FILED
United States Court of Appeals
Tenth Circuit

October 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CECILIA MARIBEL CHAVEZ-RAMIREZ,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9575
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Cecilia Maribel Chavez-Ramirez petitions for review of the Board of Immigration Appeals ("BIA") decision upholding the denial of her applications for relief from removal. Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny her petition for review.

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND

Petitioner is a native and citizen of Guatemala. In 2016, she entered the United States without being admitted or paroled. She was then placed in removal proceedings, and the immigration judge ("IJ") found her removable. Seeking relief from removal, Petitioner applied for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").

In 2018, the IJ held a hearing on the merits of her applications. Found credible by the IJ, Petitioner testified that she grew up in Shexubel, a small village comprised of poor indigenous farmers. Her father abandoned the family when Petitioner was young. Petitioner began working in the fields with her mother and three older sisters after she finished the sixth grade. She could not continue her education because the closest middle school was in a city called Tajumulco, and she did not have a safe way to get there; she heard about girls being raped and kidnapped when they tried to walk from Shexubel to Tajumulco.

Petitioner testified that she fears persecution in Guatemala by Julian Chavez, a distant male relative who lived near her family's farmland. At times, Chavez watched Petitioner and her sisters as they worked, which scared Petitioner because of rumors that Chavez was violent and had raped women in the village. Chavez often yelled at and insulted Petitioner's mother, sometimes while waving a machete, and occasionally disconnected the hose Petitioner's family used to water their crops. Petitioner believes Chavez mistreated her mother "because he knew that she was a single mother without a husband to protect her." R. vol. I at 318.

One time, Chavez's sister-in-law came to Petitioner's house seeking protection from Chavez. She said her husband was in the United States and that Chavez had raped her. Chavez showed up with a gun, fired a shot in the air, and forced his sister-in-law to leave with him; she fled to the United States not long afterwards. Around that time, Petitioner's two eldest sisters moved away.

After that, Chavez targeted Petitioner on three separate occasions. First, one day when Petitioner was alone in the field, Chavez restrained her and groped her breasts. She got away because her mother heard her screams and came running. The second time, Chavez saw that Petitioner was alone and started masturbating in front of her. She was terrified and eventually managed to run away. After that incident, both Petitioner and her sister, Elvira, were afraid to leave the house. Petitioner's mother asked village leaders for help, but they were unhelpful, so she went to report Chavez at the nearest police station in Tajumulco. The police did not take a report; they told her that Petitioner and Elvira should just stay inside because Chavez was an unmarried man with needs.

The third and final incident happened when Petitioner's grandfather caught Chavez walking on her family's farmland with a chemical-soaked rag. Petitioner heard her grandfather shout that Chavez was trying to harm her and Elvira. Petitioner's mother came running and Chavez turned to her and said, "I'm going to get myself one of your daughters. Elvira is already grown but [Petitioner] is still young, and the young girls are more delicious." *Id.* at 319. Petitioner's mother and grandfather made Chavez leave, but her mother worried Chavez would continue

coming after Petitioner if she stayed in Shexubel. Fearing she would not be safe anywhere in Guatemala from men targeting her for sexual abuse, Petitioner came to the United States.

In 2019, the IJ issued a written decision denying Petitioner's applications and ordering her removal to Guatemala. On October 3, 2022, the BIA dismissed her appeal. Petitioner now seeks review of the BIA's decision.

II. DISCUSSION

A. Standard of Review

Where, as here, a single BIA member issues a brief order affirming an IJ's decision, we review both the BIA decision and any parts of the IJ's decision it relied on. *Dallakoti v. Holder*, 619 F.3d 1264, 1267 (10th Cir. 2010). We review the BIA's legal conclusions de novo. *Id.* 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." *Id.*

B. Asylum

To receive asylum, an applicant must be a "refugee." *See* 8 U.S.C. § 1158(b)(1)(A). A refugee is a person who is unable or unwilling to return to—and unable or unwilling to avail herself of the protection of—her country because of past persecution or a well-founded fear of persecution *on account of* any of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. *Id.* § 1101(a)(42(A); *Rodas-Orellana v. Holder*, 780 F.3d 982, 986 (10th Cir. 2015).

