

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 20, 2023

Christopher M. Wolpert
Clerk of Court

MARIELA TRUJILLO SAUCEDO; JOSE
L. RIOS MADRIGAL,

Petitioners,

v.

MERRICK B. GARLAND, United States
Attorney General,

Respondent.

No. 22-9560
(Petition for Review)

ORDER AND JUDGMENT*

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

Petitioners, Mariela Trujillo Saucedo and Jose L. Rios Madrigal, are a married couple. They are both citizens of Mexico. In removal proceedings, they applied for asylum and restriction on removal. The immigration judge denied their applications, and the Board of Immigration Appeals (Board) dismissed their appeal. They now petition for review of the Board's decision. We deny the petition.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See Fed. R. App. P. 34(a)(2)*; 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

Background

Asylum and restriction on removal protect people who face persecution in their home country on account of any of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group. *See Rodas-Orellana v. Holder*, 780 F.3d 982, 986 (10th Cir. 2015). Petitioners sought relief under the theory that they face persecution in Mexico on account of their membership in particular social groups comprising their immediate families.¹

Petitioners submitted declarations describing why they feared persecution in Mexico. They had returned to Mexico in 2009 after raising a family for several years in the United States. For a time, life for them was good in Mexico. They farmed, ran a chicken business, and rented several houses.

But problems eventually emerged. Many of the problems came from Mr. Rios Madrigal's brother Fernando. Fernando had been deported to Mexico after serving prison time in the United States for selling drugs. Mr. Rios Madrigal suspected Fernando was selling drugs once again back in Mexico. One day Fernando accused Mr. Rios Madrigal of stealing \$25,000 from him while they were in the United States. On another occasion, armed with two pistols, Fernando threatened to kidnap Ms. Trujillo Saucedo to extort money from Mr. Rios Madrigal.

¹ Ms. Trujillo Saucedo cited her membership in the groups made up of the immediate relatives of her husband (Mr. Rios Madrigal) and the immediate relatives of her daughter (Jessica). Mr. Rios Madrigal cited his membership in the groups made up of the immediate relatives of his brother (Fernando) and the immediate relatives of his daughter (Jessica).

Mr. Rios Madrigal heard that Fernando had become involved with a local drug cartel. Petitioners' daughter Jessica learned this information too, and she passed it along to Fernando's wife. Complaining about Jessica's gossip, Fernando accosted Ms. Trujillo Saucedo twice. He also threatened Jessica directly, saying "that he would take her if she did not" stop talking to his wife online. R. vol. 1 at 282–83. Petitioners learned that Fernando had told another family member that he was going to kill Jessica.

In addition to the problems related to Jessica, cartel members started demanding that Mr. Rios Madrigal give them money and a gun they thought he owned. But he did not own a gun. His father had once owned a gun, but he had recently sold it. Fernando himself approached Mr. Rios Madrigal to collect the money and the gun. Mr. Rios Madrigal responded that he had neither the gun nor the money. Fernando later told Mr. Rios Madrigal that the cartel was "going to come for" Mr. Rios Madrigal and his family because he had not complied with its demands. *Id.* at 285. Petitioners then hid in a relative's house, but armed men arrived at the house and pounded on the door. The next morning, Petitioners fled to the United States.

The immigration judge concluded that the threats against Petitioners amounted to persecution. Although the order is not clear on this point, it seems the immigration judge either concluded or assumed that Petitioners' particular social groups were cognizable. The order does make clear, however, that the immigration judge found that the reason for the persecution was not Petitioners' membership in a particular

social group. The immigration judge found that Fernando made threats out of anger over Jessica's gossip and a desire for money and a gun. The immigration judge similarly found that the cartel was motivated by a desire for money and a gun, not by Petitioners' familial relationships. Having concluded that Petitioners failed to show persecution on account of a protected ground, the immigration judge denied their applications for asylum and restriction on removal.

The Board affirmed the denials and dismissed Petitioners' appeal. It found that Fernando and the cartel targeted Petitioners not on account of their family memberships, but instead because of desires to obtain money and a gun, and to stop Jessica's gossip.

Discussion

Petitioners primarily argue that the agency applied the wrong legal standard to determine that they had not been persecuted on account of their membership in a particular social group. Although the Board incorrectly paraphrased one of our cases on the topic, we conclude that it nevertheless applied the correct standard. And we uphold its factual findings about the persecutors' motives.

A single Board member issued a brief order affirming the immigration judge's decision in this case, so the Board's order is the final agency decision. *See Takwi v. Garland*, 22 F.4th 1180, 1184 (10th Cir. 2022). Although we limit our review to the grounds appearing in the Board's decision, we may consult the immigration judge's more detailed explanation of those grounds. *See id.*

We review de novo whether the Board applied the correct legal standard. *See Brue v. Gonzales*, 464 F.3d 1227, 1232 (10th Cir. 2006). And we review its factual findings for substantial evidence, meaning we will treat those findings as “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” *Dallakoti v. Holder*, 619 F.3d 1264, 1267 (10th Cir. 2010) (internal quotation marks omitted).

The key issue in this case is whether Petitioners suffered or fear persecution *on account of* their memberships in particular social groups. An asylum applicant must show that a protected ground (the relevant ground here being membership in a particular social group) “was or will be at least one central reason for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i).² “This means that the protected ground cannot play a minor role in the applicant’s past mistreatment or fears of future mistreatment. That is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm.” *Orellana-Recinos v. Garland*, 993 F.3d 851, 855 (10th Cir. 2021) (brackets and internal quotation marks omitted).

The persecutor’s motive is critical in this analysis. *See id.* at 856. For persecution to qualify as having occurred on account of a protected characteristic, the “protected characteristic must have motivated the persecutor to harm the applicant.” *Id.* at 855–56 (internal quotation marks omitted).

² Restriction on removal similarly requires a nexus between the persecution and a protected ground. *See Rodas-Orellana*, 780 F.3d at 987.

Addressing an asylum claim alleging persecution on account of membership in a family, the Board has said that “the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground.” *Matter of L-E-A-*, 27 I. & N. Dec. 40, 45 (B.I.A. 2017).³ Citing *Matter of L-E-A-*, we recognized in *Orellana-Recinos* the Board’s view that membership in a particular social group “should not be considered a *motive* for persecution if the persecutors are simply pursuing their distinct objectives and a victim’s membership in the group is relevant only as a means to an end—that is, the membership enables the persecutors to effectuate their objectives.” 993 F.3d at 856.

Petitioners cite the Board’s attempt to paraphrase these principles to argue that it applied the wrong standard. In this case, the Board paraphrased *Orellana-Recinos* as having said “that where a gang threatens family members as a means to achieve an end, such threats are unrelated to a protected ground.” R. vol. 1 at 5. That statement

³ The Board’s decision in *Matter of L-E-A-* was overruled in part on other grounds by *Matter of L-E-A-*, 27 I. & N. Dec. 581, 581 (Att’y Gen. 2019), a decision that itself was later vacated by *Matter of L-E-A-*, 28 I. & N. Dec. 304, 304 (Att’y Gen. 2021). Through all this, the Board’s nexus analysis in *Matter of L-E-A-* has remained good law. And we will not now consider the argument in Petitioners’ reply brief urging us to reject the Board’s nexus analysis in *Matter of L-E-A-* as arbitrary and capricious. Not only did Petitioners fail to raise the argument in their opening brief, but they affirmatively asserted that we “need not consider” whether we should defer under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), “to the principle from *Matter of L-E-A-*.” Pet’rs’ Opening Br. at 29. By expressly forgoing the argument in their opening brief, Petitioners waived it. See *In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1181 (10th Cir. 2023).

is not accurate. When threats are a means to achieve an end, whether the threats relate to a protected ground will often depend on what end the persecutor seeks to achieve. Threats made to achieve the end of exterminating a family, for example, would obviously be made on account of the victim's membership in the family. And so we agree with Petitioners that *Orellana-Recinos* does not support the principle that the Board's order attributed to it.

