FILED
United States Court of Appeals
Tenth Circuit

August 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FLORIDALMA SUAZO-ESPINALES;
MARIA SARED VASQUEZ-SUAZO;
MILTON JAFET VASQUEZ-SUAZO,

Petitioners,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9587
(Petition for Review)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Floridalma Suazo-Espinales,[1] a native and citizen of Honduras, petitions for review of the decision of the Board of Immigration Appeals (Board) upholding the

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Two of Ms. Suazo-Espinales's children, Maria and Milton Vasquez-Suazo, also are petitioners. We do not discuss them separately because they have joined Ms. Suazo-Espinales's application. *See* 8 U.S.C. § 1158(b)(3)(A).

denial of her applications for asylum and withholding of removal.[2] Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny the petition for review.

BACKGROUND

I. Legal Background

To obtain asylum, an applicant must establish she is a refugee. *See* 8 U.S.C. § 1158(b)(1)(A); *Matumona v. Barr*, 945 F.3d 1294, 1300 (10th Cir. 2019). A refugee is a person who is "unable or unwilling to return to the country of origin 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Rivera-Barrientos v. Holder*, 666 F.3d 641, 645-46 (10th Cir. 2012) (quoting 8 U.S.C. § 1101(a)(42)(A)) (emphasis omitted). "Persecution is the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive and must entail more than just restrictions or threats to life and liberty." *Ritonga v. Holder*, 633 F.3d 971, 975 (10th Cir. 2011) (internal quotation marks omitted). "[P]ersecution may be inflicted by the government itself,

[2] Ms. Suazo-Espinales also applied for relief under the Convention Against Torture (CAT). The Board held that she waived any challenge to the immigration judge's denial of CAT relief by failing to "meaningfully contest" the denial. R. at 3 n.2. Before this court, Ms. Suazo-Espinales again waived any challenge to the denial of CAT relief by failing to challenge the Board's waiver decision in her opening brief. *See Addo v. Barr*, 982 F.3d 1263, 1266 n.2 (10th Cir. 2020). Although Ms. Suazo-Espinales attempts to resurrect her CAT claim in supplemental briefing this court ordered in the wake of *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), *Santos-Zacaria* does not alter the longstanding requirement for parties to present their issues in their opening brief. We therefore do not discuss the CAT claim.

or by a non-governmental group that the government is unwilling or unable to control." *Id.* (internal quotation marks omitted).

In recent years the Attorney General issued three decisions regarding the "unwilling or unable to control" standard. First in 2018 came *Matter of A-B-* (*A-B- I*), 27 I. & N. Dec. 316 (Att'y Gen. 2018). *A-B- I* stated that "[a]n applicant seeking to establish persecution based on violent conduct of a private actor must show more than difficulty controlling private behavior. The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *Id.* at 337 (citation, ellipses, and internal quotation marks omitted). Then in 2021 came a second *A-B-* decision. *See Matter of A-B-* (*A-B- II*), 28 I. & N. Dec. 199 (Att'y Gen. 2021). *A-B- II* held that *A-B- I* "did not alter the 'unable or unwilling' standard." *Id.* at 201. "The complete helplessness language does not depart from the unable or unwilling standard; the two are interchangeable formulations." *Id.* (internal quotation marks omitted). But then later that year, the Attorney General vacated both *A-B- I* and *A-B- II*, stating that "immigration judges and the Board should no longer follow *A-B- I* or *A-B- II* when adjudicating pending or future cases," but instead they "should follow pre-*A-B- I* precedent." *Matter of A-B-* (*A-B- III*), 28 I. & N. Dec. 307, 309 (Att'y Gen. 2021).

As for withholding of removal, "a noncitizen must make a showing similar to that required for an asylum claim." *Addo v. Barr*, 982 F.3d 1263, 1273 (10th Cir. 2020). "But to qualify for withholding of removal, applicants must prove a *clear probability* of persecution on account of a protected ground, a higher standard than

the reasonable possibility showing necessary for asylum claims." *Id.* (internal quotation marks omitted). Thus, if an applicant cannot satisfy the standard for asylum, she necessarily cannot satisfy the standard for withholding of removal. *See Rodas-Orellana v. Holder*, 780 F.3d 982, 987 (10th Cir. 2015).

