

18-204
Attipoe v. Barr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: February 6, 2019)

Decided: December 19, 2019)

Docket No. 18-204

EMELI KWASI ATTIPOE, AKA EMELI ATTIPOE, AKA ANDREW
C. MITCHELL,

Petitioner,

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL,

Respondent.

Before: POOLER, LOHIER, and CARNEY, *Circuit Judges.*

Petition for review of the January 18, 2018 decision of the Board of
Immigration Appeals (“BIA”) refusing to accept Emeli Attipoe’s untimely appeal
of an Immigration Judge’s July 8, 2016 order of removal to Ghana. The BIA erred

1 in refusing to consider whether the argument that the appeal deadline, which is
2 nonjurisdictional, is subject to an equitable tolling exception. We find that the
3 appeal deadline is a claim-processing rule amenable to equitable tolling, and we
4 remand to the BIA to develop standards for equitable tolling and to determine
5 whether Attipoe qualifies for equitable tolling under those standards.

6 Petition granted.

7

8 MATTHEW J. MOFFA, Perkins Coie LLP (Gene W. Lee,
9 *on the brief*), New York, NY, *for Petitioner Emeli Kwasi*
10 *Attipoe*.

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12 BRETT F. KINNEY, U.S. Department of Justice, Civil
13 Division, Office of Immigration Litigation (Joseph J.
14 Hunt, Assistant Attorney General, Kohsei Ugumori,
15 Senior Litigation Counsel, *on the brief*), Washington,
16 D.C., *for Respondent William P. Barr*.

17
18 TRINA REALMUTO, American Immigration Council
19 (Kristin Macleod-Ball, *on the brief*), Brookline, MA,
20 *amicus curiae in support of Petitioner*.

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22 POOLER, *Circuit Judge*:

23 Petition for review of the January 18, 2018 decision of the Board of
24 Immigration Appeals (“BIA”) refusing to accept Emeli Attipoe’s untimely appeal

1 of an Immigration Judge's ("IJ") July 8, 2016 order of removal to Ghana. The BIA
2 erred in refusing to consider whether the argument that the appeal deadline,
3 which is nonjurisdictional, is subject to an equitable tolling exception. We find
4 that the appeal deadline is a claim-processing rule amenable to equitable tolling,
5 and we remand to the BIA to develop standards for equitable tolling and to
6 determine whether Attipoe qualifies for equitable tolling under those standards.

7 Petition granted.

8 BACKGROUND

9 Attipoe, a native and citizen of Ghana, entered the United States in 1998 as
10 a lawful permanent resident. In April 2015, Attipoe pled guilty in Connecticut to
11 attempted first-degree larceny in violation of Connecticut General Statutes
12 ("CGS") §§ 53a-49 and 53a-122. He was initially sentenced to three years'
13 imprisonment (execution suspended) and three years' probation, but the
14 sentence was later modified to simply impose a \$1,950 fine.

15 In August 2015, the Department of Homeland Security ("DHS") placed
16 Attipoe in removal proceedings based on his Connecticut conviction. DHS later
17 filed amended charges of removability, ultimately charging Attipoe as removable
18 for his convictions of two or more crimes involving moral turpitude based on

1 both his Connecticut conviction and a 2013 Texas conviction for theft, an
2 aggravated felony involving fraud or deceit in which the loss exceeded \$10,000,
3 and an attempt to commit an aggravated felony. In July 2016, following a
4 hearing, the IJ ordered Attipoe removed.

5 As relevant here, the IJ concluded that Attipoe's attempted larceny
6 conviction under CGS §§ 53a-49 and 53a-122 was an aggravated felony,
7 rendering Attipoe statutorily ineligible for cancellation of removal. In analyzing
8 the issue, the IJ employed a modified categorical approach, delved into the
9 disposition and plea minutes. The IJ determined that Attipoe was convicted of
10 attempting to obtain property in excess of \$10,000 through false pretenses, an
11 aggravated felony under two subsections of 8 U.S.C. § 1101: (a)(43)(M)(i), fraud
12 with loss to victim in excess of \$10,000; (U), attempt to commit aggravated
13 felony. The IJ's decision did not inform Attipoe of his right to appeal or the
14 deadline for doing so, and the cover letter accompanying the decision did not
15 check off the option stating that the IJ's "decision is final unless an appeal is filed
16 with the Board of Immigration Appeals within 30 calendar dates of the date of
17 the mailing of this written decision." App'x at 433.

1 Attipoe received a copy of the IJ's decision from his lawyer, Saul Brown,
2 roughly a week after it issued. Attipoe then called Brown, who told Attipoe he
3 would charge between \$2,000 and \$3,000 to handle Attipoe's appeal. Unable to
4 afford Brown's fee, Attipoe asked around at the detention center for attorney
5 referrals, and someone suggested Michael Reeves. Other detainees vouched for
6 Reeves, and Attipoe contacted him a day or two after speaking with Brown.
7 Attipoe entered into an agreement for Reeves to file a notice of appeal and
8 habeas corpus petition for \$500, and Attipoe's sister paid Reeves on July 19, 2016.
9 Despite numerous attempts to reach Reeves and confirm the filing of the notice
10 of appeal, neither Attipoe nor his family ever heard from Reeves following
11 payment.

12 Attipoe called the BIA shortly before the August 8, 2016 filing deadline to
13 confirm that his appeal was pending, but the BIA clerk told him that a notice of
14 appeal had not been filed. Hoping that Reeves had sent in the appeal, and that it
15 had simply not yet been filed, on August 10, 2016, Attipoe filed a request for stay
16 of removal with the BIA, stating he had an appeal pending. Attipoe also filed a
17 "Request for Emergency Extension" with the BIA on August 19, 2016. On August
18 25, 2016, Attipoe received the BIA's denial of his stay request, which the BIA

1 explained was denied because Attipoe did not have an appeal pending. The BIA
2 also rejected Attipoe's "Request for an Emergency Extension," stating "the
3 regulations set strict deadlines for the filing of an appeal, and the Board does not
4 have the authority to extend the time in which to file a Notice of Appeal." App'x
5 at 64. But the BIA also enclosed the necessary forms for Attipoe to file for an
6 extension of the time to appeal.

7 Attipoe began actively recruiting new counsel, reaching out to
8 immigration attorneys and law clinics, mailing out photocopies of his file, and
9 making telephone calls. Unable to find representation, and acting pro se, Attipoe
10 mailed in his appeal form, an application for a fee waiver, a "Motion to Accept
11 the Notice of Appeal," and an "Emergency Motion for Stay of Removal" on
12 October 21, 2016. He mailed an additional packet of the same material to the BIA
13 via two-day priority mail on October 24, 2016. The BIA received Attipoe's appeal
14 notice on October 27, 2016.

15 In his pro se motion to accept his late-filed appeal, Attipoe argued that the
16 BIA should toll the deadline because it was not jurisdictional; that the attorney he
17 hired to bring his appeal failed to do so; that the equities weighed in Attipoe's
18 favor; and that he was detained, limiting the risk of flight. DHS moved to dismiss

1 the appeal, arguing that there were no exceptional circumstances that warranted
2 the BIA exercising its discretionary authority to accept the appeal via
3 certification. Shortly thereafter, Attipoe obtained counsel, who filed a new notice
4 of appeal, a motion to accept the untimely appeal, and a request for an
5 emergency stay of removal. Attipoe's counseled brief reiterated the arguments in
6 support of equitable tolling and argued that even if his appeal was untimely, the
7 BIA should grant reopening sua sponte given that the IJ's determination of
8 ineligibility for cancellation of removal was erroneous.

9 In January 2018, the BIA dismissed Attipoe's appeal as untimely. The BIA
10 found no "exceptional circumstances meriting acceptance of the respondent's
11 untimely appeal on certification." App'x at 3. The BIA "acknowledge[d]
12 [Attipoe's] arguments on appeal alleging difficulties with the individual hired to
13 file his appeal," but found that Attipoe failed to comply with the necessary
14 requirements to lodge an ineffective assistance of counsel claim under *Matter of*
15 *Lozada*, 19 I. & N. Dec. 637 (BIA 1988). App'x at 4. The BIA noted that Attipoe
16 received the IJ's decision and notice of the option to appeal, and it found that his
17 subsequent filing difficulties did not constitute exceptional circumstances given
18 that he filed his appeal more than two months late. *Id.*

jurisdiction to consider an appeal from that entirely discretionary decision. *Vela-Estrada v. Lynch*, 817 F.3d 69, 70-71 (2d Cir. 2016). However, the gravamen of Attipoe’s appeal is that the BIA erred in not considering his argument that, because the filing deadline under 8 C.F.R. § 1003.38(b) is nonjurisdictional, it is subject to equitable tolling. We review the BIA’s legal conclusions de novo. *Banegas Gomez v. Barr*, 922 F.3d 101, 106 (2d Cir. 2019).

The government argues that the BIA’s failure to consider whether the filing deadline was subject to equitable tolling is irrelevant because the BIA previously held that neither the Immigration and Nationality Act nor the regulations provide the BIA with the authority to extend the 30-day deadline for filing an appeal unless the BIA invokes its self-certification authority. *Matter of Liadov*, 23 I. & N. Dec. 990, 993 (BIA 2006). The government further argues that we are required to defer to its interpretation of its own authority and regulations pursuant to *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency interpretations of their own regulations are “controlling unless . . . plainly erroneous or inconsistent with the regulation[s]”). But filing deadlines are not a matter in which the agency exercises particular technical expertise. *See, e.g., Iavorski v. U.S. I.N.S.*, 232 F.3d 124, 133 (2d Cir. 2000) (“A statute of limitations is not a matter

1 within the particular expertise of the INS. Rather, we consider this a clearly legal
2 issue that courts are better equipped to handle.” (internal quotation marks and
3 citation omitted)).

4 We conclude that the BIA’s reliance on *Liadov* for the proposition that
5 equitable tolling is not available for late-filed appeals under Section 1003.38 is
6 misplaced. *Liadov* is at odds with precedent in this Circuit and in others, as well
7 with the Supreme Court’s repeated admonition not to treat claim-processing
8 rules—such as the filing deadline in 8 C.F.R. § 1003.38—as jurisdictional. *See, e.g.,*
9 *Henderson v. Shinseki*, 562 U.S. 428, 437 (2011) (characterizing the 120-day
10 deadline for filing a notice of appeal with the Veterans Court as a claim-
11 processing rule, and thus nonjurisdictional); *Holland v. Florida*, 560 U.S. 631, 645-
12 46 (2010) (holding that one-year statute of limitations on petitions for habeas
13 relief set by the Antiterrorism and Effective Death Penalty Act of 1996 is subject
14 to equitable tolling); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)
15 (holding that 30-day time period for filing a suit against a federal agency under
16 Title VII is subject to equitable tolling).

1 Section 1003.38 was issued pursuant to Section 545(d)(2) of the
2 Immigration Act of 1990, which instructs the Attorney General to “issue
3 regulations with respect to:”

4 the time period for the filing of administrative appeals
5 in deportation proceedings and for the filing of
6 appellate and reply briefs, which regulations include a
7 limitation on the number of administrative appeals that
8 may be made, a maximum time period for the filing of
9 such motions and briefs, the items to be included in the
10 notice of appeal, and the consolidation of motions to
11 reopen or to reconsider with the appeal of the order of
12 deportation.

13
14 Immigration Act of 1990, Pub. L. No. 101–649, § 545(d), 104 Stat. 4978, 5066.

15 In *Liadov*, the BIA concluded that “[n]either the statute nor the regulations
16 grant [the BIA] the authority to extend the time for filing appeals.” *Liadov*, 23 I. &
17 N. Dec. at 993. The BIA decided it lacks “the authority to extend the appeal
18 time,” and that the only possible cure for a late-filed appeal was for the BIA to
19 find petitioner presented “exceptional circumstances,” which would allow the
20 BIA to accept the appeal pursuant to the self-certification process set forth in
21 8 C.F.R. § 1003.1(c). *Id.* Moreover, *Liadov* makes no reference to the Immigration
22 Act of 1990—and thus does not rely on the statutory text to support its
23 conclusions. It relies exclusively on *United States v. Locke*, 471 U.S. 84 (1985), for

1 the proposition that “[t]he Supreme Court has clearly held that filing deadlines
2 must be strictly applied,” and that “[a]ccording to the Court, ‘[a] filing deadline
3 cannot be complied with, substantially or otherwise, by filing late—even by one
4 day.’” *Liadov*, 23 I. & N. Dec. at 992-93 (quoting *Locke*, 471 U.S. at 101). But even
5 *Locke* acknowledges that “[s]tatutory filing deadlines are generally subject to the
6 defenses of waiver, estoppel, and equitable tolling.” 471 U.S. at 94 n.10. While
7 *Liadov* does not use the word “jurisdictional,” the BIA treats the filing deadline as
8 jurisdictional when it concludes that it lacks the authority to consider a late-filed
9 appeal. Only jurisdictional rules strip a court of its ability to adjudicate a case.
10 See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511-12 (2006); *Irigoyen-Briones v. Holder*,
11 644 F.3d 943, 949 (9th Cir. 2011) (declining to defer to *Liadov* on the ground that
12 “Congress did not set the thirty-day time limit,” such that the appeal filing
13 deadline was “just an administrative claim-processing rule that must be treated
14 as non-jurisdictional”).

15 *Liadov*’s treatment of the appellate filing deadline as jurisdictional goes
16 against the Supreme Court’s admonition that claim-processing rules—including
17 most filing deadlines and statutes of limitation—are not jurisdictional.

18 *Henderson*, 562 U.S. at 435. Claim-processing rules “are rules that seek to promote

1 the orderly progress of litigation by requiring that the parties take certain
2 procedural steps at certain specified times.” *Id.* “Filing deadlines . . . are
3 quintessential claim-processing rules.” *Id.* “[A] rule should not be referred to as
4 jurisdictional unless it governs a court’s adjudicatory capacity, that is, its subject-
5 matter or personal jurisdiction.” *Id.* “Other rules, even if important and
6 mandatory . . . should not be given the jurisdictional brand.” *Id.*

7 To determine if a rule is jurisdictional, courts “look to see if there is any
8 clear indication that Congress wanted the rule to be jurisdictional.” *Id.* at 436.

9 Thus, “[a] rule is jurisdictional if the Legislature clearly states that a threshold
10 limitation on a statute’s scope shall count as jurisdictional.” *Gonzalez v. Thaler*,
11 565 U.S. 134, 141 (2012) (internal quotation marks, citation, and brackets
12 omitted). As explained in *United States v. Kwai Fun Wong*:

13 the Government must clear a high bar to establish that a
14 statute of limitations is jurisdictional. In recent years,
15 we have repeatedly held that procedural rules,
16 including time bars, cabin a court’s power only if
17 Congress has clearly stated as much. Absent such a
18 clear statement, courts should treat the restriction as
19 nonjurisdictional. . . . [T]raditional tools of statutory
20 construction must plainly show that Congress imbued a
21 procedural bar with jurisdictional consequences.
22

1 575 U.S. 402, 409 (2015) (internal quotation marks, citation, brackets, and ellipses
2 omitted). While this “line of authority arose in the context of the courts rather
3 than agencies . . . we find the principle a useful one here as well.” *Ortiz-Santiago*
4 *v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019).

5 Our Court considered the issue of Congress’s intent with regard to Section
6 545(d)(1) of the Immigration Act of 1990 in *Iavorski*. Section 545(d)(1) directs that
7 the Attorney General shall issue regulations with respect to “the period of time
8 in which motions to reopen and to reconsider may be offered in deportation
9 proceedings . . . [including] a maximum time period for the filing of such
10 motions.” Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat.
11 4978, 5066. We examined “the text, structure, legislative history, and purpose of
12 Congress’s 1990 amendment to the INA” and found “no indication, either
13 explicit or implicit, that Congress intended that this limitations period” be
14 jurisdictional. *Iavorski*, 232 F.3d at 130. Observing that “immigration law in
15 general possesses no special status where equitable tolling is concerned,” we
16 rejected the government’s argument that our Court must defer to the BIA’s
17 policy rejecting equitable tolling for motions to reopen. *Id.* at 130 n.4. We held
18 that equitable tolling of the ninety-day filing deadline for motions to reopen

1 removal proceedings was permissible under Section 545(d)(1), because the time
2 limitations at issue were not jurisdictional. *Id.* at 130.

3 Here, as in *Iavorski*, nothing in the text of Section 545(d)(2) itself, or in its
4 legislative history, indicates that Congress intended the appeal filing deadline to
5 be jurisdictional. To the contrary, the House Conference Report states that
6 “[u]nless the Attorney General finds reasonable evidence to the contrary, the
7 regulations must state that administrative appeals be made within 30 days, *except*
8 *that the appellate body may, upon motion, extend such period up to 90 days, if good cause*
9 *is shown by the movant.*” H.R. Rep. No. 101-955 at 133 (emphasis added). The
10 legislative history thus indicates that Congress was amenable to the idea of
11 extending the time to file an appeal past the deadline upon a showing of good
12 cause. And the BIA may, sua sponte, decide to accept late filings under the self-
13 certification process. It could not accept any late filings—exceptional
14 circumstances or not—if the filing deadline truly was jurisdictional.

15 We therefore extend *Iavorski*’s interpretation of Section 545(d)(1) to its
16 sister subsection, Section 545(d)(2), and hold that the BIA must consider the
17 principles of equitable tolling when an untimely appeal is filed and the petitioner
18 raises the issue, as Attipoe did here. We remand to the BIA to consider whether

equitable tolling allows consideration of Attipoe’s late-filed appeal. The BIA is free to develop the factors it will apply in considering equitable tolling, although we note that it need not start from scratch. In *Holland*, the Supreme Court set out standards for courts to apply in determining whether equitable tolling is appropriate: (1) a showing that a petitioner “has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” 560 U.S. at 649 (internal quotation marks omitted). And in the context of a late motion to reopen, we have held that petitioners seeking equitable tolling must demonstrate (1) that their constitutional rights to due process were violated by the conduct of counsel; and (2) that they exercised due diligence during the putative tolling period. *Iavorski*, 232 F.3d at 135; *see also Rashid v. Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008) (requiring that a petitioner prove diligence during “both the period of time before the ineffective assistance of counsel was or should have been discovered and the period from that point until the motion to reopen is filed”); *Cekic v. I.N.S.*, 435 F.3d 167, 170 (2d Cir. 2006) (requiring that petitioner “affirmatively demonstrate that he exercised reasonable due diligence during the time period sought to be tolled”). After it determines what the

standards for equitable tolling under Section 1003.38 are, the BIA should
determine whether Attipoe satisfies those standards.

CONCLUSION

For the reasons given above, the petition is granted, the BIA's decision is
vacated, and this matter remanded to the BIA for further proceedings consistent
with this opinion.