NONPRECEDENTIAL DISPOSITION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 September 13, 2023
Decided December 20, 2023

Before

JOEL M. FLAUM, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 22-2638

BHARANI KUMAR ANANDAKRISHNAN,
Petitioner,

v.

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

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

No. A078-694-259

O R D E R

Bharani Anandakrishnan, an Indian national, lawfully entered the United States in 1996 on a non-immigrant H-1B visa. After working for several years as an IT specialist, Anandakrishnan successfully adjusted his status to that of a lawful permanent resident. In 2007, however, he was convicted in an Illinois court of misdemeanor domestic battery, 720 ILCS 5/12–3.2(a)(1), an offense that made him removable under the immigration laws. See 8 U.S.C. § 1227(a)(2)(E)(i). This led the Department of Homeland Security several years later to initiate removal proceedings against him.

After some initial delay, Anandakrishnan appeared in a Chicago immigration court for a master calendar hearing before an immigration judge. At that hearing,

Anandakrishnan's lawyer, Angela Kwan, sought a continuance. The immigration judge granted the request and, with Anandakrishnan present, orally scheduled Anandakrishnan's removal hearing for March 7, 2018. When that day came, however, neither Anandakrishnan nor his attorney showed up. Declining to delay matters further, the immigration judge ordered Anandakrishnan removed *in absentia*. See 8 U.S.C. § 1229a(b)(5)(A).

In the more than five years that have passed since the entry of that order, Anandakrishnan has sought to stave off removal through a series of motions to reopen—one filed directly with the immigration judge and two more filed with the Board of Immigration Appeals. In this petition for review, Anandakrishnan challenges the Board's denial of a motion for reconsideration he filed after the Board denied his third motion to reopen. Although the procedural history of this case—and the scope of our review—defy easy summary, the necessary resolution is straightforward. We lack jurisdiction to review many of Anandakrishnan's arguments and the rest lack merit.

I

Once entered, *in absentia* removal orders like Anandakrishnan's can be very difficult to rescind. Because Anandakrishnan unquestionably received sufficient notice of the date, time, and place of his removal hearing, see 8 U.S.C. § 1229a(b)(5)(C)(ii), the Immigration and Nationality Act permitted the immigration judge to rescind Anandakrishnan's removal order and reopen his case "only" if Anandakrishnan could demonstrate, in a motion to reopen filed within 180 days, that his "failure to appear was because of exceptional circumstances" that were "beyond [his] control." 8 U.S.C. § 1229a(b)(5)(C), (C)(i), (e)(1); see also *Kay v. Ashcroft*, 387 F.3d 664, 670–71 (7th Cir. 2004) (explaining and applying standard); *Marinov v. Holder*, 687 F.3d 365, 368 (7th Cir. 2012) (same).

Anandakrishnan attempted to make this showing in an initial motion to reopen filed just one week after his removal hearing. In that motion, he explained that he and Ms. Kwan had "confused" his court date with that of another one of her clients and argued that this confusion warranted reopening the prior removal proceeding. As the immigration judge recognized, however, Anandakrishnan's explanation fell far short of the statutory standard because the circumstances he identified were not "beyond [his] control." See *Kay*, 387 F.3d at 670 (quoting 8 U.S.C. § 1229a(e)(1)). Recalling that he gave Anandakrishnan oral notice of the date of his removal hearing—a fact that has at all times remained uncontested, including throughout this appeal—the immigration judge determined that any confusion that arose after Anandakrishnan received that notice was not beyond Anandakrishnan's control. The immigration judge therefore denied the

motion to reopen. Anandakrishnan appealed, but the Board of Immigration Appeals agreed with the immigration judge's ruling.

This disposition dealt Anandakrishnan's prospects for lifting the removal order a serious blow. With an exception not relevant here, non-citizens may file only a single motion to reopen under 8 U.S.C. § 1229a(b)(5)(C). See 8 U.S.C. § 1229a(c)(7)(A). With dwindling options under the INA, Anandakrishnan filed a second motion to reopen in December 2019, this time invoking the Board's *sua sponte* authority to reopen removal proceedings. That power exists by virtue of 8 C.F.R. § 1003.2(a), a regulation which vests the Board with the discretion to "at any time reopen or reconsider a case in which it has rendered a decision." *Id.*

The difficulty for Anandakrishnan, then as now, was that the Board exercises this power only in "exceptional situations." *Matter of J–J–*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997); *Matter of G–D–*, 22 I. & N. Dec. 1132, 1133–34 (B.I.A. 1999) (emphasizing that *sua sponte* reopening is "an extraordinary remedy reserved for truly exceptional situations"). Anandakrishnan attempted to convince the Board that his was such a case by directing attention to his eligibility for cancellation of removal and the hardship removal would cause his family. The Board was not convinced, however, and declined to reopen Anandakrishnan's case.