Petitioner asserts the IJ and BIA erred in not granting asylum because, she contends, she suffered persecution and has a well-founded fear of future persecution on account of her membership in a particular social group—Guatemalan women.

1. Past Persecution Claim

The IJ found Petitioner endured harm rising to the level of persecution and that "Guatemalan women" was a cognizable particular social group. However, the IJ determined Petitioner's asylum claim based on past persecution failed because she did not show that the harm she endured was on account of her membership in that group. The BIA affirmed the IJ's determination that Petitioner failed to show "a nexus between her past harm and a protected ground." R. vol. I at 4. We agree and affirm.

To establish a nexus between past or feared persecution and a protected ground, an applicant must demonstrate that her protected ground "was or will be at least one central reason for" the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). In other words, the applicant's protected ground "must be central to the persecutor's decision to act against" her. *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005). The protected ground "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti*, 619 F.3d at 1268 (internal quotation marks omitted)

Here, the IJ found that Petitioner did not present evidence that Chavez targeted and harmed her "to overcome a protected characteristic." R. vol. I at 70 (brackets and internal quotation marks omitted). Instead, the IJ found the evidence showed

that Chavez targeted Petitioner "because she was vulnerable as the youngest daughter" and because Chavez was a violent man and a rapist. *Id.* The BIA found no clear error in these findings, reasoning that they were supported by Petitioner's testimony that Chavez "noted her young age as a motivating factor, that he abused other particularly vulnerable women in the village, . . . and that he was generally feared in the community because of his violent nature." *Id.* at 4. Thus, the BIA upheld the IJ's denial of Petitioner's past persecution claim based on her failure to satisfy the nexus requirement.

We must affirm unless the record compels the conclusion that Petitioner's status as a Guatemalan woman was one central reason Chavez harmed her. *See Dallakoti*, 619 F.3d at 1268; 8 U.S.C. § 1158(b)(1)(B)(i). Petitioner argues that it does, pointing out that the people Chavez targeted were Guatemalan women, and attributing Chavez's treatment of his sister-in-law, Petitioner's mother, and Petitioner herself to gender-motivated violence. She contends the IJ committed legal error by "fail[ing] to identify [her] gender as the reason for her persecution, discussing instead her vulnerability and her persecutor's criminality." Pet'r's Opening Br. at 12 (internal quotation marks omitted). We disagree and decline to reweigh the evidence. *See Vladimirov v. Lynch*, 805 F.3d 955, 960 (10th Cir. 2015) ("We neither reweigh the evidence nor assess witness credibility."); *Yuk v. Ashcroft*, 355 F.3d 1222, 1236 (10th Cir. 2004) ("[I]t is not our prerogative to reweigh the evidence, but only to decide if substantial evidence supports the IJ's decision."). After carefully

examining the record, we cannot say that it compels the conclusion that Petitioner endured past persecution in Guatemala.

2. Future Persecution Claim

Even without past persecution, an applicant can obtain refugee status by showing a subjectively genuine and objectively reasonable fear of future persecution on account of a protected ground. *See Ritonga v. Holder*, 633 F.3d 971, 976 (10th Cir. 2011). Such a fear is objectively reasonable if future persecution is a reasonable possibility. *Uanreroro v. Gonzales*, 443 F.3d 1197, 1202 (10th Cir. 2006). An applicant can demonstrate the likelihood of future persecution by showing either (1) an individualized risk of persecution, or (2) a pattern or practice of persecution of individuals who are similarly situated to her because of a common protected ground. *See Matumona v. Barr*, 945 F.3d 1294, 1306 (10th Cir. 2019). A pattern or practice exists when the persecution is "organized or systemic or pervasive." *Woldemeskel v. INS*, 257 F.3d 1185, 1191 (10th Cir. 2001) (internal quotation marks omitted).

