

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 10, 2023

Christopher M. Wolpert
Clerk of Court

GAGANDEEP SINGH,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9563
(Petition for Review)

ORDER AND JUDGMENT*

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

Gagandeep Singh, a native and citizen of India, petitions for review of a decision by the Board of Immigration Appeals (Board or BIA) affirming the denial of his applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). Exercising jurisdiction under 8 U.S.C. § 1252(a), we dismiss the petition in part and deny the remainder.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

BACKGROUND

I. Underlying Facts

Mr. Singh, a Sikh, is from the Indian state of Punjab. He is a worker for the Shiromani Akali Dal (SAD) Mann party, which is opposed by the SAD Badal party as well as other political parties in India. Mr. Singh testified that on two occasions while the SAD Badal party was the governing party in Punjab, he was beaten by SAD Badal party members.

First, in June 2015, he was attacked by four people who came up behind him while he was hanging party posters. Beating him with hockey sticks and baseball bats, they told him to leave SAD Mann and join SAD Badal and warned him he would be killed if he did not comply. The beating ended when Mr. Singh's screams attracted the attention of others nearby. As a result of this attack, Mr. Singh suffered bruises and internal injuries. He saw a doctor, who gave him pain medication and advised a few days of rest.

Then, in August 2015, Mr. Singh was returning home from a SAD Mann event when a different group of four attacked him. They threw him to the ground, kicked him, and again beat him with hockey sticks while repeating the previous threats. As before, his cries attracted a crowd, scaring away his attackers. As they left, they told him they would kill him the next time they saw him. A doctor treated Mr. Singh for internal and external injuries, swelling, lacerations, and contusions.

The day after the second beating, Mr. Singh and his father went to the police station. The police refused to take a complaint, and they told Mr. Singh's father that

if he tried to file a complaint elsewhere, they would file an accusation against him and Mr. Singh. Afterward Mr. Singh lodged in Delhi for two months, under the name of his father's friend, before leaving India and making his way to the United States by the end of January 2016.

II. Legal Standards

For asylum, a petitioner must establish he is a refugee. *See* 8 U.S.C. § 1158(b)(1)(A). A refugee is a person who is “unable or unwilling to return to the country of origin ‘because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.’” *Rivera-Barrientos v. Holder*, 666 F.3d 641, 645-46 (10th Cir. 2012) (quoting 8 U.S.C. § 1101(a)(42)(A)) (emphasis omitted). “Persecution is the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive and must entail more than just restrictions or threats to life and liberty.” *Ritonga v. Holder*, 633 F.3d 971, 975 (10th Cir. 2011) (internal quotation marks omitted). “[P]ersecution may be inflicted by the government itself, or by a non-governmental group that the government is unwilling or unable to control.” *Id.* (internal quotation marks omitted). Where a petitioner seeks asylum based on fear of future persecution, he must show his fear is “both subjectively genuine and objectively reasonable.” *Tulengkey v. Gonzales*, 425 F.3d 1277, 1281 (10th Cir. 2005).

The standard for withholding of removal is “more stringent” than that for asylum. *Zhi Wei Pang v. Holder*, 665 F.3d 1226, 1233 (10th Cir. 2012). “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.” *Id.* (internal quotation marks omitted). And “[t]o be eligible for relief under the CAT, an individual must establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” *Id.* at 1233-34 (internal quotation marks omitted). Such torture must be by or with the consent or acquiescence of “a public official acting in an official capacity or other person acting in an official capacity.” 8 C.F.R. § 1208.18(a)(1).

III. Agency Proceedings

Mr. Singh’s Notice to Appear (NTA) charged him with entering the United States without being admitted or paroled and being subject to removal because he did not possess a valid entry document. Mr. Singh admitted the factual allegations in the NTA and conceded removability. He applied for asylum, withholding of removal, and relief under the CAT.