At this point, Anandakrishnan began to develop doubts about Ms. Kwan's representation. These doubts led Anandakrishnan to meet with, and ultimately retain, new counsel. Anandakrishnan's new lawyer, Robert D. Vinikoor, found the work of his predecessor lacking. Ms. Kwan's alleged deficiencies extended beyond her failure to apprise Anandakrishnan of the date of his removal hearing. By Mr. Vinikoor's measure, Ms. Kwan had also failed to support Anandakrishnan's initial motion to reopen with evidence—a point the immigration judge stressed in denying relief—and made representations to both the immigration judge and the Board that Anandakrishnan believes were self-serving and detrimental to his prospects for relief.

These and other alleged shortcomings lay at the foundation of Anandakrishnan's third motion to reopen, which charged Ms. Kwan with ineffective assistance of counsel and sought reopening to remedy her inadequate representation. The precise arguments advanced in that motion are difficult to discern. As best we can tell, Anandakrishnan principally sought *sua sponte* reopening under 8 C.F.R. § 1003.2(a). But he also sought equitable tolling of the INA's time and number restrictions, which would seem to indicate that he intended to proceed under 8 U.S.C. § 1229a(b)(5)(C)(i) as well.

Not addressing Anandakrishnan's request for equitable tolling, the Board treated the motion as involving only a request for *sua sponte* reopening. So framed, the Board

found for the second time that Anandakrishnan's case—even when considered through the lens of Ms. Kwan's allegedly ineffective assistance of counsel—did not involve the kind of "truly exceptional situation" for which relief under 8 C.F.R. § 1003.2(a) is reserved. It reached this conclusion for two primary reasons. First, in light of Anandakrishnan's receipt of "oral notice of [his] hearing date," the Board was not convinced that Ms. Kwan's alleged ineffectiveness was the "sole[ ]" reason for his failure to appear. And even if it were, the Board found that Anandakrishnan had failed to diligently pursue his claims of ineffectiveness.

Anandakrishnan sought reconsideration, pointing out that the Board had failed to address his request for equitable tolling, and taking issue with the Board's weighing of the evidence bearing on both Ms. Kwan's ineffectiveness and his diligence in bringing the motion. But the Board stuck by its decision to deny relief, holding that Anandakrishnan was not eligible for equitable tolling and declining—for the third time—to exercise its *sua sponte* discretion to reopen the removal proceedings.

The case thus came to us when Anandakrishnan petitioned for review from the denial of reconsideration.

II

Because Anandakrishnan did not petition for review of the Board's denial of his third motion to reopen—opting instead only to seek reconsideration—the only question before us is whether the Board abused its discretion denying that request. See *Lopez-Garcia v. Barr*, 969 F.3d 749, 752 (7th Cir. 2020). We will affirm the decision of the Board unless it "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis, such as invidious discrimination against a race or particular group." *Vyloha v. Barr*, 929 F.3d 812, 815 (7th Cir. 2019) (internal quotation marks omitted).

One notable omission in Anandakrishnan's brief stands out and indeed anchors our analysis. Anandakrishnan mounts no attack on the Board's denial of equitable tolling. This is noteworthy because it is possible to construe both Anandakrishnan's third motion to reopen and his motion for reconsideration as seeking reopening on two, independent bases: statutory reopening under 8 U.S.C. § 1229a(b)(5)(C)(i) and *sua sponte* reopening under 8 C.F.R. § 1003.2(a). Because Anandakrishnan has forfeited any objection to the Board's conclusion that he does not qualify for equitable tolling—a showing he had to make to bring a second, untimely motion to reopen under the INA—he is limited to arguing that the Board abused its discretion by declining to reconsider its denial of *sua sponte* relief. Any uncertainty there might be about the scope of Anandakrishnan's third motion to reopen and his motion for reconsideration is therefore irrelevant.

The challenge for Anandakrishnan is that our jurisdiction to review the Board's denial of *sua sponte* relief is exceedingly narrow. It is well-settled that because "there is no meaningful standard by which to evaluate the exercise of the Board's discretion" under 8 C.F.R. § 1003.2(a), which in any case it is "not require[d] … to exercise," "the merits of the Board's decision to deny a motion to reopen *sua sponte* are unreviewable." *Fuller v. Whitaker*, 914 F.3d 514, 519 (7th Cir. 2019); see also *Anaya-Aguilar v. Holder*, 683 F.3d 369, 372 (7th Cir. 2012); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003). That does not leave Anandakrishnan without any recourse, for we retain jurisdiction to "recognize and address constitutional transgressions and other legal errors that the Board may have committed" en route to exercising its *sua sponte* discretion. *Fuller*, 914 F.3d at 519; see also 8 U.S.C. § 1252(a)(2)(D). But that qualification does mean that any argument directly attacking the merits of the Board's decision to deny *sua sponte* relief or objecting to that decision on purely factual grounds is off limits.

