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United States Court of Appeals
Tenth Circuit

August 21, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HIPOLITO ESTRADA-ORTEGA, a/k/a Miguel Estrada, a/k/a Reynel Ortega Estrada, a/k/a Reynel Estrada-Ortega, a/k/a Miguel Aangel Estrada,

Petitioner,

v.

WILLIAM P. BARR, United States Attorney General,

Respondent.

No. 19-9563
(Petition for Review)

ORDER AND JUDGMENT[*]

Before **HARTZ**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

Hipolito Estrada-Ortega petitions for review of the decision of the Board of Immigration Appeals (BIA) denying his request to remand to an immigration judge (IJ) in a cancellation-of-removal proceeding; the government moves to dismiss the petition for lack of jurisdiction. For the reasons explained below, we deny the government's motion and affirm the BIA.

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

Background

Estrada-Ortega is a Mexican citizen who entered the United States in 1998 without legal status. His wife also lacks legal status; together, they have a son and a daughter who are U.S. citizens. Estrada-Ortega also has a stepdaughter living in Mexico. In 2013, the Department of Homeland Security initiated a removal proceeding against him. In response, Estrada-Ortega conceded that he is subject to removal but asked for a cancellation of that removal. *See* 8 U.S.C. § 1229b(b)(1) (allowing cancellation of removal for certain noncitizens who meet listed requirements).

The IJ concluded Estrada-Ortega met the statutory requirements and granted his request for cancellation of removal. As relevant here, that conclusion included a finding that Estrada-Ortega's U.S. citizen children would suffer from "exceptional and extremely unusual hardship" if he were removed from the United States. § 1229b(b)(1)(D). The IJ found that Estrada-Ortega is the sole financial provider for his disabled wife and two U.S. citizen children and that he supports his stepdaughter in Mexico. Because his wife does not work and his U.S. citizen children would remain in the United States, the IJ explained, removing Estrada-Ortega "would not only result in impoverishment, it would result in the breakup of an intact family unit." R. vol. 1, 144. Next, the IJ considered "psychological and educational evidence" of hardship as it pertained to Estrada-Ortega's daughter. *Id.* The IJ noted that, "if she were to accompany her father to Mexico," her academic accomplishments would "suffer significantly" and her career aspirations "would

become unattainable." *Id.* at 145. Further, her teachers said that her father's removal would be "catastrophic" to the whole family. *Id.* Thus, the IJ concluded, Estrada-Ortega had demonstrated the requisite level of hardship to merit cancellation of removal.

The government appealed to the BIA. The BIA first acknowledged that the IJ found that Estrada-Ortega's family would suffer financial hardship if he were removed. But it also explained that the IJ wrongly considered what would happen to his daughter if she went with Estrada-Ortega to Mexico because the children intended to remain in the United States. Thus, under its de novo review and "upon consideration of all relevant factors," the BIA "disagree[d]" with the IJ's conclusion that Estrada-Ortega "met his burden of establishing that his children will face" the requisite level of hardship if he were removed. *Id.* at 60; *see In re Andazola-Rivas*, 23 I. & N. Dec. 319, 323 (B.I.A. 2002) (explaining that "economic detriment alone" does not demonstrate exceptional and extremely unusual hardship).

Estrada-Ortega moved for the BIA to reconsider its decision, arguing that the BIA had impermissibly based its hardship ruling only on economic hardship to his children. As relevant here, he requested that the BIA remand the case so the IJ could clarify its factual findings. The BIA granted his motion to reconsider. It acknowledged that it had not discussed nonfinancial hardships in its decision, but nevertheless found Estrada-Ortega had not met the hardship standard:

> We also understand that this case presents additional hardship relating to understandable concerns about the emotional impact on [Estrada-Ortega's] children that would be created by his absence, particularly given [Estrada-

> Ortega's] belief that his daughter's academic performance will decline without his presence. However, the evidence presented does not demonstrate elevated or unusual emotional or psychological issues which rise to the requisite level of hardship for cancellation[-]of[-]removal purposes. The hardships described by [Estrada-Ortega] consist of the type of hardships that are normally associated with a parent's removal from the United States[] and do not rise to the level of [the] exceptional[-]and[-]extremely[-]unusual standard for cancellation of removal, despite the significance of these issues to the family.

R. vol. 1, 4 (internal citations omitted). It declined to remand the case for additional factfinding because it had "reached a different conclusion based on the same factors." App. vol. 1, 4. Estrada-Ortega petitions for review of the BIA's decision, and the government moves to dismiss the petition for lack of jurisdiction.[1]

Analysis

To obtain cancellation of removal, a removable noncitizen must demonstrate (1) that he or she has been in the United States continuously for 10 years, (2) that he or she has had "good moral character" during that period, (3) that he or she has not been convicted of certain offenses, and (4) that eligible family members will suffer "exceptional and extremely unusual hardship" if he or she is removed. § 1229b(b)(1)(A)–(D). As relevant here, this hardship exists only where eligible family members "would suffer hardship that is substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members" in the United States. *In re Monreal-Aguinaga*, 23 I. & N.

[1] The government urges us to reject Estrada-Ortega's response to its jurisdictional motion because he filed it outside the applicable 10-day deadline. *See* Fed. R. App. P. 27(a)(3)(A). But that deadline does not apply if we "extend[] the time" to file—which is exactly what we did in this case. *Id.* We therefore reject the government's argument.

Dec. 56, 65 (B.I.A. 2001). And "economic detriment alone" does not demonstrate such hardship. *In re Andazola-Rivas*, 23 I. & N. Dec. at 323.

Estrada-Ortega argues that the BIA erred by denying his request to remand and by making factual findings on appeal in violation of its own caselaw, applicable regulations, and his due-process rights; the government argues that we lack jurisdiction to consider his petition.

We begin with this jurisdictional argument. Our jurisdiction is a legal issue we review de novo. *Osuna-Gutierrez v. Johnson*, 838 F.3d 1030, 1033 (10th Cir. 2016). In general, we lack "jurisdiction to review[] any judgment regarding the granting of relief" in cancellation-of-removal proceedings. 8 U.S.C. § 1252(a)(2)(B)(i). Notwithstanding that provision, we do have jurisdiction over two categories of review relevant here. First, we have held that § 1252(a)(2)(B)(i) is limited by § 1252(a)(2)(B)(ii): when read together, those provisions "prohibit review only of those 'judgments' that are discretionary in nature." *Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1149 (10th Cir. 2005) (quoting § 1252(a)(2)(B)(i)). In addition to nondiscretionary determinations, we also have jurisdiction over "constitutional claims or questions of law." § 1252(a)(2)(D).

The government argues that we lack jurisdiction over Estrada-Ortega's appeal because he asks us to review the BIA's discretionary decision: determining if the facts of his case amount to exceptional and extremely unusual hardship. The government is correct that "determining whether removal would cause" such hardship is discretionary, and we therefore lack jurisdiction to consider the merits of

that determination. *Morales-Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003). But the government misunderstands Estrada-Ortega's argument. He does not ask us to decide if the facts of his case meet the hardship standard. Rather, he asks us to decide only whether the BIA violated its own caselaw, applicable regulations, and his due-process rights when it declined his request to remand to the IJ.

Nevertheless, the government argues that we do not have jurisdiction over even this question. First, the government argues that Estrada-Ortega fails to present a colorable constitutional claim. But Estrada-Ortega explicitly argues that the BIA violated his procedural due-process rights by denying him an opportunity to be meaningfully heard when it ignored its regulations and caselaw. *Cf. Schroeck v. Gonzales*, 429 F.3d 947, 952 (10th Cir. 2005) (noting that a petitioner's "minimal" due-process rights in removal proceedings include having "an opportunity to present" his or her case (first quoting *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1292 (10th Cir. 2001))). Next, the government asserts that Estrada-Ortega does not present a question[] of law" under § 1252(a)(2)(D). True, our precedents once suggested that "questions of law" in § 1252(a)(2)(D) were limited to those legal questions that involve statutory construction. *See Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006). But the Supreme Court recently clarified, and the government concedes, that this basis for our jurisdiction is not so narrow. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067, 1073 (2020) (explaining that "questions of law" also extend to mixed questions of law and fact). We subsequently explained that we have jurisdiction to determine whether the BIA "contravene[d] statutory requirements" or

"depart[ed] from or ignore[d] its precedent" when it determines whether a petitioner has met the hardship requirement. *Galeano-Romero v. Barr*, No. 19-9585, 2020 WL 4458998, at *5 (10th Cir. Aug. 4, 2020). And even if we did not have jurisdiction over Estrada-Ortega's appeal under § 1252(a)(2)(D), we have jurisdiction to hear appeals from nondiscretionary BIA decisions, as explained above. *Sabido Valdivia*, 423 F.3d at 1149. The BIA does not have discretion to violate the law. *See Galeano-Romero*, 2020 WL 4458998, at *5("Obviously, the [BIA] would lack discretion to contravene statutory requirements."); 8 C.F.R. § 1003.1(d)(1), (g) (requiring BIA's decisions to be "consistent" with statutes and regulations; explaining that BIA is bound by its own precedent). We therefore have jurisdiction over Estrada-Ortega's assertion that, here, the BIA did just that.

