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United States Court of Appeals
Tenth Circuit

May 16, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AGNES MUKANTAGARA; EBENEZER SHYAKA,

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; ALEJANDRO MAYORKAS, Secretary; U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS); TRACY RENAUD, Senior Official performing the duties of the Director; DAVID DOUGLAS, District Director, District 32 (Denver); KIN MA, Field Office Director, Salt Lake City,

Defendants - Appellees.

No. 21-4144

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:20-CV-00897-RJS)

Daniel R. Black, Stowell Crayk, PLLC, Salt Lake City, Utah, (Marti L. Jones, Stowell Crayk, PLLC, Salt Lake City, Utah, with him on the brief) for Plaintiffs-Appellants.

Jennifer P. Williams, Assistant United States Attorney, Salt Lake City, Utah, (Trina A. Higgins, United States Attorney, with her on the brief) for Defendants-Appellees.

Before **CARSON**, **BALDOCK**, and **EBEL**, Circuit Judges.

CARSON, Circuit Judge.

Congress set forth a comprehensive scheme for judicial review of removal orders in 8 U.S.C. § 1252(b)(9). This statute bars review of claims arising from actions or proceedings brought to remove an alien. But the Supreme Court has told us this statute is narrow and has cautioned us not to engage in broad readings of § 1252(b)(9)'s jurisdictional provisions.

Plaintiff Agnes Mukantagara, and her son, Plaintiff Ebenezer Shyaka, challenged an unfavorable United States Citizenship and Immigration Services ("USCIS") decision on refugee status. Meanwhile, the government began separate removal proceedings. The district court determined it lacked jurisdiction over the refugee status appeal because of § 1252(b)(9). But the district court read the statute too expansively. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand.

I.

Plaintiffs, Rwandan citizens, escaped to the United States following the 1994 Rwandan genocide. In seeking refugee status, Mukantagara alleged past persecution because of an imputed political opinion arising from the genocide. She alleged an attack and rape, beatings by Rwandan authorities, the murder of her former husband, and false genocide accusations by her neighbors. The United States admitted Mukantagara as a refugee in 2005—when Shyaka was a minor. The United States granted Shyaka derivative refugee status as Mukantagara's minor child. Plaintiffs later applied for Lawful Permanent Resident Status with USCIS. In 2007,

Mukantagara traveled to Kenya on a valid Refugee Travel Document. Upon reentry into the United States, government officials interviewed her and confiscated her refugee admission documents. The government paroled her for further inspection.

In 2016, USCIS issued Plaintiffs a Notice of Intent to Terminate Refugee Status, alleging that Mukantagara did not meet the refugee definition at her admission because she had participated in the genocide. Mukantagara responded to the Notice, denying those allegations. Defendants then issued a Notice to Terminate Refugee Status. Mukantagara's termination in turn necessarily terminated Shyaka's derivative refugee status.

The Department of Homeland Security initiated removal proceedings against Plaintiffs. An immigration judge concluded that the administrative court lacked legal authority to review USCIS's action terminating Plaintiffs' refugee status and could only decide Plaintiffs' new application for asylum. The immigration judge found significant reasons to doubt the genocide accusations against Mukantagara. So the immigration judge granted Mukantagara's new asylum application. But the immigration judge denied Shyaka's application because he was over twenty-one years old—too old to be a derivative of his mother's asylum application. So the law required his application to stand on its own merit. Shyaka conceded his removability to the immigration judge. The immigration judge thus denied his application and ordered him removed to Rwanda.

Shyaka appealed the denial to the Board of Immigration Appeals ("BIA"). And the government appealed the grant of Mukantagara's application. The BIA

affirmed the immigration judge's denial of asylum, withholding of removal, and protection under the Convention Against Torture as to Shyaka. The BIA explained that Shyaka's counsel's concession of removability waived any challenge to removability on appeal. The BIA remanded Mukantagara's claims for the immigration judge to evaluate her credibility and to reconsider his findings. On remand, the immigration judge granted her application. The government again appealed to the BIA.[1] That appeal is pending.[2]

Plaintiffs then filed this suit in the United States District Court for the District of Utah seeking judicial review of the termination of their refugee status. Defendants moved to dismiss, contending that the district court lacked subject matter jurisdiction because the agency action was not final and because of the jurisdiction-stripping provisions of the Immigration and Nationality Act. The district court dismissed the action, concluding that it lacked jurisdiction pursuant to 8 U.S.C. § 1252(b)(9). Plaintiffs appealed.

II.

[1] Shyaka filed a Petition for Review with this Court from the BIA's final decision on his removability. Shyaka v. Garland, No. 21-9583. Shyaka challenged USCIS's termination of his refugee status. We abated that case pending the disposition of Mukantagara's removal proceedings in the immigration court and this appeal.