Anandakrishnan's appellate brief is difficult to parse. So far as we can discern, it lodges three challenges to the Board's denial of reconsideration. First, Anandakrishnan contends that the Board abused its discretion by finding that his case does not involve "exceptional circumstances" of the kind appropriate for *sua sponte* relief. Second, Anandakrishnan contends that the Board did not adequately explain the basis for its conclusion that his case is not exceptional. Third, Anandakrishnan takes issue with several factual errors he believes led the Board to deny reconsideration. At oral argument, Anandakrishnan pressed a fourth argument—that the Board engaged in impermissible fact finding in violation of 8 C.F.R. § 1003.1(d)(3)(iv)—but he conceded that this argument was not raised in the briefs. It is therefore waived.

Two of Anandakrishnan's preserved objections—the first and the third—exceed the bounds of our jurisdiction. Anandakrishnan's contention that the Board committed legal error by concluding that his case did not involve "exceptional circumstances" is a direct attack on the merits of the Board's decision to withhold *sua sponte* relief. He attempts to circumvent this jurisdictional barrier by conceptualizing the Board's conclusion that his case is not "exceptional" as a legal prerequisite to the exercise of discretion. In his view, the Board can exercise its discretion *only* after it properly concludes that a non-citizen's circumstances are exceptional.

True enough, the Board has reserved *sua sponte* relief for exceptional cases. Board precedent is clear on this point. See *Matter of J–J–*, 21 I. & N. Dec. at 984; *Matter of G–D–*, 22 I. & N. Dec. at 1133–34. But Anandakrishnan points us to no case in which we or any other circuit court has understood the Board's discussion of "exceptional circumstances" in like cases to establish a legal standard, rather than as simply acknowledging that the

Board exercises its *sua sponte* discretion sparingly. To the contrary, we have, in case after case, described the Board's *sua sponte* discretion as standardless and discretionary. *Anaya-Aguilar*, 683 F.3d at 373 ("[T]he Board has not established any sort of comprehensive standard or list of factors in its case law that it considers when determining whether an extraordinary situation exists in a particular case."); *Fuller*, 914 F.3d at 519 ("[T]here is no law defining what situations will qualify as exceptional."); *Malukas v. Barr*, 940 F.3d 968, 970 (7th Cir. 2019) ("[W]e reiterate ... that, because the board has unfettered discretion to reopen, or not, *sua sponte*, its decision is not subject to judicial review at all.").

To hold that we have jurisdiction to decide for the Board which cases present "exceptional circumstances" and which do not would require us to reject the core rationale for these decisions. This we decline to do. Because Anandakrishnan's first argument is nothing more than a roundabout way of contesting the merits of the Board's exercise of *sua sponte* discretion, it exceeds the bounds of our jurisdiction, and we consider it no further.

We likewise lack jurisdiction to consider Anandakrishnan's factual arguments—the specifics of which we need not discuss in any detail. Although the "wholesale failure to consider evidence" may amount to a legal error reviewable under 8 U.S.C. § 1252(a)(2)(D), see *Huang v. Mukasey*, 534 F.3d 618, 620 (7th Cir. 2008) (citing *Hanan v. Mukasey*, 519 F.3d 760, 764 (8th Cir. 2008)), a run-of-the-mill factual error does not. See *Jezierski v. Mukasey*, 543 F.3d 886, 887–88 (7th Cir. 2008); *Patel v. Holder*, 563 F.3d 565, 569 (7th Cir. 2009). All of Anandakrishnan's factual objections are of this sort—an alleged failure to properly construe the record, not a wholesale failure to consider record evidence. We therefore lack jurisdiction to consider them, seeing as they are relevant, if at all, only to evaluate the basis for the Board's denial of *sua sponte* reopening.

That leaves Anandakrishnan's argument that the Board failed to adequately explain why it declined to exercise its *sua sponte* authority. As Anandakrishnan recognizes, the Board "does not have to 'write an exegesis on every contention.'" *Kebe v. Gonzales*, 473 F.3d 855, 857 (7th Cir. 2007) (quoting *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000)). An explanation is adequate so long as it "'announce[s] [the Board's] decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" *Id.* (quoting *Mansour*, 230 F.3d at 908). In our view, the Board's decision easily clears this bar. The Board's decision is detailed and gives several reasons for its conclusion that Anandakrishnan's case was not "exceptional," chief among them the fact that he received oral notice of the date of his removal hearing from the immigration judge. Having carefully reviewed its order and the accompanying

administrative record, we are of the firm mind that the Board gave careful thought to—and certainly did not reflexively deny—Anandakrishnan's motion for reconsideration.

For these reasons, Anandakrishnan cannot show that the Board abused its discretion—at least not in a way that we have jurisdiction to correct. Accordingly, Anandakrishnan's petition is DISMISSED in part and DENIED in part.