdiction to consider the immigration judge's determination that Calzadilla-Sanchez failed to establish that a qualifying relative would suffer an exceptional and extremely unusual hardship in the event of his removal. This court only has jurisdiction over an immigration judge's non-discretionary decisions. *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 502 (6th Cir. 2008). Because an immigration judge's determination that a noncitizen failed to establish that a qualifying relative would suffer an exceptional and extremely unusual hardship in the event of the noncitizen's removal is discretionary, this court "lack[s] jurisdiction to review a determination that the requisite hardship to a relative was not established in an application for cancellation of removal[.]" *Ximon-Rosales v. Holder*, 596 F. App'x 486, 487 (6th Cir. 2015) (citing *Ettienne v. Holder*, 659 F.3d 513, 517–18 (6th Cir. 2011)). An exception to that general denial of jurisdiction allows for jurisdiction over "constitutional claims of questions of law." 8 U.S.C. § 1252(a)(2)(D).

Calzadilla-Sanchez has failed to assert any persuasive argument that would permit the court to exercise jurisdiction under this exception. He argues that this court has jurisdiction because his hardship to a relative argument raises a constitutional claim. He first argues that his removal would violate his children's liberty interest in association with their parent. Alternatively, Calzadilla-

Sanchez claims that his removal would violate the Equal Protection Clause, because, as Hispanics, his children are members of a suspect classification. Neither contention converts Calzadilla-Sanchez's claim into one over which we possess jurisdiction.

The Sixth Circuit has previously determined that the removal of an alien parent, who is present in the country illegally, does not implicate the constitutional rights of a child who is a United States citizen. *See Newton v. I.N.S.*, 736 F.2d 336, 343 (6th Cir. 1984) (finding "no constitutional rights of citizenship implicated in the decision to deport [the children's parents]"); *see also Ayala-Flores v. I.N.S.*, 662 F.2d 444, 445 (6th Cir. 1981) (per curiam) ("While we recognize that the . . . child enjoys all the rights of United States citizenship . . . we do not agree that deportation of her parents is an unconstitutional abridgement of those rights."). This holding is consistent with other circuits. *See de Chavez v. Holder*, 514 F. App'x 449, 450 (5th Cir. 2013) ("A United States citizen child's constitutional rights are not implicated by the deportation of a parent[.]"); *Flores-Nova v. Att'y Gen. of the U.S.*, 652 F.3d 488, 492–93 (3d Cir. 2011) (finding that deportation of the alien parents of children born in the United States does not violate the constitutional rights of the children to choose their residence); *Martinez-Velasquez v. Holder*, 311 F. App'x 476, 478–79 (2d Cir. 2009) (rejecting petitioner's argument that his removal would violate his son's due process rights); *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007) ("The circuits that have addressed the constitutional issue (under varying incarnations of the immigration laws and in varying procedural postures) have uniformly held that a parent's otherwise valid deportation does not violate a child's constitutional right."); *Naranjo Vasquez v. Gonzales*, 235 F. App'x 652, 653 (9th Cir. 2007) (rejecting petitioner's argument that his deportation would infringe on his family's right to family unity); *Oforgi v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) ("The law is clear that citizen family members of illegal aliens have no

cognizable interest in preventing an alien's exclusion and deportation."); *Gallanosa v. United States*, 785 F.2d 116, 120 (4th Cir. 1986) ("The courts of appeals that have addressed this issue have uniformly held that deportation of the alien parents does not violate any constitutional rights of the citizen children.").

Because Calzadilla-Sanchez's only argument is that his alleged children's constitutional rights are at issue here, "no constitutional right[] of citizenship is implicated." *Newton*, 736 F.2d at 343. Therefore, we are without jurisdiction to consider the immigration judge's discretionary determination that Calzadilla-Sanchez's alleged qualifying relatives would not experience exceptional and extremely unusual hardship.

Our inability to consider that finding requires us to leave it in place. And, because that finding alone defeats Calzadilla-Sanchez's request for cancellation, we need not consider the immigration judge's other findings.

IV.

The Supreme Court's recent decision in *Pereira v. Sessions* did not prevent immigration judges or this court from considering removal proceedings where the Notice to Appear failed to include the date and time of the hearing, so long as the noncitizen receives that information at a later time. We are, however, without jurisdiction to consider the immigration judge's finding that Calzadilla-Sanchez failed to demonstrate that his purported children would experience exceptional and extremely unusual hardship were he removed. Because that finding alone defeats Calzadilla-Sanchez's request for cancellation, the immigration judge's decision denying Calzadilla-Sanchez's request for cancellation is affirmed.