IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14563-D

MANUEL LEONIDAS DURAN-ORTEGA,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

Before: MARTIN, JORDAN, and NEWSOM, Circuit Judges.

BY THE COURT:

Petitioner Manuel Leonidas Duran-Ortega's emergency motion for a stay of removal is GRANTED. *See Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749 (2009). The American Society of News Editors and other amicus organizations' emergency motion for leave to file an amicus brief is also GRANTED.

MARTIN, Circuit Judge, concurring:

Manuel Leonidas Duran-Ortega, a journalist from El Salvador, seeks an emergency stay of removal from this country. He argues that he has made the requisite showing under Nken v. Holder, 556 U.S. 418, 129 S. Ct. 1749 (2009), to qualify for a stay.[1] I agree. In my view, Mr. Duran-Ortega has raised at least two meritorious arguments that warrant a stay in these circumstances.

First, Mr. Duran-Ortega has made a strong showing that he is likely to succeed on the merits of his argument that the Board of Immigration Appeals ("BIA") erred in denying his motion to reopen immigration proceedings. Ordinarily, noncitizens must move to reopen within ninety days of the "date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(7)(C)(i). However, petitioners may file a motion to reopen past the deadline if they can demonstrate a material change in country conditions through evidence that "was not available and would not have been discovered or presented at the previous proceeding." Id. § 1229a(c)(7)(C)(ii).

Mr. Duran-Ortega argues the BIA erred when it found that country conditions in El Salvador for journalists like himself had not materially changed since 2007. Specifically, he contends the BIA improperly limited its analysis of El Salvador's country conditions to the 2007 and 2017 State Department Reports, to the exclusion of his other evidence, including news reports of increased violence directed towards journalists. Although this Court's review is only preliminary at this stage, Mr. Duran-Ortega has raised a serious legal question concerning the

[1] Under Nken, the legal standards governing a federal court's assessment of a motion for a stay may be "distilled into . . . four factors": "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies." 556 U.S. at 434, 129 S. Ct. at 1761 (quotation marks omitted). Of these, the first two factors "are the most critical." Id. Mr. Duran-Ortega has made a compelling showing on both.

BIA's adjudication of his motion to reopen. As this Court explained in Mezvrishvili v. United States Attorney Gen., 467 F.3d 1292, 1295 (11th Cir. 2006), the agency must give "reasoned consideration" to a petitioner's application and evidence. This necessarily includes "consider[ing] any country conditions evidence submitted by an applicant that materially bears on his claim." Zheng v. Att'y Gen., 549 F.3d 260, 268 (3d Cir. 2008). Although the agency is entitled to "rely heavily on State Department reports about a country," Imelda v. U.S. Att'y Gen., 611 F.3d 724, 728 (11th Cir. 2010), it may not cherry pick information from the reports and ignore contradictory information presented by the petitioner. Tambadou v. Gonzales, 446 F.3d 298, 303–04 (2d Cir. 2006). Here, however, it appears the BIA may have done just that.

For one, the 2007 and 2017 Country Reports seem to differ substantially with respect to their description of El Salvador's freedom of press. The 2007 Report, unlike its 2017 counterpart, does not include a separate section discussing "[v]iolence and [h]arassment" against journalists. Indeed, the 2007 Report's only mention of violence against journalists pertains to complaints that the government did not adequately investigate the death of a journalist in 1997. In contrast, the 2017 Report details at least one occasion when "[a]fter reporting on violence in the country, journalist contacts reported experiencing threats from persons believed to be government officials." The 2017 Report also indicates there have been continued "allegations that the government [has] retaliated against members of the press for criticizing its policies." The 2007 Report contains no such allegations.

For another, the BIA appears to have improperly dismissed the weight of Mr. Duran-Ortega's other evidence. The BIA agreed with the IJ that the news articles Mr. Duran-Ortega put in the record only "establish[ed] the current level of violence against journalists," and that this was insufficient to show a change in conditions from 2007. But this determination seems at odds with

the articles themselves, which point to an uptick in aggression against journalists in recent years. One article notes that El Salvador "reported eight instances of aggression against journalists in 2013," compared to twenty-eight instances in 2014 and one assassination and numerous death threats in the beginning of 2015. Another article explains that "freedom of information [in El Salvador] ha[s] declined since Salvador Sánchez Cerén was installed as president in June 2014" because President Cerén's government is "hostile towards the media and neither protects journalists nor promotes their work." Together, this record indicates the BIA may have improperly truncated its analysis of Mr. Duran-Ortega's motion to reopen by failing to fully consider all the evidence. See Jean-Pierre v. U.S. Att'y Gen., 500 F.3d 1315, 1325–26 (11th Cir. 2007) (remanding because "the BIA omitted from its analysis any review of the most important facts presented in this case"). Moreover, the likelihood the BIA erred in its adjudication of Duran-Ortega's motion to reopen is more than a "mere possibility." Nken, 556 U.S. at 434, 129 S. Ct. at 1761. I believe Mr. Duran-Ortega has made a sufficiently strong showing the BIA may have erred when it denied his motion to reopen.

Although one meritorious argument is enough to satisfy the first Nken factor, Mr. Duran-Ortega's emergency motion for a stay presents a second, equally compelling argument that the agency's *in abstentia* removal order must be rescinded in light of Pereira v. Sessions, 138 S. Ct. 2105 (2018). The governing statute, 8 U.S.C. § 1229(a)(1)(G)(i), requires that a notice to appear ("NTA") "specify[] . . . [t]he time and place at which the proceedings will be held." Once a charging document, such as an NTA, is filed with the immigration court, the court may then exercise jurisdiction over a petitioner's removal proceedings. See 8 C.F.R. § 1003.14 ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." (emphasis added)). The Supreme

Court's recent decision in Pereira appears to suggest, as Duran-Ortega argues, that self-described "notice to appears" issued without a time and place are not, in fact, notice to appears within the meaning of § 1229. 138 S. Ct. at 2113–14. In particular, Pereira emphasized that § 1229 "does not say a 'notice to appear' is 'complete' when it specifies the time and place of the removal proceedings." Id. at 2116. "Rather," the Supreme Court explained, § 1229 "defines a 'notice to appear' as a 'written notice' that 'specifies,' at a minimum, the time and place of the removal proceedings." Id. (alteration omitted) (emphases added). In other words, just as a block of wood is not a pencil if it lacks some kind of pigmented core to write with, a piece of paper is not a notice to appear absent notification of the time and place of a petitioner's removal proceedings.

Pereira's reasoning has led some district courts to conclude that a self-styled "notice to appear" lacking the requisite time and place of the hearing is legally insufficient to vest an immigration court with jurisdiction. See, e.g., United States v. Zapata-Cortinas, 2018 WL 4770868, at *2–3 (W.D. Tex. 2018); United States v. Virgen-Ponce, 320 F.Supp.3d 1164, 1166 (E.D. Wash. 2018). Other district courts have disagreed. See, e.g., United States v. Romero-Colindres, 2018 WL 5084877, at *2 (N.D. Ohio 2018). Most recently, the BIA issued a published decision holding that a defective NTA is sufficient to vest jurisdiction in an immigration court "so long as a notice of hearing specifying this information [on time and date] is later sent to the alien." Matter of Bermudez-Cota, 27 I. & N. Dec. 441, 447 (BIA 2018). This Court, however, need not defer to Bermudez-Cota if the agency's holding is based on an unreasonable interpretation of the statutes and regulations involved, or if its holding is unambiguously foreclosed by the law. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45, 104 S. Ct. 2778, 2782–83 (1984); see also Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997). In light

of Pereira and the various regulations and statutes at issue here, it may well be the case that deference is unwarranted.

As a result, it is clear to me that Mr. Duran-Ortega has presented "a substantial case on the merits" sufficient to satisfy the first Nken factor, given the other three factors "weigh[] heavily in favor of granting the stay." Ruiz v. Estelle, 650 F.2d 555, 565–66 (5th Cir. Unit A 1981).[2]

The second *Nken* factor asks whether Mr. Duran-Ortega would be irreparably injured absent a stay. Here, I am mindful of the likelihood Mr. Duran-Ortega would be physically harmed if he is removed to El Salvador while his appeal remains pending. Prior to fleeing to the United States, Mr. Duran-Ortega worked as a television station manager and reported on corruption in El Salvador's criminal justice and legal system. During his time in the United States, Mr. Duran-Ortega has only increased his visibility in the journalism community for his coverage of Immigration and Customs Enforcement and law enforcement activity. Given his intent to continue working as an investigative, anti-corruption journalist, there is a significant likelihood Mr. Duran-Ortega will be harmed if the government removes him to El Salvador. I agree with Mr. Duran-Ortega that this is sufficient to show irreparable injury. See Leiva-Perez v. Holder, 640 F.3d 962, 969 (9th Cir. 2011).

Where, as here, the government is the opposing party, the third and fourth factors of the Nken test merge. 556 U.S. at 435–36, 129 S. Ct. at 1762. The government and the public undoubtedly have an interest in promptly executing valid removal orders. Id. at 436, 129 S. Ct. at 1762. But there are no circumstances here that would heighten the ordinary public interest in removing Mr. Duran-Ortega. The record does not indicate that Mr. Duran-Ortega was convicted

[2] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. Id. at 1209.

of a crime and there is no evidence that he abused the processes provided to him. Id. To the contrary, it appears Mr. Duran-Ortega served as a community leader and dedicated himself to covering important local events. The balance of the equities thus tips in Mr. Duran-Ortega's favor, given the strong public interest in "preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." Id.

Because Mr. Duran-Ortega has adequately satisfied the *Nken* factors, I agree with my colleagues that a stay is warranted while this Court decides the merits of his appeal.