The IJ found that although Petitioner's fear was subjectively genuine, the record did not support a finding that it was objectively reasonable. The IJ determined Petitioner did not show an individualized risk of future persecution because the record lacked evidence that Chavez (or anyone else) would be motivated to track her down and harm her specifically upon her return to Guatemala. Likewise, the IJ found she did not show a reasonable possibility of future harm based on a pattern or practice of persecution against Guatemalan women, reasoning that the record did not

establish that violence against Guatemalan women was due to a systemic or organized effort. The BIA agreed with these findings and affirmed the IJ's denial of Petitioner's future persecution claim.

Petitioner challenges the BIA's conclusion, arguing that the record compels the conclusion that her fear of future persecution based on her status as a Guatemalan woman is objectively reasonable. She points to country conditions evidence, for example, of high levels of violence and harassment against women and girls in Guatemala. Although some evidence supports Petitioner's view, and while we might decide this case differently than the IJ or the BIA, we cannot say that the record compels that view. Accordingly, we cannot disturb the BIA's conclusion that Petitioner lacks an objectively reasonable fear of future persecution in Guatemala.

In sum, we conclude substantial evidence supports the BIA's determinations that Petitioner did not establish past persecution or a well-founded fear of future persecution. And those determinations prevent Petitioner from receiving asylum.

C. Withholding of Removal

To qualify for withholding of removal, an applicant must show "a clear probability of persecution on account of a protected ground." *Rodas-Orellana*, 780 F.3d at 987 (internal quotation marks omitted). This burden of proof is higher than the burden for asylum. *Id.* at 986. Thus, Petitioner's inability to satisfy the asylum burden necessarily precludes her from meeting the burden for withholding. *See id.* at 987.

D. The Convention Against Torture

To receive protection under the CAT, an applicant must establish that if she is returned to her country, it is more likely than not that she would be tortured, *see* 8 C.F.R. § 1208.16(c)(2), "by, or at the instigation of, or with the consent or acquiescence of, a public official," *id.* § 1208.18(a)(1). Unlike asylum or withholding of removal, a CAT claim does not require the applicant to show a nexus between the harm and a protected ground. *Ritonga*, 633 F.3d at 978. "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). This standard does not require the government's actual knowledge or willful acceptance; willful blindness is enough. *Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013).

The IJ concluded, and the BIA affirmed, that Petitioner did not show she will more likely than not be tortured with the acquiescence of a public official if she returns to Guatemala. Petitioner challenges this conclusion, citing evidence of high levels of impunity for crimes in Guatemala, which "create a culture where perpetrators of crime, including violence against women, believe they can get away with it." Pet'r's Opening Br. at 28 (internal quotation marks omitted). Conversely, the record contains evidence showing that the Guatemalan government is making efforts to combat violence against women and that Guatemalan officials are trying to prevent and punish gender-based violence. Even if these efforts are largely ineffectual as Petitioner argues, that does not compel an acquiescence finding. *See,*

e.g., *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006) (no acquiescence where the record showed the government had made efforts to prevent potential torture); *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (evidence of government corruption and underfunded police force did not compel acquiescence finding). Hence, after carefully examining the record, we cannot say that it compels the conclusion that it is more likely than not that (1) Petitioner would be tortured in Guatemala, or (2) that Guatemalan officials would acquiesce in her torture.

E. Prejudicial Bias

Petitioner asserts that "but for the IJ's prejudicial bias" her applications would have been granted. Pet'r's Opening Br. at 16. The government responds that Petitioner did not raise this argument before the BIA and therefore failed to exhaust her administrative remedies.

We may only review a final removal order if the noncitizen "has exhausted all administrative remedies available . . . as of right." 8 U.S.C. § 1252(d)(1). Recently, the Supreme Court held that that § 1252(d)(1)'s exhaustion provision is not jurisdictional; it is instead a claim-processing rule subject to waiver and forfeiture. *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1114–16 (2023). Thus, we have jurisdiction to consider the issue even if not presented to the BIA. Even so, the government has invoked § 1252(d)(1)'s exhaustion rule. And we consider an argument exhausted only if the noncitizen presented "the *same specific legal theory* to the BIA." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010),

abrogated on other grounds by Santos-Zacaria, 143 S. Ct. at 1110. We therefore cannot review Petitioner's prejudicial bias argument.

III. CONCLUSION

We deny the petition for review.

Entered for the Court

Joel M. Carson III
Circuit Judge