FILED
United States Court of Appeals
Tenth Circuit

September 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENIA MARGARITA MUNTO-TOLEDO,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 20-9630
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge, and **MATHESON**, Circuit Judge.

Kenia Margarita Munto-Toledo, a native and citizen of El Salvador, petitions for review of the Board of Immigration Appeals' ("BIA") decision upholding an Immigration Judge's ("IJ") denial of her applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). Exercising jurisdiction under 8 U.S.C. § 1252(a), we deny the petition.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Ms. Munto-Toledo entered the United States in August 2015. The Government initiated removal proceedings in September 2015 by filing a notice to appear. Ms. Munto-Toledo conceded she was removable. In September 2016, she applied for asylum, withholding of removal, and CAT protection. Ms. Munto-Toledo argued she would be harmed if deported because she was a member of 11 social groups, including "Salvadoran women working for NGOs." *See* C.A.R. at 65-69, 171-72.

The IJ held a hearing in April 2018 and denied her application. The IJ's order found and held as follows, stating that Ms. Munto-Toledo

- Had conceded her removability.
- Was credible in light of her demeanor while testifying and the documents she provided as exhibits, and her testimony was entitled to full weight.
- Entered the United States in August 2015 and applied for asylum in September 2016.[1]
- Had not suffered past persecution in El Salvador because her past kidnapping and other threats did not rise to the level of persecution.
- Did not show a well-founded fear of future persecution on account of a protected ground because any threat of future harm was not on account

[1] Although asylum applications are ordinarily required to be filed within one year of entry, 8 U.S.C. § 1158(a)(2)(B), Ms. Munto-Toledo's application should be considered because she made a good-faith effort to file it during the one-year window but extraordinary circumstances prevented her from filing, *see id.* § 1158(a)(2)(D) (exceptions to one-year rule).

of her membership in any particular social group ("PSG"). Rather, criminals' desire to make money caused any threat to her.

- Proposed 11 PSGs. Not one was cognizable.
- Had not shown that any future harm she feared was connected to the Salvadoran government or attributable to forces the government is unwilling or unable to control.
- Was ineligible for withholding of removal because she was ineligible for asylum.
- Was ineligible for CAT relief.

Ms. Munto-Toledo appealed the IJ's order to the BIA. She argued the IJ erred because she was part of a PSG of "educated women in El Salvador earning three times the average income of the rest of population." *Id.* at 10. She also argued the IJ should not have followed the BIA's decision in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), in its PSG analysis because that decision was inconsistent with Third Circuit precedent. C.A.R. at 4, 10-13.

The BIA referred Ms. Munto-Toledo's administrative appeal to a three-member panel. In October 2020, the panel affirmed the IJ in a two-page opinion. The panel

(1) "[A]dopt[ed] and affirm[ed] the" IJ's decision, and held the IJ "properly determined that none of the respondent's proffered PSGs is legally cognizable." *Id.* at 3.

(2) Said Ms. Munto-Toledo had "redefined" her PSG as "educated women in El Salvador earning three times the average income of the rest of population." *Id.* "[B]ecause this [PSG] formulation was not first presented to the Immigration Judge," the panel did "not take it into consideration on appeal." *Id.*

(3) Held that Third Circuit precedent was irrelevant to Ms. Munto-Toledo's case, which arose within the Tenth Circuit, and that *Matter of M-E-V-G-* remained good law. *Id.* at 4.

Ms. Munto-Toledo timely filed a petition for review.

II. DISCUSSION

In her petition for review, Ms. Munto-Toledo argues (1) the BIA should have assigned her administrative appeal to a one-member panel rather than a three-member panel, and (2) the BIA should have found that "Salvadoran women working for NGOs" is a PSG for asylum and withholding of removal. We reject both arguments.

A. *Three-Member Panel*

Unless an appeal from an IJ order can be resolved through summary disposition, *see* 8 C.F.R. § 1003.1(e)(1), the BIA initially assigns it to a single member for review, *id.* at § 1003.1(e)(3). The BIA member may only assign the appeal to a three-member panel if any one of seven circumstances applies. *Id.* § 1003.1(e)(6).[2]

[2] The seven circumstances are:

(i) The need to settle inconsistencies among the rulings of different immigration judges;
(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
(iii) The need to review a decision by an immigration judge or DHS that is not in conformity with the law or with applicable precedents;
(iv) The need to resolve a case or controversy of major national import;
(v) The need to review a clearly erroneous factual determination by an immigration judge;
(vi) The need to reverse the decision of an immigration judge or DHS, other than a reversal under § 1003.1(e)(5); or

Ms. Munto-Toledo contends the BIA violated § 1003.1(e)(6) because none of the seven circumstances applies to her case. The argument in her briefing is threadbare and makes no attempt to show prejudice. Even if assignment to the three-member panel is reviewable as error, the error would be harmless. *See Nazaraghaie v. INS*, 102 F.3d 460, 465 (10th Cir. 1996) (holding BIA's alleged failure to consider particular evidence was harmless); *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir.1990) (fundamental fairness of deportation proceedings not open to question unless prejudice shown to result); *Navidi-Masouleh v. Ashcroft*, 107 F. App'x 856, 861 (10th Cir. 2004) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)). Assignment of Ms. Munto-Toledo's administrative appeal to a three-member panel afforded her, if anything, more process, not less. She offers no reason how the assignment could possibly have prejudiced adjudication of her appeal.

B. ***Particular Social Group***

In her administrative appeal to the BIA, Ms. Munto-Toledo redefined her proposed PSG as "educated women in El Salvador earning three times the average income of the rest of [the] population," C.A.R. at 3, which the BIA rejected because she

---

(vii) The need to resolve a complex, novel, unusual, or recurring issue of law or fact.

did not present this group to the IJ. Ms. Munto-Toledo now argues, as she did before the IJ, that "Salvadoran women working for NGOs" is cognizable as a PSG.[3]

The Government argues that "Salvadoran women working for NGOs" is not a cognizable PSG because it is not immutable—NGO workers can leave their jobs. *See Rodas-Orellana v. Holder*, 780 F.3d 982, 990-92 (10th Cir. 2015). Ms. Munto-Toledo argues that her having worked for an NGO in El Salvador is immutable because it occurred in the past. We need not resolve this dispute.

Even if "Salvadoran women working for NGOs" is a PSG, the BIA adopted the IJ's decision that Ms. Munto-Toledo failed to show a nexus between her fear of persecution and any of her proposed PSGs. *See Orellana-Recinos v. Garland*, 993 F.3d 851, 855 (10th Cir. 2021) (petitioner must show persecution on account of membership in a PSG). As previously noted, the IJ found Ms. Munto-Toledo had not shown a well-founded fear of future persecution because any threat of future harm was not on account of her membership in any proposed PSG. C.A.R. at 63-65. Rather, criminals targeted her to make money. *Id.* Ms. Munto-Toledo does not argue otherwise, let alone make any nexus argument.

[3] The BIA expressly adopted and affirmed the IJ's decision, stating that the IJ "properly determined that none of the respondent's proffered [PSGs] is legally cognizable," C.A.R. at 3, which preserved the issue for review here, *see Sidabutar v. Gonzales*, 503 F.3d 1116, 1120 (10th Cir. 2007).

III. **CONCLUSION**

We deny the petition for review.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge