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United States Court of Appeals
Tenth Circuit

July 22, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ADONIS LA ROSA HERNANDEZ,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,*

Respondent.

No. 20-9638
(Petition for Review)

ORDER AND JUDGMENT**

Before **MATHESON**, **BRISCOE**, and **CARSON**, Circuit Judges.

Adonis La Rosa Hernandez, a native and citizen of Cuba, petitions for review of the Board of Immigration Appeals' ("BIA") decision upholding an Immigration Judge's ("IJ") denial of his applications for asylum, withholding of removal, and

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* On March 11, 2021, Merrick B. Garland became Attorney General of the United States. He thus has been substituted for William P. Barr as Respondent, per Fed. R. App. P. 43(c)(2).

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

protection under the Convention Against Torture ("CAT"). Exercising jurisdiction under 8 U.S.C. § 1252(a), we deny the petition.

I. BACKGROUND

Mr. La Rosa Hernandez entered the United States in April 2019 without a valid visa or entry documents. An asylum officer found he had a credible fear of returning to Cuba due to his political opinions. In removal proceedings, he conceded removability and applied for asylum, withholding of removal, and CAT protection.

At his merits hearing, Mr. La Rosa Hernandez testified as follows. He left Cuba in September 2018 on a valid passport issued that July and traveled through 11 countries before reaching the United States. His first adverse encounter with the Cuban government occurred in 2000, when he refused to comply with compulsory military service. The government forced him to perform his two-year military service in a detention center. He was subjected to long marches, guard duty without sufficient sleep, and manual labor without adequate protective equipment.

For the next 16 years, Mr. La Rosa Hernandez had no "really big" issues, though he continued to express opposition to the regime and refused to vote or attend official events. Admin. R. at 122. On July 24, 2018, he told a local official that he was boycotting a celebration because of his political opinions. The next day, he found a citation by his front door ordering him to appear at the police station on July 26 at 8:00 a.m. He went to the station and was detained for three days. Officers punched and kicked him during this detention. He eventually was charged with disorderly conduct and released after paying a fine.

The IJ noted that Mr. La Rosa Hernandez did not include any details from the July 2018 incident in his application and did not submit a written account before his testimony, as another IJ had ordered. He responded that he thought his testimony would suffice.

When asked to describe his next adverse encounter, Mr. La Rosa Hernandez testified that on September 10, 2018, three officers forced their way into his home and beat him. They accused him—wrongly, he said—of placing an anti-Castro sign on a public wall. The officers handcuffed him, shoved him into a patrol car, and took him to the police station. There, they interrogated him and beat him with batons. He was released after four days with "bruises all over the place," "a swollen eye," and "a cut." *Id.* at 140. He did not seek medical attention, and "[t]he bruising went away little by little." *Id.* at 141. As with the July incident, the IJ noted that Mr. La Rosa Hernandez did not describe this one in detail before the hearing.

The IJ then asked if the police or government officials followed him between July and September 2018. He said they cited him "many" times and detained and mistreated him. He lost his job. *Id.* at 142. The IJ noted Mr. La Rosa Hernandez did not report these encounters on his application, to the asylum officer, or during in his testimony when asked about his next encounter after the July incident.

At the hearing, government counsel asked Mr. La Rosa Hernandez why he told the asylum officer that he was maced during the September 2018 incident but did not testify to being maced. He insisted he did not tell the asylum officer he had been maced. Government counsel then addressed the July 2018 incident and asked

Mr. La Rosa Hernandez to clarify why the citation's date of issuance was August 1 given that he received it on July 25 and was required to appear at the station on July 26. He initially proposed that the date of issuance was the latest date he could appear at the station and then suggested it may have been a typographical error.

The IJ found Mr. La Rosa Hernandez was not credible, noting he failed to comply with a prior IJ's order to submit a written statement before the hearing. The IJ also cited discrepancies between his testimony and pre-hearing statements in his written application and credible-fear interview. In particular, the IJ viewed Mr. La Rosa Hernandez's testimony about encounters between July and September 2018, "to have been embellished for the purpose of adding things to the application and to his claim as he went along." *Id.* at 34, 63.

The IJ also addressed Mr. La Rosa Hernandez's testimonial demeanor. The IJ noted that he was "evasive" and "defensive" when the government's counsel questioned his account and that he audibly "snorted," rolled his eyes, and stated "Dios Mio" ("My God") when asked about various discrepancies. *Id.* at 38-39, 67. The IJ further noted that Mr. La Rosa Hernandez was released after each detention despite his claim that the police threatened to "disappear him," *id.* at 39, 68 and that he traveled on a recently issued passport without interference from the government, "despite his problems from 20 years ago to the present with the Cuban authorities," *id.* at 40, 68.

