IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 10, 2020
Lyle W. Cayce
Clerk

No. 19-60347

AMILCAR CASTILLO-DUARTE,

Petitioner

v.

WILLIAM P. BARR, U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A029 577 905

Before DENNIS, ELROD, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:*

Amilcar Castillo-Duarte, a citizen of Guatemala, has twice asked the Board of Immigration Appeals (BIA) to rescind his *in absentia* deportation order[1] and reopen proceedings. It has twice denied him relief. His appeal presents two grounds for reopening the proceeding. He contends that his age at the time of the deportation hearing (15) was reasonable cause for failing to appear. He also argues that the BIA failed to consider evidence that Castillo-

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Because this order issued before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, it used the deportation label rather than removal.

Duarte did not receive the notice to appear. We disagree with his first contention but agree with the second. We thus VACATE and REMAND so the Board can evaluate whether the evidence of nondelivery rebuts the presumption that he received the notice to appear sent by regular mail.

I.

Immigration and Naturalization Service detained Castillo-Duarte near Brownsville, Texas on October 19, 1988. Castillo-Duarte was 15 at the time. The next week, INS set his initial hearing for November 16, 1988, in Texas. A few days after INS set the hearing, it released Castillo-Duarte to reside with his cousin in Los Angeles.

In late November, INS sent notice by regular mail to Castillo-Duarte in Los Angeles that his hearing was rescheduled for early 1989. Castillo-Duarte claims that he never received the notice. Instead, he says that he reported to an INS office in Los Angeles on November 16, 1988, where an officer told him that his file was still in Texas and that his case was "dismissed." When he did not appear for the January hearing in Texas, an immigration judge ordered his deportation. Castillo-Duarte learned of the deportation order in 1997, after obtaining counsel to apply for asylum and, as a spouse of a permanent resident, for a green card.

In 2007, Castillo-Duarte filed a motion to reopen his case on the ground that he never received the hearing notice. But he failed to provide evidence of where he lived at the time of the hearing and that he had not received notice at that address. As a result, the immigration judge denied his motion, and the BIA affirmed.

About a decade later, Castillo-Duarte filed directly with the BIA another motion to reopen his deportation proceeding, arguing that he had not received notice of the hearing and asserting being a minor as reasonable cause for

failing to appear. This time, Castillo-Duarte provided several affidavits to support his claim of nonreceipt. His own affidavit states he had not received notice and that he had obtained counsel in 1997 to seek status that would have been unavailable to him due to the deportation order. An affidavit from his cousin, who lived at the Los Angeles address, says that she never received the notice from the INS. And Castillo-Duarte's wife states in an affidavit that he was "devastated" when he learned about the deportation order.

The BIA denied the motion, concluding that Castillo-Duarte failed to demonstrate he did not receive notice. While the Board stated that it had "reviewed the evidence of record and continue to find that there is a presumption of proper delivery in this case," it did not acknowledge the three affidavits supporting Castillo-Duarte's claim of nondelivery. The BIA instead focused on another argument Castillo-Duarte made: that the notice listed the wrong guardian. The BIA also rejected the notion that being 15 was reasonable cause for not appearing.

II.

We review the BIA's denial of a motion to reopen for abuse of discretion, reviewing legal conclusions *de novo* and factual findings for substantial evidence. *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 815 (5th Cir. 2020). The BIA must grant a motion to reopen a case adjudicated before 1992 if the individual ordered deported in absentia lacked reasonable opportunity to be present for the proceeding or had reasonable cause for his failure to appear. *See* 8 U.S.C. § 1252(b) (1988); *see also United States v. Estrada-Trochez*, 66 F.3d 733, 736 (5th Cir. 1995). An individual who lacks notice of a proceeding does not have a reasonable opportunity to be present. *Estrada-Trochez*, 66 F.3d at 736.

A.

The Board did not abuse its discretion in concluding that Castillo-Duarte's status as a minor was not reasonable cause for his failure to appear. *See generally In re Haim*, 19 I. & N. Dec. 641, 642 (B.I.A. 1988) (discussing source of "reasonable cause" standard that allows reopening proceeding at which party was absent). Very few circumstances rise to the level of "reasonable cause" that will excuse failure to appear at an immigration hearing. One court has held that incarceration does. *See United States v. Munoz-Giron*, 943 F. Supp. 2d 613, 627 (E.D. Va. 2013). Other courts have held that extreme circumstances preventing the individual from knowing about the hearing qualify. *See, e.g., Lahmidi v. I.N.S.*, 149 F.3d 1011, 1017 (9th Cir. 1998) (addressing INS failure to inform of the requirement to provide notice of a change of address); *In re N-K- & V-S-*, 21 I. & N. Dec. 879, 881 (B.I.A. 1997) (finding extreme circumstances when an individual's prior counsel neglected to inform her of the proceedings). But we have concluded that advice from counsel not to attend, *Patel v. U.S. I.N.S.*, 803 F.2d 804, 806 (5th Cir. 1986), and counsel's losing a hearing notice, *Wellington v. I.N.S.*, 108 F.3d 631, 635 (5th Cir. 1997), do not. *See also Shah v. I.N.S.*, 788 F.2d 970, 972 (4th Cir. 1986) (holding that a pending motion to change venue did not excuse failure to appear).