[2] We note that had the immigration judge's ruling on Mukantagara's new asylum application become final, we would have to confront the mootness doctrine because the immigration judge would have granted her the relief she seeks: asylum. But the government continues to appeal the immigration judge's asylum decision on her new application. Because the government's appeal is pending with the BIA, Mukantagara's appeal here is not moot.

On appeal, Plaintiffs assert that the district court erred in ruling that it did not have subject matter jurisdiction.[3] We review the district court's dismissal for lack of subject matter jurisdiction de novo. Chance v. Zinke, 898 F.3d 1025, 1028 (10th Cir. 2018) (citing Butler v. Kempthorne, 532 F.3d 1108, 1110 (10th Cir. 2008)).

The district court concluded that it lacked jurisdiction under the Immigration and Nationality Act's jurisdiction-stripping "zipper clause," which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from* any *action taken or proceeding brought to remove an alien* from the United States under this subchapter shall be available only in judicial review of a final order under this section. . . .

8 U.S.C. § 1252(b)(9) (emphasis added). The Supreme Court has described this section as a "general jurisdictional limitation" and as an "unmistakable 'zipper' clause," channeling review of all "decisions and actions leading up to or consequent upon final orders of deportation" in the courts of appeal, following issuance of an order of removal.[4] Reno v. Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 482-85 (1999).

In the district court's view, the regulation implementing the Immigration and Nationality Act's provision allowing for the termination of refugee status, 8 C.F.R

[3] Plaintiffs also contend the district court erred in ruling that its decision would not foreclose meaningful review of Plaintiffs' claims and further posit that no other provision bars Plaintiffs' Administrative Procedure Act claims. We need not reach these arguments given our reversal of the district court's subject matter jurisdiction ruling.

[4] We note that Reno's discussion of § 1252(b)(9) is dicta because its holding concerned the Supreme Court's interpretation of 8 U.S.C. § 1252(g).

§ 207.9, constitutes a triggering event that "arises from" an action taken to remove an alien. That regulation provides:

> The refugee status of any alien (and of the spouse or child of the alien) admitted to the United States under section 207 of the Act will be terminated by USCIS if the alien was not a refugee within the meaning of section 101(a)(42) of the Act at the time of admission . . . . There is no appeal under this chapter I from the termination of refugee status by USCIS. Upon termination of refugee status, USCIS will process the alien under sections 235, 240, and 241 of the Act.

8 C.F.R. § 207.9. The district court said Plaintiffs' claims fell within the scope of § 1252(b)(9) because they challenged the decision "to seek removal." And the decision to terminate a refugee status, according to the district court, is a decision to seek removal because the regulation governing refugee status termination requires USCIS to launch removal proceedings upon termination. The mandate to seek removal, the district court said, links the decision to terminate a noncitizen's refugee status to the decision to seek removal. Thus, under the district court's analysis, only the appropriate appellate court could review refugee status termination after all administrative remedies on alien removal have concluded and the administrative courts enter a final order.

We cannot accept the district court's expansive interpretation of § 1252(b)(9). Indeed, the language of the statute leaves no room for debate. The statute's "narrow" scope does not deprive the district court of jurisdiction. DHS v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1907 (2020). Congress did not intend the zipper clause "to cut off claims that have a tangential relationship with pending removal proceedings." Canal A Media Holding, LLC v. USCIS, 964 F.3d 1250, 1257 (11th Cir. 2020)

(quoting J.E.F.M. v. Lynch, 837 F.3d 1026, 1032 (9th Cir. 2016)). A claim only arises from a removal proceeding when the parties in fact are challenging removal proceedings. Id. (citing Regents, 140 S. Ct. at 1907). And 8 C.F.R. § 207.9 does not constitute a triggering event that "arises from" an action taken to remove an alien. The regulation's removal commencement mandate does not convert the decision to terminate refugee status into an action taken to remove an alien. Indeed, the lack of USCIS's discretion to commence proceedings does not bring its prior status termination decision within the statute. Rather, the regulation strips USCIS's discretion whether it should take action to remove an alien under the circumstances.

Plaintiffs do not challenge their removal proceedings. Rather, they challenge USCIS's determination to terminate refugee status. USCIS's decision "is not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order." Regents, 140 S. Ct. at 1907. Put simply, it does not arise from any action taken or proceeding brought to remove an alien from the United States. Thus "the zipper clause's channeling function has no role to play" and it does not bar Plaintiffs' challenge. Canal A Media Holding, 964 F.3d at 1257.

REVERSED AND REMANDED.