The IJ also found, in addition to failing to provide credible testimony, that Mr. La Rosa Hernandez's testimony was "virtually uncorroborated," with "no

documents regarding his alleged arrest and detention; no warning letters; no fine receipts; no corroboration of any political manifestations or political activity; and no medical records." *Id.* at 37, 65. Mr. La Rosa Hernandez provided letters from his girlfriend in Cuba, her brother, and her father. But only the letter from his girlfriend provided any specifics, and she described only the September 2018 incident.

The IJ further found that the citation from the July 2018 incident was "extremely suspect." *Id.* at 38, 67. It had no stamps, seals, or letterhead indicating it was authentic. "Most troubling," the issuance date of August 1 was incompatible with Mr. La Rosa Hernandez's receipt of the citation on July 25 and the demand that he appear at the station on July 26. *Id.* at 37, 66. The IJ observed that he "scrambled for some type of explanation" and that his explanation was "completely implausible" and "completely preposterous." *Id.* at 38, 66-67.

Based on the adverse credibility finding, the IJ determined that Mr. La Rosa Hernandez had failed to carry his burden on his asylum and withholding claims. Alternatively, the IJ found that even if Mr. La Rosa Hernandez had testified credibly, he failed to show that the mistreatment he suffered amounted to persecution. The IJ denied the CAT claim, concluding, even if the incidents occurred as alleged, the mistreatment did not constitute torture, and Mr. La Rosa Hernandez offered only speculation that he would be tortured upon return to Cuba.

In August 2020, the BIA dismissed Mr. La Rosa Hernandez's appeal. It found no clear error in the IJ's adverse credibility finding and upheld the denial of asylum and withholding on that basis, declining to address the IJ's alternative merits ruling.

The BIA also found no clear error in the IJ's determination that Mr. La Rosa Hernandez had not carried his burden for protection under the CAT.

II. **DISCUSSION**

A. ***Standards of Review***

When a single BIA member upholds an IJ's decision in a brief order, we review the BIA's order as the final agency decision but "may consult the IJ's decision to give substance to the BIA's reasoning." *Razkane v. Holder*, 562 F.3d 1283, 1287 (10th Cir. 2009). We review legal conclusions de novo and findings of fact, including credibility determinations, for substantial evidence. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). Under the substantial-evidence standard, "the BIA's findings of fact are conclusive unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary." *Rivera-Barrientos v. Holder*, 666 F.3d 641, 645 (10th Cir. 2012) (internal quotation marks omitted).

Because Mr. La Rosa Hernandez represents himself, we liberally construe his opening brief. *See James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013). But he must "sufficiently raise all issues and arguments on which [he] desire[s] [] review in [his] opening brief." *Clark v. Colbert*, 895 F.3d 1258, 1265 (10th Cir. 2018) (internal quotation marks omitted). And "[w]hen a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (internal quotation marks omitted).

B. ***Asylum and Withholding of Removal***

"To qualify for asylum, a noncitizen must demonstrate either past persecution or a well-founded fear of future persecution on account of" a statutorily protected ground, such as "political opinion." *Addo v. Barr*, 982 F.3d 1263, 1269 (10th Cir. 2020) (internal quotation marks omitted). "Where the noncitizen has demonstrated past persecution, he is entitled to a presumption of a well-founded fear of future persecution." *Id.* "To show a well-founded fear, an applicant must at least show that persecution is a reasonable possibility." *Rodas-Orellana v. Holder*, 780 F.3d 982, 986-87 (10th Cir. 2015) (internal quotation marks omitted).

The requirements for withholding of removal are similar to those for asylum except that an applicant "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." *Addo*, 982 F.3d at 1273 (internal quotation marks omitted). Thus, an applicant's failure to carry his burden on an asylum claim necessarily forecloses a withholding-of-removal claim based on the same facts. *See Rodas-Orellana*, 780 F.3d at 987.

The BIA denied Mr. La Rosa Hernandez's asylum and withholding claims based on the IJ's adverse credibility finding. We will uphold such a denial "if the IJ or the BIA has presented specific, cogent reasons for the [adverse credibility] finding." *Solomon v. Gonzales*, 454 F.3d 1160, 1164 (10th Cir. 2006) (internal quotation marks omitted), *superseded by statute on other grounds*, 8 U.S.C. § 1158(b)(1)(B)(ii). The BIA did. It upheld the IJ's adverse credibility finding based

on (1) "inconsistencies and omissions involving matters such as the nature, circumstances, and severity of the harm that [Mr. La Rosa Hernandez] allegedly suffered at the hands of the authorities"; (2) his "demeanor during the hearing when confronted with the observed inconsistencies and omissions"; and (3) his "failure to corroborate his claim with reliable evidence." Admin. R. at 2. *See* 8 U.S.C. § 1229a(c)(4)(C) (establishing that an IJ may base an adverse credibility finding on factors such as inconsistencies, insufficient detail, implausibility, and testimonial demeanor).

