FILED
United States Court of Appeals
Tenth Circuit

May 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LILIANA LLELITZA CARDENAS SOLIS,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 22-9536
(Petition for Review)

ORDER AND JUDGMENT[*]

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

The United States ordered the removal of Ms. Liliana Llelitza Cardenas Solis to Mexico. Though she was a lawful permanent resident of the United States, she had been convicted of a drug crime and considered removable. She sought asylum, withholding of removal, and deferral of

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[*] Oral argument would not help us decide the petition for review, so we have decided the petition based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

removal. The immigration judge denied relief, and Ms. Solis petitioned for judicial review.

1. We consider the immigration judge's decision under a deferential standard of review.

After the immigration judge denied relief, Ms. Solis appealed to the Board of Immigration Appeals. A single member of the Board affirmed without issuing an opinion. In this situation, we review the immigration judge's decision rather than the Board's. *Uanreroro v. Gonzales*, 443 F.3d 1197, 1203 (10th Cir. 2006). For the immigration judge's legal determinations, we conduct de novo review; for her factual findings, we consider whether the immigration judge had substantial evidence. *Igiebor v. Barr*, 981 F.3d 1123, 1131 (10th Cir. 2020).

2. Ms. Solis was ineligible for asylum or withholding of removal based on her conviction of a particularly serious crime.

Even when noncitizens are otherwise removable, they may be able to avoid removal through asylum or withholding of removal. But asylum and withholding of removal are unavailable to noncitizens convicted of particularly serious crimes. 8 U.S.C. § 1158(b)(2)(A)(ii) (asylum); 8 U.S.C. § 1231(b)(3)(B)(ii) (withholding of removal).

We consider whether Ms. Solis's underlying crime was particularly serious. Her crime involved the possession of roughly two kilograms of heroin. For this crime, she was convicted of possessing heroin with the intent to distribute. 21 U.S.C. § 841(a), (b)(1)(A)(i).

Because the crime entailed illicit trafficking of a controlled substance, Ms. Solis's conviction involved an aggravated felony. 8 U.S.C. § 1101(a)(43)(B). And a conviction for an aggravated felony necessarily constitutes a particularly serious crime for purposes of asylum. 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i). So Ms. Solis was not eligible for asylum.

She argues that even if she were ineligible for asylum, she would qualify for withholding of removal. But withholding of removal is presumptively unavailable when the applicant was convicted of an aggravated felony involving drug trafficking. *Matter of Y-L-*, 23 I. & N. Dec. 270, 274–76 (A.G. 2002). An exception exists, allowing eligibility for withholding of removal when the circumstances are "extraordinary and compelling." *Id.* at 274. The circumstances are extraordinary and compelling only when a noncitizen shows, "at a *minimum*," all of these six facts:

1. The conviction involved only "a very small quantity of controlled substance."
2. The conviction involved "a very modest amount of money."
3. The noncitizen was only "peripheral[ly] involve[d]" in the transaction.
4. The crime didn't involve violence or a threat of violence.
5. The crime didn't involve an organized criminal enterprise.
6. The crime didn't adversely affect or harm juveniles.

Id. at 276–77.[1]

The immigration judge found a failure to satisfy some of these elements, and substantial evidence existed for this finding. Examples include the first and second elements of the exception—the involvement of "a very small quantity of controlled substance" and "a very modest amount of money." In the administrative proceedings, Ms. Solis acknowledged that she had tried to transport nearly two kilograms of heroin. For these efforts, she obtained about $3000 to $4000 per trip. The immigration judge could reasonably regard two kilograms of heroin as more than "a very small quantity of controlled substance" and $3000 to $4000 per trip as more than "a very modest amount of money." *See Guerrero v. Whitaker*, 742 F. App'x 293, 293 (9th Cir. 2018) (unpublished) (upholding a finding that a conviction for possessing more than one kilogram of heroin didn't satisfy the exception because the quantity of heroin was not "a very small quantity" (internal quotation marks omitted)); *see also United States v. Romer*, 270 F. App'x 728, 731 (10th Cir. 2008) (unpublished) (stating that "a kilogram is considered a significant quantity of heroin exceeding typical street-level distribution amounts").

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[1] Ms. Solis argues that the Attorney General should rescind *Matter of Y-L-*, but she didn't present this argument to the immigration judge. We thus decline to consider this argument. *See Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010).

Ms. Solis asserts that she cooperated with law enforcement, obtained early release for good behavior, and distanced herself from other criminals. But these assertions wouldn't compel the immigration judge to find all the elements for the exception. *See Matter of Y-L-*, 23 I. & N. Dec. 270, 277 (A.G. 2002) (stating that "commonplace circumstances" like "cooperation with law enforcement authorities, limited criminal histories, . . . and post-arrest (let alone post-conviction) claims of contrition . . . do not justify . . . a deviation" from the presumption that drug-trafficking felonies constitute particularly serious crimes).

We thus conclude that the immigration judge didn't err in finding Ms. Solis ineligible for asylum or withholding of removal.

3. The immigration judge didn't err in denying eligibility for deferral of removal.

Ms. Solis also sought deferral of removal based on a risk of torture if she returned to Mexico. To obtain deferral of removal, Ms. Solis needed to show that (1) it was "more likely than not" that she would be tortured if she returned to Mexico and (2) the Mexican government acquiesces in such torture. 8 C.F.R. § 1208.16(c)(2) (torture "more likely than not"); 8 C.F.R. § 1208.18(a)(7) (acquiescence).

The immigration judge found that Ms. Solis had failed to satisfy either element. Because these findings are factual, Ms. Solis must show that any reasonable adjudicator would have been compelled to find both a

likelihood of torture and acquiescence by the Mexican government. 8 U.S.C. § 1252(b)(4)(B); *Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021). In our view, Ms. Solis had not satisfied that burden.

a. Risk of torture

Ms. Solis bases the risk of torture on her cooperation with law enforcement and membership in the LGBTQ community. But the immigration judge could reasonably find that torture wasn't "likely."

When Ms. Solis was prosecuted, she cooperated with law enforcement and provided information about a Mexican heroin dealer (named "Primo") and his organization. Afterward, Ms. Solis's mother received some "random calls." R. at 191. But the immigration judge pointed out that

- Primo had been removed to Mexico before Ms. Solis's arrest,
- Ms. Solis hadn't known where Primo was in Mexico or the name of his organization,
- neither Primo nor the organization would likely target Ms. Solis because she was a low-level participant who knew little about the operation, and
- the random calls to Ms. Solis's mother had been anonymous and could have been unrelated.

The immigration judge thus had substantial evidence to find that Ms. Solis had not shown a likelihood of torture based on her cooperation with law enforcement.

The same is true of the immigration judge's consideration of Ms. Solis's membership in the LGBTQ community. The immigration judge acknowledged Mexican discrimination and violence against homosexuals and transgender individuals. But the immigration judge pointed out that the administrative record also showed that

- a local law had stiffened penalties for hate-crimes based on sexual orientation and gender identity,
- another local law had banned conversion therapy for gay and lesbian individuals, and
- a federal law had prohibited discrimination against gay, lesbian, and transgender individuals.

Based on this evidence, the immigration judge could reasonably find that Ms. Solis had not shown a likelihood of torture based on her membership in the LGBTQ community.

b. Acquiescence by the Mexican government

Ms. Solis also challenges the immigration judge's finding that the Mexican government would not acquiesce in torture. According to Ms. Solis, the immigration judge should have found acquiescence because some public officials had been complicit in the domination of cartels and discrimination against homosexuals. Even if some officials had been complicit, the immigration judge would have needed to balance that complicity against the Mexican government's broader efforts to combat cartels and discrimination. And even if the Mexican government hadn't

been entirely effective in fighting cartels and discrimination against homosexuals, a reasonable adjudicator could find that the Mexican government wouldn't acquiesce in torture. *See, e.g.*, *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (recognizing that evidence of corruption and underfunding of the police did not compel a finding that the government would acquiesce in torture).

4. We lack jurisdiction to consider the Board's decision to forgo an opinion.

Ms. Solis challenges not only the immigration judge's decision but also the Board's decision to forgo an opinion. For this challenge, jurisdiction must be grounded in the Immigration and Nationality Act or the Administrative Procedure Act. Neither statute applies.

Under the Immigration and Nationality Act, we have jurisdiction to review the "final order of removal." *Tsegay v. Ashcroft* 386 F.3d 1347, 1353 (10th Cir. 2004) (internal quotation marks omitted). The final order of removal came from the immigration judge, not the Board. So the Immigration and Nationality Act doesn't confer jurisdiction over the Board's method of decision-making. *Id.*[2]

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[2] Ms. Solis argues that *Tsegay* doesn't apply because there the Court lacked jurisdiction to review the immigration judge's decision. But in *Tsegay*, the Court addressed the same jurisdictional issue (whether jurisdiction exists to consider the Board's decision to affirm without an opinion). *Tsegay*, 386 F.3d at 1353. *Tsegay* thus applies.

Similarly, the Administrative Procedure Act doesn't confer jurisdiction because the Board's method of affirming without an opinion is a case management technique committed to the Board's discretion. *Id.* at 1356.

We thus lack jurisdiction to consider the Board's decision to affirm the immigration judge's decision without issuing an opinion.

5. Summary

We dismiss the petition as to the challenge involving the Board's decision to forgo an opinion. The rest of the petition is denied.

Ms. Solis's conviction involved a particularly serious crime, so she was ineligible for asylum or withholding of removal. And the immigration judge had substantial evidence to reject Ms. Solis's claim that she was likely to face torture upon returning to Mexico.

Entered for the Court

Robert E. Bacharach
Circuit Judge