[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11711
Non-Argument Calendar

Agency No. A027-023-733

NGAMBULA KUBINDAMA WABIBI,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(December 8, 2020)

Before NEWSOM, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Ngambula Kubindama Wabibi challenges the Board of Immigration Appeal's (BIA) summary affirmance of an immigration judge's (IJ) denial of her second motion to *sua sponte* reopen her 1990 deportation proceedings. After careful review, we dismiss her petition for lack of jurisdiction.

I

Wabibi, a native and citizen of the Democratic Republic of the Congo, entered the United States in August 1984 on a nonimmigrant visitor visa with permission to remain until February 1985. Wabibi remained in the United States beyond that date, and the former Immigration and Naturalization Services (INS) issued her an Order to Show Cause in December 1989. On May 16, 1990, an IJ determined that Wabibi was deportable and granted her voluntary departure in lieu of a deportation order. In 1992, Wabibi filed her first motion to reopen and reconsider her deportation proceedings, which an IJ denied in 1993.[1]

More than a decade later, Wabibi's adult U.S. citizen children filed with the United States Citizenship and Immigration Services (USCIS) I-130 petitions for an alien relative on Wabibi's behalf. USCIS approved these petitions, but Wabibi

[1] Wabibi's deportation proceeding concluded in 1990, prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (IIRIRA). Therefore, the regulations concerning motions to reopen apply, rather than the statutory successors to those regulations in Immigration and Nationality Act (INA) § 240(c)(7), 8 U.S.C. § 1229a(c)(7). *See Cunningham v. U.S. Att'y Gen.*, 335 F.3d 1262, 1268 (11th Cir. 2003) ("The 'general rule' is that the 1996 amendments do not apply to aliens who are in deportation proceedings prior to April 1, 1997.").

was ultimately unable to adjust her status to that of legal permanent resident (LPR) because of her 1990 deportation order and previously denied motion to reopen.

Wabibi then filed at least two more motions requesting that her 1990 deportation proceedings be reopened *sua sponte*.[2] In October 2015, she filed a motion to reopen *sua sponte* and terminate proceedings with the Atlanta immigration court, which an IJ denied because it was untimely and because Wabibi had not exercised due diligence. Then in March 2018, Wabibi filed the motion now on appeal. In this motion, she claimed that her failure to comply with the 1990 voluntary-departure order "was not an act of defiance" but that she disobeyed the order to protect her U.S. citizen children from having to return to the Democratic Republic of the Congo, which was experiencing political unrest. She acknowledged that her motion for reopening was "outside the normal regulatory provisions of time and number," and requested the IJ exercise discretion to reopen her case *sua sponte*.

The IJ denied Wabibi's motion to reopen, noting that he had considered all evidence in the record, "even if not specifically discussed further in th[e] decision." The IJ found that Wabibi's motion was number-barred and time-barred because 8 C.F.R. § 1003.23(b)(1) permits an alien to file only one motion to

[2] She also filed an earlier request in 2009, but that request was rejected because of defective filing.

reopen within 90 days after the entry of a final order. The IJ also found that Wabibi's motion was not subject to equitable tolling because she could not show that she diligently pursued her rights or was prevented from filing earlier by some extraordinary circumstances. In a single-judge order, the BIA affirmed the IJ's denial of Wabibi's motion to reopen without opinion, making the IJ ruling its decision.

Wabibi now petitions this Court for review of the BIA's final order.[3]

II

On appeal, Wabibi argues (1) that the BIA abused its discretion by failing to provide a reason for rejecting Wabibi's equitable-tolling argument and (2) that "extraordinary circumstances" preventing her from seeking relief at an earlier time because she didn't have a basis to reopen her 1990 deportation proceedings until her U.S.-born children could sponsor her for LPR status.

Before considering Wabibi's arguments, we must determine the scope of our jurisdiction. We lack jurisdiction to review the BIA's decision not to exercise its authority to reopen proceedings *sua sponte* because that decision is committed to agency discretion. *Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008).

[3] We review de novo questions of subject-matter jurisdiction, *Butka v. U.S. Att'y Gen.*, 827 F.3d 1278, 1282 n.4 (11th Cir. 2016), and issues of law, *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1152 (11th Cir. 2019).

Nevertheless, if a petitioner alleges "constitutional claims related to the BIA's decision not to exercise its *sua sponte* power" to reopen, then we "may have jurisdiction" over those claims. *Id*. at 1294 n.7. Finally, we lack jurisdiction to review legal claims related to the BIA's denial of a motion to reopen proceedings *sua sponte*. *See Butka v. U.S. Att'y Gen*, 827 F.3d 1278, 1285–86 (11th Cir. 2016).

Here, because we generally lack jurisdiction to review a *sua sponte* motion to reopen immigration proceedings and because Wabibi does not raise any colorable constitutional claim that we might have jurisdiction to consider, we lack jurisdiction to review the denial of her motion to reopen and any legal arguments she has made in support of that motion. *See id*. at 1286. Because Wabibi's equitable-tolling argument on appeal is a legal challenge related to the BIA's denial of her request to *sua sponte* reopen, we lack jurisdiction to consider this argument.[4]

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[4] Wabibi also argues that the BIA no longer has discretionary authority over motions to reopen because, she argues, the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA) divested the BIA of this discretion. In *Kucana v. Holder*, the Supreme Court determined that the BIA's discretion to grant or deny motions to reopen is "where it was pre-IIRIRA[.]" 558 U.S. 233, 250 (2010). And the Court "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*." *Id*. at 251 n.18. Therefore, the BIA's decision whether to reopen Wabibi's deportation proceedings *sua sponte* remains firmly committed to agency discretion and unreviewable. *See Butka*, 827 F.3d at 1285.

We therefore dismiss Wabibi's petition for lack of jurisdiction.

PETITION DISMISSED.