

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1945

EDISSON MAURICIO BARROS ANGUISACA,
Petitioner

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA

On Petition for Review of an Order of the Board of Immigration Appeals
(Agency No. 075-808-929)
Immigration Judge: Charles Adkins-Blanch

Submitted Under Third Circuit L.A.R. 34.1(a)
July 10, 2024

Before: KRAUSE, PORTER, and CHUNG, Circuit Judges

(Opinion filed: July 12, 2024)

OPINION*

CHUNG, Circuit Judge.

Edisson Mauricio Barros Anguisaca (“Barros”) petitions for review of a Board of Immigration Appeals (“BIA” or “Board”) order denying his motion to reopen. For the

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

reasons that follow, we will deny the petition in part and dismiss the petition in part.

I. **BACKGROUND**

Barros, a native and citizen of Ecuador, was ordered removed from the United States in 2003. After Barros illegally reentered the country, he was arrested by immigration officers in New York City on July 16, 2018. Barros, through his attorney, then filed a motion to reopen on July 31, 2018. An Immigration Judge (“IJ”) denied the motion on the grounds that (1) Barros filed it outside of the ninety-day window for seeking reopening, (2) Barros had failed to include a cancellation of removal application or present evidence that he met the continuous physical presence requirement for cancellation of removal under 8 U.S.C. § 1229b(b)(1) and 8 C.F.R. § 1003.2(c)(1), and (3) hardship to Barros’s family arising from his removal was not an exceptional circumstance warranting sua sponte reopening. The BIA affirmed the IJ’s decision. Barros then filed his first petition for review.

While Barros’s petition was pending, the Supreme Court decided Niz-Chavez v. Garland, in which it held that a notice to appear for removal proceedings that lacks a hearing date cannot trigger the stop-time rule set forth in 8 U.S.C. §1229b(d)(1) for the continuous physical presence requirement.¹ 593 U.S. 155 (2021). The Department of Homeland Security (“DHS”) filed an unopposed motion with this Court in which it noted that Barros’s 2003 notice to appear did not specify a date or time for the hearing and

¹ Under the stop-time rule, the period of continuous presence is “deemed to end . . . when the alien is served a notice to appear under section 1229(a).” 8 U.S.C. § 1229b(d)(1).

asked for remand “to allow the Board to consider the effect of [Niz-Chavez] on Petitioner’s claim that reopening of his removal proceedings was warranted to allow him to pursue an application for cancellation of removal.” AR 302, 305. A motions panel agreed that remand was appropriate and stated that “the BIA may also consider or reconsider any other issue presented by petitioner’s motion to reopen.” AR 300–01.

On remand, the BIA dismissed Barros’s appeal on the ground that Barros’s 2018 motion was untimely and declined to reopen his proceedings sua sponte. Barros subsequently filed this second petition for review.

II. **DISCUSSION**²

A. Motion to Reopen³

A motion to reopen must be filed within ninety days of a removal order.⁴ See 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The removal order in this case was entered in 2003 and Barros moved to reopen fifteen years later in 2018, unquestionably outside of the ninety-day window. Barros’s motion is therefore time-barred.

² The BIA had jurisdiction over the motion to reopen under 8 C.F.R. § 1003.2. We generally have jurisdiction to review the denial of a motion to reopen pursuant to 8 U.S.C. § 1252(a)(1). See Khan v. Att’y Gen., 691 F.3d 488, 492 (3d Cir. 2012).

³ Motions to reopen are disfavored and are granted only under compelling circumstances. Darby v. Att’y Gen., 1 F.4th 151, 159 (3d Cir. 2021). We review the BIA’s denial of a motion to reopen for abuse of discretion. Sevoian v. Ashcroft, 290 F.3d 166, 174 (3d Cir. 2002). The decision will be reversed only if it is arbitrary, irrational, or contrary to law. Id.

⁴ This time limit does not apply under certain circumstances enumerated in 8 C.F.R. § 1003.2(c)(3), none of which is present here.

Barros argues that the BIA’s consideration of timeliness was improper because the motion panel’s remand order “makes clear that consideration of alleged untimeliness was foreclosed.” Opening Br. 15. This argument fails. As the panel noted when granting the unopposed motion for remand, the BIA could also “consider or reconsider any other issue presented by petitioner’s motion to reopen.” AR 300–01. On remand, the BIA considered the effect of Niz-Chavez on Barros’s case and determined that, even if Barros now had the required continuous physical presence required for cancellation of removal, the untimeliness of his motion to reopen was nonetheless fatal. The BIA’s consideration of timeliness is well within the bounds of the remand order.⁵

Barros argues further that, in agreeing to remand, he believed the BIA would be foreclosed from dismissing his appeal due to untimeliness. In support, Barros argues that the BIA’s first dismissal was not based on timeliness and therefore, on remand, “this waived ground could [not] somehow be brought back from the dead.”⁶ Opening Br. 14. Barros’s argument is easily rejected at the outset as factually inaccurate. The BIA’s 2019 order affirming the IJ specifically noted that Barros “filed an untimely motion to reopen”

⁵ Barros suggests that timeliness was not “presented by [his] motion to reopen” because he did not raise the issue when making his motion—nor would he, because no “person seeking relief would choose to raise the issue of whether his request for relief was timely made.” Opening Br. 15. We reject Barros’s narrow reading of the words “presented by” to mean “raised by” Barros himself. As discussed above, the filing of a motion to reopen by its nature presents the issue of timeliness.

⁶ We note that the government asserted untimeliness and did not waive this basis for dismissal. Barros apparently argues that the *BIA* waived this argument by not addressing it. Parties waive arguments. Courts and administrative tribunals do not and on remand, courts may consider any issue that is encompassed within the remand order.

fifteen years after his removal.⁷ AR 310. As a legal matter, even if the BIA had not so found, nothing foreclosed the BIA from considering timeliness on remand, a fundamental consideration of motions to reopen. See In re G-D-, 22 I. & N. Dec. 1132, 1134 (BIA 1999) (“The motions rules respond directly to the legislative interest in setting meaningful and effective limits on motions and ultimately in achieving finality in immigration case adjudications. Accordingly, we may not casually set those limits aside or otherwise undermine them through the exercise of our independent regulatory power to reopen or reconsider cases.”) In short, we find the BIA did not abuse its discretion when it joined both Barros and the government in concluding that his motion to reopen was untimely and dismissing his appeal.

B. Sua Sponte Reopening

Barros argues in the alternative that the BIA erred by not reopening the removal proceedings sua sponte. The BIA “invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations.” In re G-D-, 22 I. & N. Dec. at 1133–34. A fundamental change in law that is “sufficiently compelling” may constitute such an exceptional circumstance. Id. at 1135. The decision not to reopen proceedings sua sponte is within the BIA’s sole discretion and, as a result, is generally unreviewable. Park v. Att’y Gen.,

⁷ As Barros did not contest the untimeliness of his filing, only the competence of his counsel, the BIA had no need to further discuss this basis for dismissing his appeal.

846 F.3d 645, 651 (3d Cir. 2017). This Court has recognized two limited exceptions to this rule and Barros argues that both apply here.

The first exception to non-reviewability occurs when the BIA's decision not to reopen rests on an incorrect legal premise. Id. (citing Pllumi v. Att'y Gen., 642 F.3d 155, 160 (3d Cir. 2011)). We may remand such cases to the agency to exercise its discretion under the correct legal framework. Id. Here, Barros argues that the BIA failed to recognize that Barros sought reopening based on a fundamental change in the law that makes him eligible for relief—i.e., the Supreme Court's decisions in Niz-Chavez and a second case concerning notice requirements, Pereira v. Sessions, 585 U.S. 198 (2018)—and that this change in law constitutes an exceptional circumstance that warrants sua sponte reopening. The BIA did not conclude that Pereira and Niz-Chavez could not constitute exceptional circumstances; rather, the BIA correctly noted that its assessment of exceptional circumstances is made in light of “all facts and circumstances presented in [a] case” and dismissed Barros's appeal on the unreviewable conclusion that the particular facts and circumstances of Barros's case did not merit reopening. AR 4-5; see Calle-Vujiles v. Ashcroft, 320 F.3d 472, 475 (3d Cir. 2003) (“No language in [8 C.F.R. § 3.2(a)] requires the BIA to reopen a deportation proceeding under any set of particular circumstances. Instead, the provision merely provides the BIA the discretion to reopen immigration proceedings as it sees fit.”) (quoting Anin v. Reno, 188 F.3d 1273, 1279 (11th Cir.1999)); see also Darby v. Att'y Gen., 1 F.4th 151, 165 (3d Cir. 2021) (exception to non-reviewability did not apply because BIA's holding that petitioner's circumstances were not “rare or exceptional” did not rest on a legal determination of her status). The

BIA's decision not to further address Pereira and Chavez does not constitute reliance on an incorrect legal premise and we thus lack jurisdiction to review the BIA's decision pursuant to that exception.

The second exception allows for review if the BIA has "limited its discretion via a policy, rule, settled course of adjudication, or by some other method, such that the BIA's discretion can be meaningfully reviewed for abuse." Park, 846 F.3d at 653. Barros argues that the BIA has limited its own discretion through the Board's "settled course" of reopening sua sponte when presented with a fundamental change in law that makes a movant eligible for relief. To the extent the BIA has limited its discretion through such a policy, that policy only applies when the outcome of the case "turn[s] on the cited change in the law." In re G-D-, 22 I. & N. Dec. at 1135. See also In re X-G-W-, 22 I & N Dec. 71 (BIA 1998) (en banc) (reopening sua sponte based on a fundamental change in law where the IJ concluded that he would have granted the applicant's request for asylum but for the now-abrogated authority). As we have already noted, however, Barros failed to file a timely motion or application. Thus, assuming this exception exists, it is also inapplicable.

Because neither exception to the rule against review applies, we lack jurisdiction to review the BIA's decision not to grant relief sua sponte.

* * *

For the reasons discussed above, we will deny the petition with respect to the motion to reopen and dismiss the petition with respect to the motion for sua sponte reopening.