11-27-2019

Maximiliano Bautista v. Attorney General United States

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 19-1126

_____

MAXIMILIANO VENTURA BAUTISTA,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

_____

On Petition for Review from a Final Order
of the Board of Immigration Appeals
Agency No. A206-905-415
Immigration Judge: Daniel A. Morris

_____

Submitted Pursuant to Third Circuit L.A.R. 34.1(a):
September 13, 2019

_____

Before: CHAGARES, JORDAN, and RESTREPO, *Circuit Judges*.

(Filed: November 27, 2019)

_____

OPINION[*]

_____

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

RESTREPO, *Circuit Judge*.

Maximiliano Ventura Bautista petitions for review of a Board of Immigration Appeals ("BIA") final order of removal. Bautista challenges that order on several grounds, which can be summarized into three salient claims: (1) he was served a deficient Notice to Appear ("NTA") that failed to vest jurisdiction in the Immigration Court, (2) the BIA improperly denied his application for asylum and withholding of removal, and (3) the BIA improperly denied him protection under the Convention Against Torture ("CAT"). We disagree and therefore will deny Bautista's petition for review.

I.

Bautista is a native and citizen of Mexico. He entered the United States in June 2004 without a valid entry document. Bautista claims to have come to the United States because of actual harm and threats of violence that he suffered over the course of several years as a result of his indigenous descent and his recruitment to—and ultimate decision not to join—a gang. Bautista also claims to have witnessed and reported a crime, and that this experience resulted in his being beaten by one of the people who had been arrested for that crime.

On November 17, 2017, Bautista was personally served with an NTA that did not state the time and date of his initial hearing. Bautista later received a Notice of Hearing in Removal Proceedings that indicated the time, date, and location of his initial hearing. After attending several hearings, Bautista filed a motion to terminate proceedings for lack of jurisdiction based on the United States Supreme Court's decision in *Pereira v.*

Sessions, 138 S. Ct. 2105 (2018). On July 19, 2018, the Immigration Judge ("IJ") denied Bautista's motion to terminate.

In the interim, on May 10, 2018—fourteen years after his initial entry to the United States—Bautista applied for asylum, withholding of removal, and CAT protection on the basis that he feared returning to Mexico because of the risk of being tortured or killed. Bautista claims he did not apply for asylum within the one-year limit from date of entry because, when he arrived in the United States, he was told that, as a Mexican national, his application would not be granted. However, Bautista claims his asylum application is still timely due to exceptional circumstances; violence in Mexico has escalated and he would not be safe in Mexico if he returns.

On July 24, 2018, the IJ denied Bautista's application for asylum as untimely, and denied Bautista's request for withholding of removal and CAT protection because he failed to meet the standard for relief. Bautista appealed the IJ's decision to the BIA, which dismissed the appeal and issued a final order of removal.

II.

The BIA had jurisdiction to review the decision of the IJ under 8 C.F.R. §§ 1003.1(b)(3) and 1240.15. We have jurisdiction to review the BIA's final order pursuant to 8 U.S.C. § 1252(a). "[W]hen the BIA both adopts the findings of the IJ and discusses some of the bases for the IJ's decision, we have authority to review the decisions of both the IJ and the BIA." *Chen v. Ashcroft*, 376 F.3d 215, 222 (3d Cir. 2004). We review legal questions *de novo* with appropriate deference to the BIA's reasonable interpretation of the Immigration and Nationality Act. *Yusupov v. Att'y Gen.*

of U.S., 518 F.3d 185, 197 (3d Cir. 2008). We review the BIA's findings of fact under the substantial evidence standard. *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 590 (3d Cir. 2011).

III.

A. Claim Regarding the NTA

The applicable regulations require that an NTA contain the time, date, and place of the initial hearing only "where practicable." 8 C.F.R. § 1003.18(b). Bautista's claim that the NTA was defective and thus did not vest jurisdiction in the Immigration Court fails because an NTA that omits the time and date of the initial removal hearing does not void the Immigration Court's jurisdiction as long as a notice of hearing specifying that information is later sent to the individual (as was the case here). *See Nkomo v. Att'y Gen of U.S.*, 930 F.3d 129, 131, 133-34 (3d Cir. 2019).

Contrary to Bautista's assertion, the Supreme Court's decision in *Pereira* does not compel a different result because that case addressed a separate question. The statute at issue in *Pereira* explicitly referred to the NTA requirements in 8 U.S.C. § 1229(a). 138 S. Ct. at 2114. There is no reference to those requirements here. *See Nkomo*, 930 F.3d at 133-34.

B. Claim Regarding Asylum and Withholding of Removal

The BIA concluded that Bautista's asylum application was untimely because it was not filed within one year of Bautista's arrival to the United States, and Bautista was unable to demonstrate that circumstances had changed to such an extent to justify waiting fourteen years to apply for asylum. We do not typically review decisions made by the

executive branch regarding the timeliness of an asylum application. 8 U.S.C. § 1158(a)(3); *Sukwanputra v. Gonzalez*, 434 F.3d 627, 633 (3d Cir. 2006) ("Because judicial review is not constitutionally guaranteed, the judicial review bar of § 1158(a)(3) does not violate the Due Process Clause.").

Notwithstanding the timeliness determination, the IJ and the BIA considered Bautista's testimony as well as the country condition report provided by Bautista and concluded, among other things, that any discrimination or harm he suffered did not rise to the level of persecution. Because Bautista did not demonstrate past persecution or a well-founded fear of future persecution to satisfy the burden for asylum, the IJ and the BIA appropriately found that Bautista also failed to demonstrate it was "more likely than not" that he would suffer persecution to warrant withholding of removal. *See Wu v. Ashcroft*, 393 F.3d 418, 423 (3d Cir. 2005).

C. Claim Regarding Protection under the CAT

The IJ and the BIA properly concluded that Bautista was not entitled to CAT protection. The IJ and the BIA reviewed Bautista's testimony and determined Bautista came to the United States because of violence he faced as a result of his race, his refusal to join a gang in Mexico, and his reporting of a crime he witnessed. However, Bautista did not express fear of torture or harm from the government or the police if he were removed to Mexico and failed to demonstrate that the people who harmed him in the past were acting at the behest of the government or the police. Thus, Bautista failed to meet his burden of showing that he was more likely than not to be tortured if removed to Mexico and that the police or government officials would be involved in, or acquiesce to,

that harm, as is necessary to be granted relief under the CAT. *Sevoian v. Ashcroft*, 290 F.3d 166, 174-75 (3d Cir. 2002) ("An applicant for relief on the merits under the Convention Against Torture bears the burden of establishing 'that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.'" (quoting 8 C.F.R. § 208.16(c)(2)).

IV.

For the reasons stated above, we will deny Bautista's petition for review.