But although the Board mischaracterized *Orellana-Recinos*, we conclude that it nevertheless applied the correct standard. The Board upheld the immigration judge's finding that Petitioners had not suffered persecution on account of their family memberships. In doing so, the Board found that Fernando and the cartel threatened Petitioners not on account of their family memberships, but on account of the persecutors' desires for money and a gun, and to stop Jessica from telling Fernando's wife about his ties to the cartel. The Board further found that Petitioners identified no evidence indicating that Fernando would continue to target them if he achieved his desired ends.⁴ In other words, the Board considered the persecutors' actual motives. The Board did not simply affirm based on the idea that the persecutors threatened Petitioners as a means to achieve an end without going further and considering what end they sought to achieve.

⁴ This finding refutes Petitioners' claim that the agency never "considered whether the evidence in this case established that the persecution would continue, absent the motives identified by the" immigration judge. Pet'rs' Opening Br. at 30.

For similar reasons, we reject Petitioners’ argument that the Board focused too much on “factual conclusions grounded in the records of other cases.” Pet’rs’ Opening Br. at 21. Although the Board cited several asylum cases and discussed *Orellana-Recinos*, it did not “substitute” the analysis of those cases “for a careful review of the actual record” in this case. *Id.* at 21–22.⁵

Nor do we agree with Petitioners’ claim that the Board overlooked legal error by the immigration judge. Although the immigration judge described Fernando as “a bad actor,” R. vol. 1 at 57, the immigration judge did not, as Petitioners suggest, infer from that characterization that Fernando *could not* persecute someone on account of a protected ground. The immigration judge found simply that he *did not* persecute Petitioners on account of a protected ground. And we see no support for Petitioners’ claim that the immigration judge believed that a persecutor’s having one motive unrelated to a protected ground necessarily prevents him or her from having yet another motive related to a protected ground.⁶

⁵ Pointing to minor discrepancies between the immigration judge’s and the Board’s factual descriptions, Petitioners suggest that perhaps the Board improperly reviewed de novo the immigration judge’s findings. Pet’rs’ Opening Br. at 22–23. We are not persuaded. The Board expressly purported to review the immigration judge’s factual findings for clear error, and we see no reason to think it departed from that standard.

⁶ Making a related point, Petitioners highlight that the immigration judge said Fernando had turned “against his family.” R. vol. 1 at 57. But Petitioners take this statement out of context. Far from suggesting that Fernando harbored some animus against his family per se, the immigration judge found that his reasons for “turning against his family were” personal anger, a belief that Mr. Rios Madrigal owed him money, or a belief that he could obtain money and weapons from Petitioners. *Id.*

On this record, we must uphold the finding that Petitioners did not suffer persecution on account of their family memberships. Petitioners' own evidence amply supports the agency's findings about what motivated Fernando and the cartel. We acknowledge the evidence that Fernando attacked and threatened other members of the family. But Petitioners fail to identify any evidence compelling the conclusion that any of Fernando's behavior arose from animus against the family itself.

Petitioners insist that the persecution against them was "not random." Pet'rs' Opening Br. at 19. In other words, they say, they never would "have been targeted for persecution had they not been members of their particular family." *Id.* at 20. Although it is fair enough to say that the persecution was not random, it does not ineluctably follow that Petitioners would have escaped persecution but for their family memberships. The agency could properly infer that the cartel would have extorted anyone thought to have money or a gun. And the agency could similarly infer that Fernando would have pressured anyone with sufficient influence over Jessica, not only members of her family, to get her to stop gossiping about him.

That is why focusing on Petitioners' traits, as Petitioners urge us to do, does not change the outcome. Petitioners maintain that the agency should have considered what it was about them that caused their persecutors to target them instead of someone else. But the evidence does not compel the conclusion that the persecutors chose them out of animus against their family. Ample evidence supports the conclusion that Fernando and the cartel targeted Petitioners because they thought Petitioners had money, a gun, and influence over Jessica.

Petitioners also highlight that they could not have satisfied the cartel's demands because they did not in fact have a gun or the amount of money requested. But what matters is whether the cartel *thought* Petitioners could comply. And Petitioners have not identified any evidence compelling the conclusion that the cartel knew they could not comply, or that the cartel demanded the money and the gun as a pretext for harming them based on animus against their family.

Conclusion

The Board applied the correct legal standard. And substantial evidence supports its finding that Petitioners failed to show a nexus between a protected ground and harm they suffered in the past or fear in the future. We deny the petition for review.

Entered for the Court

Gregory A. Phillips
Circuit Judge