Having concluded that we have jurisdiction, we now consider the merits of Estrada-Ortega's petition. We review the BIA's denial of a request to remand for abuse of discretion. *Banuelos v. Barr*, 953 F.3d 1176, 1179 (10th Cir. 2020). The BIA "abuses its discretion when it makes an error of law." *Id.*

Estrada-Ortega argues that the BIA improperly made its own factual findings instead of remanding to the IJ to make those findings. Generally, the BIA cannot engage in its own de novo factfinding and instead may remand to the IJ if more factfinding is needed. *See* § 1003.1(d)(3)(i), (iv). Because of that "limited fact[]finding authority" on appeal, "[i]f incomplete findings of fact are entered and the [IJ's] decision ultimately cannot be affirmed on the basis that he or she decided the case, a remand of the case for further fact[]finding may be unavoidable." *In re S-*

H-, 23 I. & N. Dec. 462, 465 (B.I.A. 2002). And because "predictive findings of what may or may not occur in the future" are "findings of fact," they may only be made by an IJ. *In re Z-Z-O-*, 26 I. & N. Dec. 586, 590 (B.I.A. 2015).

Estrada-Ortega argues that the IJ did not make predictive findings about the nonfinancial hardship Estrada-Ortega's children might face if he were removed. And, he continues, because the BIA nevertheless made the hardship determination without that predictive factfinding from the IJ, the BIA "must have inferred its own factual findings" when it found that Estrada-Ortega did not demonstrate the requisite level of hardship. Aplt. Br. 19. Thus, he argues, *In re S-H-* required the BIA to remand the case to the IJ to make predictive factual findings in the first instance instead of making the hardship determination itself without those findings from the IJ.

But the IJ's decision in *In re S-H-* is not like the IJ's decision here. There, the BIA explained the IJ's decision had an "almost complete lack of factual findings and legal analysis." *In re S-H-*, 23 I. & N. Dec. at 463. In fact, the BIA noted that the IJ "did not make *any* specific findings of fact." *Id.* (emphasis added). Here, by contrast, the IJ did make predictive factual findings: among others, the IJ found that Estrada-Ortega's deportation would cause financial hardship and "break[ ]up" the family. R. vol. 1, 144. Thus, unlike the "complete lack of factual findings" of any kind in *In re S-H-*, the IJ's decision here contained factual findings, including predictive findings. *In re S-H-*, 23 I. & N. Dec. at 463. And Estrada-Ortega cites no authority that requires the BIA to remand to the IJ to make particular types of factual findings. *Cf.* § 1003.1(d)(3)(iv) ("If further factfinding is needed in a particular case, the [BIA]

may remand the proceeding . . . ." (emphasis added)). We therefore reject Estrada-Ortega's argument that the BIA failed to follow its precedent in *In re S-H-* by not remanding for the IJ to make further predictive factual findings.

Estrada-Ortega also argues that the BIA violated its regulations by finding facts. Specifically, he maintains that the BIA "did no analysis of the IJ's factual findings of non[]financial harm because the IJ made no such findings." Aplt. Br. 20. And, he continues, without such findings from the IJ, the BIA must have made its own findings when it "recognized" the emotional effect Estrada-Ortega's removal would have on his children and "acknowledged" the effect it would have on his daughter's education. Rep. Br. 12-13. To be sure, the BIA's regulations generally prohibit it from making additional factfinding on appeal. *See* § 1003.1(d)(3)(i), (iv). R. vol. 1, 28. But the BIA accepted the characterization of the hardships as "described by" Estrada-Ortega. R. vol. 1, 4. Nevertheless, the BIA explained, even those hardships do not meet the "exceptional[-]and[-]extremely[-]unusual standard for cancellation of removal, despite the significance of these issues to the family." *Id.*; *see In re Monreal-Aguinaga*, 23 I. & N. Dec. at 65; *In re Andazola-Rivas*, 23 I. & N. Dec. at 323. And Estrada-Ortega does not point to any law that prohibits the BIA from concluding that he failed, as a matter of law, to demonstrate the requisite hardship even assuming the facts as "described by" him. R. vol. 1, 4. Accordingly, we reject Estrada-Ortega's argument that the BIA abused its discretion by committing legal error.

Finally, Estrada-Ortega suggests that the BIA violated his due-process rights by making its own factual findings and failing to remand his case for additional factfinding. Noncitizens in removal proceedings are entitled to "minimal procedural due process rights for an 'opportunity to be heard at a meaningful time and in a meaningful manner.'" *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009) (quoting *de la Llana-Castellon v. I.N.S.*, 16 F.3d 1093, 1096 (10th Cir. 1994)). But Estrada-Ortega had such an opportunity on the facts of this case because, as explained above, the BIA followed its regulations and caselaw. And if Estrada-Ortega is instead arguing that the BIA and the IJ should have done more factfinding before making the hardship determination, we do not have jurisdiction over that argument. Although, as noted above, we have jurisdiction over colorable constitutional claims, a "quarrel about the level of detail required in the BIA's analysis" is not such a claim. *Alzainati v. Holder*, 568 F.3d 844, 851 (10th Cir. 2009).

Conclusion

Because we have jurisdiction to hear this appeal, we deny the government's motion to dismiss. But because the BIA did not abuse its discretion in denying Estrada-Ortega's request to remand, we affirm its decision.

Entered for the Court

Nancy L. Moritz
Circuit Judge