The immigration judge (IJ) found that Mr. Singh lacked credibility. He further found that (1) even if he were to credit Mr. Singh’s testimony, the incidents described did not rise to the level of past persecution, (2) Mr. Singh could reasonably relocate within India, and (3) Mr. Singh’s fear of future persecution was not objectively reasonable. Having denied asylum, the IJ also denied withholding of removal. Finally, the IJ denied CAT relief, finding Mr. Singh had not suffered torture and had

not established it was more likely than not that he would suffer torture if he returned to India.

The Board dismissed Mr. Singh's appeal. Unlike the IJ, it assumed Mr. Singh's credibility. Like the IJ, however, it held that the circumstances did not establish past persecution. It therefore determined he was not entitled to a presumption of future persecution. The Board further concluded that Mr. Singh had not independently established a well-founded fear of future persecution, noting he had "not meaningfully challenged the [IJ's] determination" that fear of persecution would not be objectively reasonable. R. Vol. 1 at 4. Because the Board upheld the denial of asylum, it also upheld the denial of withholding of removal. Finally, the Board concluded Mr. Singh had not been tortured within the meaning of the CAT, and he had not shown he was more likely than not to be tortured in the future. It thus denied relief under the CAT.

Mr. Singh filed a timely petition for review.

DISCUSSION

I. Standards of Review

Where a single Board member issues a brief order deciding an appeal, as here, it is that order we review as the final agency order. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). In those circumstances, "we will not affirm on grounds raised in the IJ decision unless they are relied upon by the BIA in its affirmance." *Id.*

For asylum and withholding of removal, we review legal questions de novo and findings of fact for substantial evidence. *See Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091 (10th Cir. 2008). We also review the denial of CAT relief for substantial evidence. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020). Under the substantial-evidence standard, “[t]he agency’s ‘findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.’” *Id.* (quoting 8 U.S.C. § 1252(b)(4)(B)).

II. Asylum

A. Past Persecution

Mr. Singh argues the Board erred in determining the attacks on him did not rise to the level of past persecution. In this circuit, past persecution is a finding of fact that is reviewed only for substantial evidence. *See Vicente-Elias*, 532 F.3d at 1091. This standard is restrictive: “[t]he BIA’s determination that the applicant is not eligible for asylum must be upheld if supported by reasonable, substantial, and probative evidence on the record considered as a whole.” *Yuk v. Ashcroft*, 355 F.3d 1222, 1233 (10th Cir. 2004) (brackets and internal quotation marks omitted). “We do not weigh the evidence or evaluate the witnesses’ credibility.” *Id.* (ellipsis and internal quotation marks omitted).

The record does not indicate that any reasonable adjudicator would be compelled to find past persecution in the circumstances of this case. There is no indication that the Board ignored the evidence, as Mr. Singh charges; to the contrary, the Board cited specific pieces of evidence, including the report of the medical

treatment Mr. Singh received after the second attack. And the Board accepted his testimony and presumed his credibility. It recognized he was beaten on two occasions, resulting in injuries and medical treatment, and he was subjected to threats. But considering the attacks cumulatively with the threats, the Board further cited caselaw from this court upholding a finding of no past persecution when a petitioner repeatedly was beaten due to his religion. *See Sidabutar v. Gonzales*, 503 F.3d 1116, 1124 (10th Cir. 2007). Other Tenth Circuit cases also have upheld findings of no past persecution despite petitioners' suffering physical attacks. *See Ritonga*, 633 F.3d at 973, 976; *Witjaksono v. Holder*, 573 F.3d 968, 972, 977 (10th Cir. 2009); *Tulengkey*, 425 F.3d at 1280-81; *Kapcia v. INS*, 944 F.2d 702, 704, 708 (10th Cir. 1991). Further, as the Board recognized, this court's caselaw provides that "only rarely, when they are so immediate and menacing as to cause significant suffering or harm in themselves, do threats per se qualify as persecution." *Yuk*, 355 F.3d at 1234 (internal quotation marks omitted). The record does not compel any reasonable adjudicator to find that the threats here met that standard.