Extending reasonable cause to the status of being a minor at the time of the hearing, without more,[2] would call into doubt all *in absentia* hearings conducted for minors under the pre-1992 statute. Such a holding seems incompatible with the statutory and regulatory scheme addressing the

[2] The BIA characterized Castillo-Duarte's argument as failing to appear "because he was a minor at the time and released on his own recognizance without service of his [order to show cause] on his guardian or other adult." But we need not consider the relevance of other possible circumstances because Castillo-Duarte's appeal focuses only on age itself as reasonable cause.

deportation of minors at the time of Castillo-Duarte's entry. *See generally Flores v. Meese*, 942 F.2d 1352, 1355–57 (9th Cir. 1991) (en banc) (discussing INS release policy for detained minors), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993); *Perez-Funez v. Dist. Dir., I.N.S.*, 619 F. Supp. 656, 658–59 (C.D. Cal. 1985) (discussing INS policy for voluntary departure of minors). To cite an example from current immigration law, notice must be served on an adult only if the person facing removal is under 14. *See Lopez-Dubon v. Holder*, 609 F.3d 642, 645 (5th Cir. 2010) (discussing 8 C.F.R. § 103.5(a)(c)(2)(ii)). Given how narrowly courts interpret reasonable cause, we cannot say the BIA was required to adopt the far-reaching rule Castillo-Duarte urges.

B.

Castillo-Duarte's second argument challenges a procedural aspect of the BIA ruling. He contends it did not consider the evidence he presented to counter the presumption that the Postal Service delivered the notice.

The government may mail notice of an immigration hearing if personal service is not practicable. 8 U.S.C. § 1229(a)(1), (2) (1988); *Hernandez v. Lynch*, 825 F.3d 266, 268 (5th Cir. 2016). Notice is sufficient if it reaches the most recent mailing address provided by the individual. 8 U.S.C. § 1229(b)(5)(A) (1988); *Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009). A strong presumption that notice reached the address arises when the government uses certified mail; a weaker presumption arises when the government uses regular mail, as it did here. *Hernandez*, 825 F.3d at 269. The BIA must consider all relevant evidence that an individual submits to overcome the weaker presumption of service through regular mail, which may include: (1) the individual's affidavit, (2) affidavits from others, (3) the individual's conduct upon learning of the removal order, (4) any prior application for relief showing an incentive to appear, (5) attendance at previous hearings, and (6) any other

circumstances indicating nonreceipt. *See id.* at 270 (citing *In re M-R-A-*, 24 I. & N. Dec. 665, 674 (B.I.A. 2008)). When the BIA fails to consider all relevant evidence, remand is necessary to allow it to perform that task. *Id.* at 271–72.

As discussed, Castillo-Duarte submitted three affidavits bearing on the receipt question. The BIA opinion does not refer to any of those affidavits, either in the text of the decision or in its citations. *Id.* at 270 (noting that the BIA's own precedent requires it to consider "all relevant evidence" (quoting *In re M-R-A*, 24 I. & N. Dec. at 764)). The government nonetheless argues that we should conclude the BIA considered and rejected this testimony from the general statement that "We have reviewed the evidence of record and continue to find that there is a presumption of proper delivery in this case." Without deciding whether such a conclusory statement may sometimes suffice, its appearance in this opinion does not demonstrate that the Board considered the affidavits. For one thing, the statement appears in the middle of a paragraph focused on Castillo-Duarte's argument that the notice did not suffice because it was addressed to the wrong guardian. That argument, which he does not press on appeal, is separate from the one contending that the letter, whomever it was addressed to, was not delivered. The BIA opinion is mostly about the guardian question. Indeed, it described Castillo-Duarte's nonreceipt argument this way: "Specifically, the respondent asserts that the notice of hearing was improperly addressed as it failed to properly identify his guardian." While the BIA also observed that the notice was not returned as undeliverable, its focus on the "wrong guardian" argument prevents us from assuming that the general statement appearing in the middle of the guardian discussion reflects a rejection of the affidavits on credibility grounds. In addition, the opinion does not recognize that the use of regular mail resulted in the weakened presumption that then required the evaluation of any evidence that might

overcome the presumption. *Maknojiya v. Gonzales*, 432 F.3d 588, 589 (5th Cir. 2005).

The BIA's obligation to consider the evidence a petitioner presents to rebut the presumption of delivery does not require it to find that the rebuttal evidence carries the day. As is always true for a factfinder, the BIA gets to assess credibility in deciding whether Castillo-Duarte received notice. *See Mauricio-Benitez v. Sessions*, 908 F.3d 144, 150–51 (5th Cir. 2018) (finding no error in BIA's determination that affidavit did not overcome the presumption of delivery). But its order must demonstrate that it has considered all the evidence before finding it lacking. *Hernandez*, 825 F.3d at 270. Because the order did not do that, we VACATE the decision of the BIA and REMAND for further proceedings consistent with this opinion.