Mr. La Rosa Hernandez does not contest any of the BIA's grounds for upholding the IJ's adverse credibility finding. He therefore has waived any challenge. *See Rodas-Orellana*, 780 F.3d at 998 ("The failure to raise an issue in an opening brief waives that issue." (internal quotation marks omitted)). Although he contends the BIA made incorrect factual determinations, he simply repeats his allegations, and it is not this court's role to reweigh the evidence. *See Woldemeskel v. INS*, 257 F.3d 1185, 1192 (10th Cir. 2001).

Mr. La Rosa Hernandez also argues the BIA failed to consider "all facts." Pet'r's Opening Br. at 2. But the only fact he identifies is that an asylum officer found he had credible fear of persecution. *Id.* at 4.[1] The IJ based the adverse

[1] Mr. La Rosa Hernandez attached documents to his brief that are not part of the record, including two purported citations issued to him between the July and September 2018 incidents. Our review of the BIA's decision is limited to the record before the IJ. *See* 8 U.S.C. § 1252(b)(4)(A).

credibility finding in part on inconsistencies between Mr. La Rosa Hernandez's testimony and his statements to the asylum officer during his credible-fear interview.

Finally, Mr. La Rosa Hernandez suggests the IJ should have deferred to the asylum officer's determination, but the IJ was required to make a de novo assessment of his claims and credibility based on the evidence. *See* 8 C.F.R. § 1003.42(d); *see also* 8 U.S.C. § 1229a(b)(1) (describing the IJ's authority and responsibilities); 8 C.F.R. § 1003.10(b) (same).

Based on the foregoing, "no reasonable adjudicator would be compelled to conclude [that Mr. La Rosa Hernandez's] testimony was credible." *Igiebor v. Barr*, 981 F.3d 1123, 1135-36 (10th Cir. 2020) (internal quotation marks omitted). Thus, the BIA did not err in denying Mr. La Rosa Hernandez's claims for asylum and withholding of removal. *See Diallo v. Gonzales*, 447 F.3d 1274, 1283 (10th Cir. 2006) (upholding denial of asylum based on adverse credibility determination).

C. ***CAT Claim***

For protection under the CAT, an applicant must show "it is more likely than not that he . . . would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." *Id.* § 1208.18(a)(2). In assessing a CAT claim, an IJ must consider (1) evidence that the applicant was previously tortured; (2) "[e]vidence that the applicant could relocate to a part of the country of removal where he . . . is not likely to be tortured"; (3) "[e]vidence of gross, flagrant

or mass violations of human rights within the country of removal"; and (4) "[o]ther relevant information regarding conditions in the country of removal." *Id.* § 1208.16(c)(3).

The IJ found that Mr. La Rosa Hernandez's mistreatment, "[e]ven if it occurred," did not constitute torture. Admin. R. at 42, 71. Mr. La Rosa Hernandez stated he was "physically assaulted" but suffered only "a split lip and bruises" and "required no medical attention." *Id.* at 42-43, 71. The IJ further found that the "claim is based on his assumption and a fear of what might happen rather than evidence that meets his burden of showing more likely than not he would be subjected to torture." *Id.* at 43, 71-72. The BIA concluded there was no clear error in these findings and denied the CAT claim.

Mr. La Rosa Hernandez argues that the BIA failed to properly consider the evidence of country conditions. But he does not develop this argument. *See Acosta v. Foreclosure Connection, Inc.*, 903 F.3d 1132, 1136 n.1 (10th Cir. 2018) (noting conclusory arguments may be deemed waived). In any event, the IJ gave "appropriate weight" to the government's submission of "background reports and articles related to Cuba." Admin. R. at 39, 68. And to the extent Mr. La Rosa Hernandez is referring to attachments to his brief, the IJ discussed these documents as well. *See id.* at 29, 58 (addressing Mr. La Rosa Hernandez's submission of (1) "some dark and blurry photographs, apparently associated with an undated news article, titled Repression of this Sunday in Images," with "no indication of what publication that these images appeared in"; and (2) "a four-page English language

document, source unknown, about various parts of the Cuban constitution and about various political issues in Cuba"). Although the BIA did not reference evidence of country conditions, it "is not required to discuss every piece of evidence when it renders a decision." *Hadjimehdigholi v. INS*, 49 F.3d 642, 648 n.2 (10th Cir. 1995).

Mr. La Rosa Hernandez also appears to contend that his mistreatment constituted torture. But on the record before us and circuit precedent, we cannot say any reasonable adjudicator would be compelled to conclude that his mistreatment amounted to past torture or indicated it was more likely than not that he would be tortured if removed to Cuba. *See Xue v. Lynch*, 846 F.3d 1099, 1101-02, 1110 (10th Cir. 2017) (upholding denial of CAT claim where noncitizen was arrested for attending an illegal "house church," interrogated, verbally taunted, detained in crowded and unsanitary conditions for three days and four nights, given little food, slapped in the head, struck on the arm with an officer's baton, and released only after paying a significant fine).

Substantial evidence supported the BIA's denial of Mr. La Rosa Hernandez's CAT claim.

III. CONCLUSION

We deny the petition for review. We grant Mr. La Rosa Hernandez's motion for leave to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge