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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VILMA DEL ROSARIO ABARCA-QUINTANILLA; YULISSA LISBETH ABARCA-ABARCA,

Petitioners,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9510
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **PHILLIPS**, Circuit Judges.

Petitioners Vilma del Rosario Abarca-Quintanilla and her daughter Yulissa Lisbeth Abarca-Abarca filed applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT") based on threats made against them while living in their native El Salvador. An immigration judge denied their applications, and the Board of Immigration Appeals ("BIA") affirmed the

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

decision on appeal. Petitioners now petition this court for review. Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny the petition.

I. Background

Vilma del Rosario Abarca-Quintanilla and Yulissa Lisbeth Abarca-Abarca ("Petitioners") are native citizens of El Salvador. Ms. Abarca-Quintanilla also has a son named Milton de Jesus Abarca-Abarca,[1] who fled to the United States in 2016 after a member of the MS-13 gang threatened to kill him when he refused to join. Even after he fled, members of MS-13 used social media to continue their attempts to extort money from him.

A few months after Milton left, Petitioners were walking home when they encountered two MS-13 gang members. One of the gang members—whom Ms. Abarca-Quintanilla identified only as "Galletas"—called Ms. Abarca-Quintanilla a derogatory name and made veiled threats against Yulissa. Petitioners did not respond and arrived home safely, but Yulissa (who was 13 or 14 at the time) stopped going to school based on the threats.

About a month later, Petitioners again encountered Galletas, who threatened to kill them and said Yulissa would pay for Milton's refusal to join MS-13. Ms. Abarca-Quintanilla interpreted the threat against Yulissa to mean that members of the gang intended to kill or rape her. Petitioners did not respond to Galletas's threats and continued walking.

[1] For clarity's sake, this opinion will refer to Ms. Abarca-Quintanilla's children by their first names.

Petitioners encountered Galletas a third time a week later. He threatened to kill them both unless they paid him $500, which Ms. Abarca-Quintanilla did. She reported none of these encounters to the police based on her belief, informed by news reports, that police are unhelpful and are often involved with the gangs, so that reporting to the police would only make things worse.

In September 2016, Petitioners fled to the United States and asked to apply for asylum. An asylum officer determined they had established a credible fear of persecution and served them with notices to appear, charging them as removable under 8 U.S.C. § 1182(a)(7)(A)(i)(I). In November 2018, Petitioners admitted the factual allegations and conceded removability. They then filed applications for asylum, withholding of removal, and CAT protection.

An immigration judge held a hearing on their applications. The evidence included testimony by Petitioners and numerous documents, including letters, Facebook messages, articles, reports, and sworn statements from experts on gang activity in Central America.

Shortly after the hearing, the immigration judge issued a decision denying Petitioners' applications for asylum, withholding of removal, and CAT protection. Among other things, the immigration judge held that Petitioners had not proved the necessary elements of an asylum claim. In particular, the immigration judge held that Petitioners had not demonstrated that they suffered past persecution or a well-founded fear of future persecution on account of a protected ground.

Petitioners appealed to the BIA, which issued a decision affirming the immigration judge's decision. Petitioners then filed a timely petition for review with this court.

II. Discussion

A. Standard of Review

"This court reviews the BIA's legal determinations de novo, and its findings of fact under a substantial-evidence standard." *Xue v. Lynch*, 846 F.3d 1099, 1104 (10th Cir. 2017). "Agency findings of fact are conclusive unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* at 788-89 (internal quotation marks omitted). "This is a highly deferential standard." *Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021) (internal quotation marks omitted). "Under this standard, we do not weigh evidence or independently assess credibility; rather, even if we disagree with the BIA's conclusions, we will not reverse if they are supported by substantial evidence and are substantially reasonable." *Htun v. Lynch*, 818 F.3d 1111, 1119 (10th Cir. 2016) (brackets and internal quotation marks omitted).

B. Asylum

Asylum applicants have the burden of demonstrating eligibility by proving they are refugees. 8 U.S.C. § 1158(b)(1)(B)(i). To meet that burden, applicants must establish (1) they suffered past persecution or have a well-founded fear of future persecution that is (2) "on account of" a statutorily protected ground and (3) committed by the government or by forces the government is either unable or unwilling to control. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also* 8 U.S.C. § 1101(a)(42)(A) (defining

"refugee"). A showing of past persecution on account of a protected ground gives rise to a rebuttable presumption of having a well-founded fear of future persecution on account of a protected ground. *Rivera-Barrientos*, 666 F.3d at 646.

1. Past Persecution

We agree with the BIA's determination that Petitioners did not suffer past persecution and therefore are not entitled to a rebuttable presumption of having a well-founded fear of future persecution. Whether Petitioners have demonstrated persecution is a question of fact subject to the substantial evidence standard. *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335 (10th Cir. 2008). We have held that "[m]ere denigration, harassment, and threats" do not demonstrate persecution, *Pang v. Holder*, 665 F.3d 1226, 1231 (10th Cir. 2012), nor does lawlessness in general, *Maatougui v. Holder*, 738 F.3d 1230, 1241 (10th Cir. 2013). The threats against Petitioners were undoubtedly upsetting, but the evidence suggests at most that they were harassed by criminals who caused them no physical harm. *See Vatulev v. Ashcroft*, 354 F.3d 1207, 1210 (10th Cir. 2003) ("Threats alone generally do not constitute actual persecution."). We cannot say that any reasonable adjudicator would be compelled to conclude to the contrary.[2]

[2] Petitioners cite a Ninth Circuit case, *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003), in support of their argument that threats in the context of acute country-based conditions can establish past persecution. But in *Hoxha* the court specifically held that the petitioner had not demonstrated past persecution. *Id.* at 1184.

2. Persecution on Account of Protected Ground

Having failed to demonstrate past persecution, Petitioners could still be eligible for asylum based on a "reasonable possibility of future persecution." *Xue*, 846 F.3d at 1110. To show that a fear of future persecution is "on account of" a statutorily protected ground, Petitioners must establish that the protected ground was "central" to the persecutor's motivation. *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (internal quotation marks omitted). "[T]he protected ground cannot play a minor role in the alien's . . . fears of future mistreatment . . . [or] be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (internal quotation marks omitted). We will only reverse if "any reasonable adjudicator would be compelled to conclude that one of the central reasons" for the persecution is the protected ground. *Id.*

Petitioners argue the BIA erred in determining that they failed to show a reasonable possibility of future persecution on account of several alleged protected grounds, including: immediate family members of Milton de Jesus Abarca-Abarca, Salvadoran women, Salvadoran women who fled El Salvador, and anti-gang political opinion. We address each in turn.

First, even assuming that Petitioners' family qualifies as a particular social group, *see Orellana-Recinos v. Garland*, 993 F.3d 851, 853 (10th Cir. 2021), substantial evidence supports the BIA's conclusion that the persecution alleged is not "on account of" their familial relationship with Milton. The testimony established that members of MS-13 threatened Petitioners (1) because Milton had refused to join the gang and fled

El Salvador and (2) for the purpose of extorting money from Ms. Abarca-Quintanilla. Indeed, the gang's extortion of Ms. Abarca-Quintanilla belies Petitioners' assertion that the gang would not have threatened them absent their relationship to Milton. We have held 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." *Id.* at 856. Here, Petitioners' alleged protected status as members of Milton's family is merely incidental to the gang members' distinct objectives of recruitment and extortion. *See id.* at 857.[3]

Second, substantial evidence supports the BIA's determination that any persecution is not "on account of" Petitioners' membership in alleged social groups including Salvadoran women or Salvadoran women who fled to the United States. As the immigration judge noted, others who are not women, including Milton, faced similar threats from MS-13. Indeed, even after Milton fled to the United States, members of MS-13 used social media to continue their attempts to extort money from him. At most, Petitioners' status as women was incidental to the gang's principal motives for threatening them.[4]

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[3] Petitioners attempt to distinguish *Orellana-Recinos* on the ground that in the instant case, the gang members threatened Petitioners *after* Milton had fled El Salvador so recruitment could not have been their objective. But the threats were still centrally tied to Milton's refusal to join the gang, and Petitioners ignore the evidence demonstrating the gang members' financial motive.

[4] Petitioners argue the BIA erroneously imposed a requirement that Petitioners demonstrate that gang members showed animus against women, but the BIA did no

Third, with respect to Petitioners' alleged political opinion, "a group's attempt to coercively recruit an individual is not necessarily persecution on account of political opinion," *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1228 (10th Cir. 2011). Petitioners must show that they would be persecuted because of their anti-gang political opinion, rather than Milton's refusal to join the gang. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). There is no evidence, however, that Petitioners held any particular political opinion, anti-gang or otherwise. And even if they did, there is no evidence demonstrating that members of MS-13 were motivated by a desire to suppress that political opinion. We discern no error in the BIA's determination that any persecution would not be "on account of" a political opinion.

3. El Salvador's Inability or Unwillingness to Control Gangs

Petitioners contend the BIA erred in holding they had not carried their burden of showing that if they were returned to El Salvador they would be persecuted by the government or by forces the government is unable or unwilling to control. We need not address this argument, however, in light of Petitioners' failure to carry their burden to show past persecution or a well-founded fear of future persecution that is "on account of" a statutorily protected ground. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (requiring applicants for asylum to establish "that race, religion, nationality, membership in a particular social

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such thing. The BIA's point was merely that Petitioners' gender bore "only a tangential nexus to the threatened harm," R. vol. 1 at 4, which is insufficient under the applicable standard.

group, or political opinion was or has been at least one central reason for persecuting the applicant").

C. Withholding of Removal

"To be eligible for withholding of removal, an applicant must demonstrate that there is a clear probability of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion." *Pang*, 665 F.3d at 1233 (internal quotation marks omitted). Because Petitioners have not met the requirements for asylum, they cannot "satisfy the higher standard of eligibility for withholding of removal." *Id.* at 1234.

D. CAT Relief

"Article 3 of the Convention Against Torture prohibits the return of an alien to a country where it is more likely than not that he will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (brackets and internal quotation marks omitted). "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 "actual knowledge, or willful acceptance" by the government. *Cruz-Funez*, 406 F.3d at 1192 (internal quotations marks omitted). Under the substantial evidence standard, we must deny the petition unless no reasonable adjudicator could reach the same finding as the immigration judge and BIA.

The BIA held that the record did not support a finding that if returned to El Salvador, Petitioners are more likely than not to be tortured by a public official or with the consent or acquiescence of a public official. We agree the evidence did not rise to the level of acquiescence. Indeed, as the BIA noted, the record contains evidence that the Salvadoran government is cracking down on corruption and taking other measures to protect its citizens against gang violence. The fact that such efforts are not entirely successful does not amount to acquiescence. *E.g., Del Cid Marroquin v. Lynch*, 823 F.3d 933, 937 (9th Cir. 2016) ("a government does not acquiesce to torture where the government actively, albeit not entirely successfully, combats the illegal activities" (brackets and internal quotation marks omitted)); *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 351 (5th Cir. 2006) (holding Colombian government's inability to provide complete security from guerilla group did not constitute government acquiescence); *cf. Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006) (holding government had not acquiesced in torture where it "had attempted to protect individuals" like the petitioner).

E. Due Process

Petitioners contend they were deprived of a fair hearing because during the time leading up to their hearing, former Attorney General Jeff Sessions regularly issued statements indicating that Central American asylum seekers do not have valid claims. They claim this rhetoric infected the immigration courts generally and that it resulted in the immigration judge prejudging their applications in this case.

It is true that applicants are entitled to an "opportunity to be heard at a meaningful time and in a meaningful manner" in removal proceedings.

Arambula-Medina v. Holder, 572 F.3d 824, 828 (10th Cir. 2009) (internal quotation marks omitted). Other than disagreement with the result, however, Petitioners cite no specific instances demonstrating that the immigration judge or BIA prejudged their case or denied them a meaningful opportunity to be heard. Indeed, our review of the administrative decisions shows that Petitioners' arguments received careful consideration. We are satisfied that Petitioners received all the process they were due.

III. Conclusion

We uphold the BIA's affirmance of the immigration judge's decision under the substantial evidence standard. The petition for review is denied.

Entered for the Court

Gregory A. Phillips
Circuit Judge