NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued March 3, 2021
Decided March 23, 2021

Before

DANIEL A. MANION, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 20-1834

PHILIP MWANGI KARANJA,
Petitioner,

v.

MERRICK B. GARLAND,
Attorney General of the United States,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals.

No. A099-027-436

O R D E R

Philip Mwangi Karanja, a Kenyan citizen, petitions for review of the denial of his motion to reopen his removal proceedings. He sought to reopen proceedings based on the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which holds that a Notice To Appear before the immigration authorities must specify the time and place of a noncitizen's removal hearing. He argues that he never received a Notice To Appear in compliance with 8 U.S.C. § 1229 and is therefore eligible for cancellation of removal because he has been in the United States continuously for more than 10 years. Matters are not that simple, however. Since Karanja filed his petition, the Supreme Court has taken up a case to resolve a post-*Pereira* circuit split on the question whether a defective Notice can be cured through later notices. *Niz-Chavez v. Barr*, 789 F. App'x 523

(6th Cir. 2019), *cert. granted*, 141 S. Ct. 84 (U.S. June 8, 2020) (No. 19-863). Ordinarily, we would await word from the high court before resolving this kind of case, but in this instance there is no need to do so. Karanja may have suffered prejudice at his hearing as a result of the faulty notice, but he forfeited any challenge on that basis by waiting too long to raise it. We have also recently learned that U.S. Immigration and Customs Enforcement (ICE) has designated him a fugitive for failing to report to immigration officials since 2018. We therefore deny the petition on grounds of both forfeiture and the fugitive-disentitlement doctrine.

Karanja, now 41 years old, entered the United States in 2006 using a friend's passport, student visa, and false identity documents. A few weeks later, police from the University of Illinois at Chicago arrested him for financial identity theft and detained him.

The Department of Homeland Security served Karanja with a Notice To Appear, charging him as removable for having procured his admission into the country by willfully misrepresenting his identity. 8 U.S.C. §§ 1227(a)(1)(A), 1182(a)(6)(C)(i). The Notice did not fix a time and place for his hearing; it said only that he would need to appear "on a date to be set at a time to be set." Five days later, the Chicago immigration court faxed to his custodial officer a Notice of Hearing set for just three days later, October 27, 2006. Karanja says he never received the hearing notice, but correctional officers transported him to the hearing, where he appeared pro se. Unrepresented and uninformed, he admitted to the charges and conceded removability. At the hearing's end, an immigration judge (IJ) ordered him removed to Kenya. Karanja waived his right to appeal.

ICE did not immediately try to carry out the removal order, for reasons that do not appear in the record. Instead, it released him on supervision, which wound up lasting for years. Nine years after his hearing (in 2016) he married a United States citizen and started a family. The same year, his wife filed an I-130 petition on his behalf with the U. S. Citizenship and Immigration Services (USCIS). The agency denied her petition and their administrative appeal was dismissed. See USCIS Case Status, https://egov.uscis.gov/casestatus/landing.do (receipt no. SRC1690351357) (last visited Mar. 22, 2021). Karanja sought review of that decision in the U.S. District Court for the Western District of Washington. *Muita, et al. v. Munita, et al.*,[1] No. 20-cv-01582 (W.D. Wash. filed Oct. 28, 2020). A motion to remand the visa-petition proceedings, filed by

[1] The last name of Karanja's wife was misspelled in the docket of that district court case. Karanja reports that it is spelled "Muita."

the government, is pending before that court. Karanja hopes that the remand will result in approval of his visa petition.

In 2018, Karanja sought reconsideration of his removal order based on *Pereira*, which held that a Notice To Appear that omits the hearing's date and time does not trigger the "stop-time rule" for purposes of cancellation of removal. 138 S. Ct. at 2110. Under this rule, an applicant's accumulation of time toward the necessary 10 years' continuous presence stops when he is served with a Notice To Appear. 8 U.S.C. § 1229b(d)(1). Karanja asserted that the immigration court lacked jurisdiction to order him removed in 2006 because his Notice To Appear omitted the date and time of his hearing.

The IJ denied the motion, citing the decision of the Board of Immigration Appeals in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), which held that *Pereira* does not affect whether jurisdiction vests with an IJ, even when the Notice To Appear is defective, so long as the noncitizen was given a later Notice that furnished the omitted information.

Karanja next moved to reopen his removal proceedings, reiterating his arguments under *Pereira*, so that he could pursue cancellation of removal based on the hardship to his U.S.-citizen wife and children.[2] The IJ denied the motion. The motion, the IJ explained, was untimely because it was filed beyond the 90-day deadline for such motions, 8 C.F.R. § 1003.23(b)(1), and the IJ saw no exceptions that would permit Karanja to cancel removal or adjust his status. The IJ declined to reopen the case sua sponte, given what he characterized as Karanja's "egregious" fraud upon entering the country.

Karanja appealed both denials to the Board. Because he never received the Notice of Hearing, he argued, *Matter of Bermudez-Cota* was irrelevant. And even if a two-step procedure may in theory satisfy the statutory notice requirements, he argued, it did not for him because the Department failed to comply with two rules—first, it erred by faxing the Notice of Hearing to a custodial officer rather than mailing it to Karanja or serving it upon him personally, 8 U.S.C. § 1229(a)(1), and second, it erred by giving him only three days' lead time before his hearing rather than the required ten days, *id.* § 1229(b)(1).

The Board upheld and adopted the IJ's decisions. With regard to Karanja's argument about service, the Board presumed that he received notice because he

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[2] When Karanja moved to reopen his proceedings, he had one stepchild and one biological child. By the time he filed his brief, he had two biological children and was expecting a third in December 2020.

appeared for the hearing. The Board also determined that Karanja's *Pereira*-based jurisdictional argument was foreclosed by *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019), which held that the hearing date-and-time requirement for a Notice To Appear was a claim-processing rule, not a jurisdictional one.

The most serious argument that we glean from Karanja's petition[3] is that the Board misapplied 8 U.S.C. § 1229 when it concluded that the stop-time rule for cancellation of removal was triggered by the faxed Notice of Hearing that supplied the date-and-time details omitted from the Notice To Appear. *Pereira*, he notes, held that a later Notice of Hearing does not cure a deficient Notice To Appear. Because the Notice of Hearing could not cure the defective Notice To Appear, Karanja maintains that he should be allowed to reopen his removal proceedings and pursue cancellation of removal.

In June 2020, the Supreme Court granted certiorari to resolve a split among the circuits on precisely this issue:

> Whether, to serve notice in accordance with section 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.

Niz-Chavez v. Barr, Petition for a Writ of Certiorari, 2020 WL 116160 (Jan. 9, 2020).

Compare *Guadalupe v. Att'y Gen. United States*, 951 F.3d 161 (3rd Cir. 2020) (information must be included in one document); *Banuelos-Galviz v. Barr*, 953 F.3d 1176 (10th Cir. 2020) (same), with *Garcia-Romo v Barr*, 940 F.3d 192 (6th Cir. 2019) (information need not all appear in a single document); *Yanez-Pena v. Barr*, 952 F.3d 239 (5th Cir. 2020) (same). Last November, the Court heard arguments on *Niz-Chavez*, and a decision is pending.

Since the Supreme Court's grant of certiorari, we have been faced with a similar issue in five cases. In three, we decided to hold the matter in abeyance pending the Court's decision. See *Comanescu v. Barr*, Nos. 19-3463 & 20-1867 (7th Cir. July 8, 2020); *Promotor-Isidoro v. Barr*, No. 20-1504, (7th Cir. July 13, 2020); *Zhu v. Barr*, No. 19-3346 (7th Cir. Nov. 19, 2020). In two, we concluded that the noncitizen forfeited an argument

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[3] Karanja devotes much of his brief to arguing that the defects in both notices deprived the immigration court of jurisdiction to order him removed. But this argument is foreclosed by this court's decision in *Ortiz-Santiago*, which explained that a defect in the charging document was not a jurisdictional defect but a "failure to follow a claim-processing rule." 924 F.3d at 966.

that the Notice To Appear was defective by waiting too long to raise the issue, and so the conflict did not drive the outcome. See *Meraz-Saucedo v. Rosen*, 986 F.3d 676, 683–84 (7th Cir. 2021) (noncitizen could not show how he was prejudiced by allegedly defective notice); *Rodriguez v. Rosen*, 832 F. App'x 448, 449 (7th Cir. 2020).

The government, for its part, argues that Karanja forfeited any challenge to a deficient Notice of Hearing by waiting more than a decade to raise this objection. Relying on this court's recent decision in *Chen v. Barr*, 960 F.3d 448 (7th Cir. 2020), which issued 10 days before the Court granted certiorari in *Niz-Chavez*, the government urges that Karanja's untimeliness was inexcusable because, long before *Pereira,* he could have challenged the statutory deficiencies in the Notice To Appear (lacking as it was the hearing's date and time). And, anyway, he had not shown prejudice because proper notice would not have changed the outcome, given his inability at his hearing to satisfy the cancellation-of-removal requirements.

In *Chen*, this court, facing a defective Notice To Appear similar to the one here, asked whether the petitioner "made a timely objection or can show excusable delay and prejudice." 960 F.3d at 451. Determining that the answer to all three was "no," the court held that a petitioner who "allow[s] a procedural error to lurk in the record until the 10 years have passed, and brings it to light only then, has surrendered any opportunity for judicial relief." *Id.* at 452.

Chen did, however, leave the door open a crack: "If [the petitioner] had advanced a plausible argument that she suffered prejudice, we would remand for the Board to consider that possibility." 960 F.3d at 452. Because no such showing could be made in that case ("Chen attended every scheduled hearing and does not explain how the use of two documents rather than one prejudiced her," *id*.), we denied relief. *Ortiz-Santiago* also declined to relieve a similarly situated petitioner of forfeiture, but it did acknowledge possible scenarios of prejudice that might tip the "equities": "This is not a case in which the Notice of Hearing never reached him, or it came so quickly that he had trouble preparing for the hearing, or any other discernible prejudice occurred." 924 F.3d at 964–65.

Karanja's case is closer to the line. The prejudice inquiry focuses not on the ultimate outcome of a case, but on the prejudice the noncitizen suffers at the hearing. *Meraz-Saucedo*, 986 F.3d at 684. Karanja argues the defects in his Notice of Hearing—the failure to get it to him at all, forcing him to fly blind at the hearing, or at best receipt only three days before it instead of the required ten, see 8 U.S.C. § 1229(b)(1)—left him "unable to consider his options in advance, prepare for the hearing, and obtain counsel." Left to fend for himself, he asserts, he admitted the factual allegations,

conceded removability, waived his right to an appeal, and failed to request voluntary departure. His circumstances are distinguishable from many other post-*Pereira* cases in which we have found forfeiture. In the latter group, the petitioners received their Notices of Hearing and appeared, represented by counsel and with time to prepare. See, *e.g.*, *Ortiz-Santiago*, 924 F.3d at 958 (about a month); *Meraz-Saucedo*, 986 F.3d at 680 (seven months); *Chen*, 960 F.3d at 449, 451 (a year and a half).

But prejudice is only one part of the forfeiture analysis; excusable delay also must be shown. And Karanja falls short at that point. Like so many petitioners pre-*Pereira,* he did not timely object to any defects in his Notice To Appear, and he did not choose to pursue relief until *Pereira* issued, many years later. We consistently have rejected the contention that *Pereira* excuses an untimely defective-notice argument. See *Ortiz-Santiago*, 924 F.3d at 964; *Meraz-Saucedo*, 986 F.3d at 683 (surveying cases). The language of the statute has been the same for years.

Nonetheless, in an effort to explore the possibility that Karanja reasonably may have thought that he had no obligation to pursue other remedies while his status was on hold, we asked the parties at oral argument whether, in the years since he was ordered removed, Karanja scrupulously had complied with the government's reporting orders. They were uncertain, but the government now has informed us in a post-argument letter that ICE has designated Karanja a fugitive for failing to report since at least March 2018. If that information is accurate and there are no extenuating circumstances, then it appears that both the rule of forfeiture and the fugitive-disentitlement doctrine, *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728 (7th Cir. 2004), *rehearing denied*, 384 F.3d 916 (7th Cir. 2004), require us to dismiss this petition for review. We offer no opinion about the impact, if any, that this decision has on the parallel proceedings in which Karanja's wife is seeking an I-130 visa. Counsel informs us that USCIS has filed a Motion to Remand those proceedings before the Board, and that Karanja intends to join that motion.

The petition for review is DENIED.