B. Future Persecution

Mr. Singh further argues the Board erred in failing to find he has a well-founded fear of future persecution and the government failed to present sufficient evidence to rebut his well-founded fear. The government responds that we lack jurisdiction to consider these arguments because Mr. Singh did not raise them before the Board. *See* 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies); *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) ("It is a

fundamental principle of administrative law that an agency must have the opportunity to rule on a challenger's arguments before the challenger may bring those arguments to court. . . . To satisfy § 1252(d)(1), an alien must present the *same specific legal theory* to the BIA before he or she may advance it in court.”).

The IJ found that Mr. Singh failed to establish the objective reasonableness of a fear of future persecution. Before the Board, Mr. Singh attacked the IJ's findings on credibility, past persecution, and relocation, as well as the denial of relief under the CAT. He did not argue that a fear of future persecution was objectively reasonable, nor did he make any other arguments identifiably targeting the IJ's determination regarding well-founded fear of future persecution. *See* R. Vol. 1 at 23-35 (argument section of Mr. Singh's brief to the Board); *see also id.* at 4 (Board's statement that Mr. Singh had “not meaningfully challenged the [IJ's] determination” that a fear of future persecution would not be objectively reasonable). We therefore lack jurisdiction to consider the future-persecution arguments he presents to this court. *See Garcia-Carbajal*, 625 F.3d at 1236-37.¹

¹ Mr. Singh contends the Board erred in declining to consider the IJ's determination that he could reasonably relocate within India. He did brief the issue of relocation before the Board. But his argument before this court is based on the premises that he demonstrated both past persecution and the objective reasonableness of fear of future persecution. *See* Pet'r's Opening Br. at 25-27. Given that neither premise is correct, Mr. Singh fails to show the Board was required to address relocation.

III. Withholding of Removal

Although Mr. Singh’s opening brief presents specific arguments about the denial of withholding of removal, he did not make those arguments before the Board. We thus lack jurisdiction to consider those arguments. *See id.*²

IV. Relief under the CAT

Finally, Mr. Singh challenges the denial of relief under the CAT. The Board denied relief because (1) the harm Mr. Singh suffered did not constitute torture under the regulations, and (2) the record did not establish that it was more likely than not that he would be tortured in the future. Mr. Singh argues that “[s]ubstantial evidence supports CAT relief.” Pet’r’s Opening Br. at 38. The question before us, however, is whether substantial evidence supports the Board’s *denial* of CAT relief.

“To be entitled to any type of CAT relief, an applicant must ‘establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.’” *Igiebor v. Barr*, 981 F.3d 1123, 1128 (10th Cir. 2020) (quoting 8 C.F.R. § 1208.16(c)(2)). “Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.” 8 C.F.R. § 1208.18(a)(1). It “is an extreme form of cruel and inhuman treatment and

² Past persecution is relevant to withholding of removal as well as asylum, *see Matumona v. Barr*, 945 F.3d 1294, 1304 (10th Cir. 2019) (recognizing that past persecution establishes a presumption of future persecution for purposes of withholding of removal), and Mr. Singh did argue past persecution before the Board. To the extent that argument preserved some portion of his appellate withholding argument, his failure to satisfy the burden of proof for asylum means he also necessarily failed to satisfy the higher standard for withholding of removal. *See Zhi Wei Pang*, 665 F.3d at 1233.

does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.” *Id.* § 1208.18(a)(2). For “severe pain or suffering” to warrant CAT relief, it must be “inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity.” *Id.* § 1208.18(a)(1). In assessing the likelihood of torture, a fact-finder must consider all relevant evidence, including “[e]vidence of past torture inflicted upon the applicant.” *Id.* § 1208.16(c)(3)(i).

As described, Mr. Singh was beaten twice in India. He received medical treatment but did not suffer severe injuries. Having upheld the Board’s determination that this treatment did not constitute past persecution, we also uphold the conclusion that it does not fall within the more severe category of torture. *See Sidabutar*, 503 F.3d at 1125-26. Mr. Singh has failed to show that any reasonable adjudicator would be compelled to conclude that it is more likely than not he would be tortured if he returns to India.

CONCLUSION

We dismiss the petition for review in part and deny the remainder.

Entered for the Court

Nancy L. Moritz
Circuit Judge