II. Factual Background and Prior Proceedings

Ms. Suazo-Espinales arrived in the United States with her children in 2016 without being admitted or paroled and without valid entry documents. She then applied for asylum and withholding of removal.

Ms. Suazo-Espinales sought relief based on a fear of harm at the hands of Jorge Suazo, her second cousin. When she left Honduras, Mr. Suazo was a member of the Los Espinoza gang. By the time she had her hearing before the immigration judge (IJ), she understood from relatives in Honduras that he "operate[d] his own criminal enterprise in the Comayagua region, engaging in narco-trafficking, armed robberies, and paying off police and residents of the area to maintain control over the area." R. at 122. In 2013 Mr. Suazo killed Ms. Suazo-Espinales's brother Donaldo because of longstanding personal animosity against him and to gain control over his land. Mr. Suazo continued to threaten the family even after Donaldo's murder. Ms. Suazo-Espinales acknowledged that her family had not reported Mr. Suazo to the police, but she believed the police would not protect the family from Mr. Suazo and his gang because he had bought them off.

The IJ denied relief in 2019, after *A-B- I* but before *A-B- II* and *A-B- III*. Because the harm Ms. Suazo-Espinales feared was from a non-governmental actor,

the IJ stated, "Pursuant to Matter of A-B-, [Ms. Suazo-Espinales] must show that the government condoned Mr. Suazo's actions, or would condone his actions in the future, or at least demonstrated a complete helplessness in protecting [her]." R. at 49. He found Ms. Suazo-Espinales's evidence failed to meet this standard, noting that the newspaper articles she submitted as background evidence showed the Honduran government was taking action against Los Espinoza "and the Court did not receive evidence that the government would limit their enforcement actions to those who are only now currently members of that organization. In fact, the government is actively fighting organized crime perpetrated by other groups." *Id.*

The IJ further stated that "the Court did not receive evidence that the government would be unwilling to help the respondent." R. at 50. He noted that police had responded to reports about members of the Los Espinoza gang, and that there was no evidence that Ms. Suazo-Espinales or her family had ever reported Mr. Suazo's threats to the police. Although she stated any such reports would have been futile, her background articles demonstrated that the police acted against gangs. And she failed to supply either "a basis for [the] belief that Mr. Suazo has bought off the police" or "sufficient persuasive evidence that the police are still being bought off in light of the fact that Mr. Suazo's own situation has changed in Honduras." *Id.*

Acting through a single member, the Board dismissed Ms. Suazo-Espinales's appeal in 2022, after *A-B- II* and *A-B- III*. In light of *A-B- III*, it recognized that "[t]he Attorney General has since vacated *Matter of A-B- I* and instructed Immigration Judges and the Board to apply pre-*Matter of A-B- I* precedent." R. at 4.

The Board concluded, however, that the IJ's reliance on *A-B- I* did not require remand because "[b]ased on the facts presented, even without applying the 'complete helplessness' standard, the Immigration Judge's finding that authorities are not unwilling or unable to assist the respondent is otherwise supported by controlling law and pre-*Matter of A-B- I* precedent." *Id.* The Board further concluded the IJ's findings about the futility of contacting the police were not clearly erroneous.

Ms. Suazo-Espinales now petitions for review.

DISCUSSION

"When a single member of the [Board] issues a brief order affirming an IJ's decision, this court reviews both the decision of the [Board] and any parts of the IJ's decision relied on by the [Board] in reaching its conclusion." *Dallakoti v. Holder*, 619 F.3d 1264, 1267 (10th Cir. 2010) (internal quotation marks omitted). "We consider any legal questions de novo, and we review the agency's findings of fact under the substantial evidence standard." *Matumona*, 945 F.3d at 1300 (internal quotation marks omitted). "Under the substantial-evidence standard, we examine whether the factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Id.* (internal quotation marks omitted). "[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

As previously noted, although the Board recognized that the Attorney General had vacated *A-B- I*, it upheld the IJ's finding that Ms. Suazo-Espinales had failed to

show the Honduran government was unable or unwilling to control Mr. Suazo. Ms. Suazo-Espinales argues that the Board should have remanded the issue to the IJ for consideration under the proper legal standard, or in the alternative it should have applied de novo review.

Ms. Suazo-Espinales contends that by upholding the IJ's finding under "controlling law and pre-*Matter of A-B- I* precedent," R. at 4, the Board engaged in "impermissible fact-finding" by "deciding for itself, in the first instance, the facts under the appropriate legal standard," Pet'rs' Opening Br. at 10. We disagree. Although "the [Board] should not make independent factual findings," here the Board appropriately "relied solely on facts found by the IJ" to conclude under the applicable law that the Honduran government was not unable or unwilling to protect Ms. Suazo-Espinales. *Matumona*, 945 F.3d at 1303; *see* R. at 4 (basing the Board's conclusion on "the facts presented"). "The [Board] did not exceed its appellate authority" in making that determination. *Matumona*, 945 F.3d at 1303; *see also Mena-Flores v. Holder*, 776 F.3d 1152, 1173 (10th Cir. 2015) (holding that the Board did not "engage[] in impermissible fact-finding" when it "merely determined the remaining facts would have led to the same result even without the [IJ's] mistake").

Citing *Kabba v. Mukasey*, 530 F.3d 1239, 1245 (10th Cir. 2008), Ms. Suazo-Espinales next argues that in light of the IJ's legal error, the Board should have reviewed the IJ's finding de novo. But the Board could not do so, because the regulations provide that it "will not engage in de novo review of findings of fact determined by an immigration judge." 8 C.F.R. § 1003.1(d)(3)(i). And *Kabba* offers

no support for Ms. Suazo-Espinales's position. It addressed this court's standard of review, not the Board's. *See* 530 F.3d at 1245. Moreover, this court reversed the Board's decision in *Kabba* precisely because the Board went beyond the limits of clear-error review. *See id.* at 1245, 1249.

Finally, Ms. Suazo-Espinales argues the agency did not "adequately consider [her] individual circumstances" in concluding the Honduran government was not unwilling or unable to protect her. Pet'rs' Opening Br. at 14 (capitalization, bolding, and underlining omitted). She (1) asserts the IJ "ignored key details" in her affidavit, corroborating statements in her family's affidavits, and her background newspaper articles, *id.*; (2) points out weaknesses in the newspaper-article evidence regarding the Honduran government's handling of Los Espinoza; and (3) asserts the Department of State report she submitted is "more credible" and "more reliable" than the newspaper articles she also submitted, *id.* at 16. At their heart, however, all of these assertions ask us to reweigh the evidence, which we cannot do. *See Vladimirov v. Lynch*, 805 F.3d 955, 960 (10th Cir. 2015) ("We neither reweigh the evidence nor assess witness credibility."); *Neri–Garcia v. Holder*, 696 F.3d 1003, 1009 (10th Cir. 2012) ("[I]t is not our prerogative to reweigh the evidence." (internal quotation marks omitted)).

The newspaper articles Ms. Suazo-Espinales submitted, which indicate the Honduran government is taking steps to apprehend and prosecute gang members, *see* R. at 179 (reporting police "have carried out several operations to arrest all the members of Los Espinoza" and members were in prison or fugitives), 186 (reporting

on "armed confrontation" between Los Espinoza and National Police), 187 (reporting that law enforcement continues to search for Los Espinoza members, and the government has offered a reward for the capture of fugitives), 190 (reporting that National Police investigated Los Espinoza and captured its suspected ringleader), 191 (reporting "Honduran security forces are waging a fierce battle with the Espinoza organized crime group in . . . Comayagua"), 197 (reporting "Congress [has] approved a law designed to combat gangs and help security forces capture criminals, including operatives who work for transnational criminal organizations"), are substantial evidence supporting the agency's determination that the Honduran government was not unwilling or unable to protect her, *see Ritonga*, 633 F.3d at 978 (noting that the government of Indonesia was "actively prosecuting those who perpetuated religiously-motivated crimes"). Although the articles focus on Los Espinoza and Mr. Suazo reportedly has left Los Espinoza and formed his own gang, a reasonable adjudicator would not be compelled to conclude that the Honduran government would ignore the activities of gangs other than Los Espinoza.

CONCLUSION

We deny the petition for review.

Entered for the Court

Harris L Hartz
Circuit Judge