FILED
United States Court of Appeals
Tenth Circuit

May 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONY OSBELI GIRON-LOPEZ,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9547
(Petition for Review)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Petitioner Rony Osbeli Giron-Lopez filed applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). An immigration judge ("IJ") denied the applications, and the Board of Immigration Appeals ("BIA") affirmed. Mr. Giron-Lopez then moved to reconsider, which the

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

BIA denied. He now petitions this court for review of the denial of his motion to reconsider. Exercising jurisdiction under 8 U.S.C. § 1252, we deny the petition.

I. BACKGROUND

A. *Factual Background*

Mr. Giron-Lopez, a citizen of Guatemala, illegally entered the United States in 2003. He was arrested in 2009 for driving while intoxicated and in 2014 for driving without a license. After the second arrest, the Department of Homeland Security placed Mr. Giron-Lopez in removal proceedings by filing a Notice to Appear at the immigration court in Denver. He conceded his removability and then filed applications for asylum, withholding of removal, and CAT protection.

B. *IJ Proceedings*

An IJ held a hearing on the applications. The evidence included Mr. Giron-Lopez's testimony and numerous documents, including the death certificates of his brother and cousin, and reports and articles concerning conditions in Guatemala.

Mr. Giron-Lopez offered only his own testimony about the circumstances of his brother Marvin's death. He testified that Marvin was killed in Guatemala in 2011 at the behest of Mario Ponce Rodriguez, a Guatemalan drug trafficker currently serving a 25-year prison sentence in the United States. He said that Mr. Ponce ordered Marvin's murder because Marvin celebrated Mr. Ponce's arrest. He also testified that Mr. Ponce shot and killed his cousin Maynor in 1996. Finally, Mr.

Giron-Lopez said that Mr. Ponce took an unspecified plot of land from his father following Marvin's murder. R. Vol. I at 311-16, 321.

Although Mr. Giron-Lopez did not contend he had been threatened, he said that his removal to Guatemala could put him at risk of harm. In particular, he fears Mr. Ponce's family because he knows "what they do for a living." *Id.* at 320.

When asked why he waited until 2014 to apply for asylum, Mr. Giron-Lopez said: "I have proof of what happened to my brother. And I did not have the need . . . to come to Immigration, then I got caught . . . and now I had the need to look for the stuff of what happened to my brother." *Id.* at 325.

The IJ denied Mr. Giron-Lopez's applications, holding that

(1) his asylum application was untimely;

(2) he did not qualify for withholding of removal because he had not established a well-founded fear of persecution on account of his membership in any social groups, and none of his family members had been harmed since Marvin's death; and

(3) he was not entitled to CAT protection because he had not established that he will more likely than not be tortured upon his return to Guatemala.

C. ***BIA Appeal***

1. **BIA Affirmance and Denial of Motion to Remand**

Mr. Giron-Lopez filed an appeal and motion for remand. On the timeliness of his asylum application, he argued the IJ erred in holding there had been no change in circumstances under 8 U.S.C. § 1158(a)(2)(D). On withholding of removal, he said the IJ did not consider any of his proposed social groups under 8 U.S.C. § 1231(b)(3)(A) and

incorrectly determined that none of his relatives had been harmed since his brother's death. On the CAT claim, he asserted the IJ failed to consider his country conditions evidence and also failed to consider whether Mr. Ponce acted "under color of law" under 8 C.F.R. § 1208.18(a)(1).

Mr. Giron-Lopez moved the BIA to remand for the IJ to conduct additional fact-finding concerning each of these issues. The BIA affirmed the IJ's decision and denied the motion to remand.

2. **BIA Denial of Motion to Reconsider**

Mr. Giron-Lopez moved to reconsider. He argued the BIA had erred in:

(1) denying his motion to remand for the IJ to consider whether the taking of his father's land was a change in circumstances sufficient to excuse his late asylum application;

(2) affirming the denial of withholding of removal because it failed to address whether his proposed social groups were legally cognizable and incorrectly determined that no member of his family had been harmed since his brother's death; and

(3) denying his request for CAT protection by failing to consider the many reports and articles he had submitted concerning the conditions in Guatemala.

The BIA denied the motion. Mr. Giron-Lopez timely filed a petition for review with this court. He concedes that his petition is limited only to the BIA's denial of his motion to reconsider.

II. DISCUSSION

Mr. Giron-Lopez petitions this court for review of the BIA's denial of his motion to reconsider. We have jurisdiction to do so. *See* Mata v. Lynch, 576 U.S.

143, 147 (2015); Infanzon v. Ashcroft, 386 F.3d 1359, 1362 (10th Cir. 2004). We review for an abuse of discretion. Rodas-Orellana v. Holder, 780 F.3d 982, 990 (10th Cir. 2015); 8 C.F.R. § 1003.2(a). Thus, we will reverse the BIA only if it "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." Mahamat v. Gonzales, 430 F.3d 1281, 1283 (10th Cir. 2005) (quotations omitted).

A. ***Timeliness of Asylum Application***

Mr. Giron-Lopez argues the BIA should have remanded for the IJ to address whether the taking of his father's land constituted changed circumstances excusing his untimely asylum application. *See* 8 U.S.C. § 1158(a)(2)(D) (allowing untimely asylum applications where applicant demonstrates "changed circumstances . . . materially affect[ing] the applicant's eligibility for asylum"). In denying the motion for reconsideration, the BIA rejected this argument for two reasons.

First, it observed that Mr. Giron-Lopez never argued to the IJ that the seizure of his father's land was a changed circumstance under § 1158(a)(2)(D). The BIA cited its precedent holding that it will not consider arguments that could have been but were not presented to the IJ. *See* Matter of W-Y-C- & H-O-B-, 27 I. & N. Dec. 189, 190 (B.I.A. 2018). Mr. Giron-Lopez fails to address this reasoning on appeal, and we find no fault with it.

Second, the BIA rejected Mr. Giron-Lopez's contention that it engaged in improper fact-finding when it denied his motion to remand. In denying that motion,

the BIA said that Mr. Giron-Lopez had failed to establish that the seizure of his father's land "materially affect[ed]" his eligibility for asylum. *See* § 1158(a)(2)(D). That was a legal, not a factual determination. *See* Hoover v. Radabaugh, 307 F.3d 460, 466 n.1 (6th Cir. 2002) (court's conclusions as to the materiality of fact issues is a legal determination); Lemoine v. New Horizons Ranch & Ctr., Inc., 174 F.3d 629, 633-34 (5th Cir. 1999) (same).

The BIA thus did not abuse its discretion.[1]

B. ***Withholding of Removal***

Under 8 U.S.C. § 1231(b)(3)(A), an applicant for withholding of removal may not be removed to a country if his or her "life or freedom would be threatened . . . because of the [applicant's] race, religion, nationality, membership in a particular social group, or political opinion." The applicant must "establish a clear probability

[1] Mr. Giron-Lopez also contends that in denying his initial appeal, the BIA improperly used a subjective intent standard in analyzing his changed circumstances argument. He suggests that his petition includes the arguments he made in his initial appeal, and cites § 1252(b)(6) in support. But that provision requires only that if a petitioner timely seeks review of *both* the BIA's denial of an appeal *and* motion to reconsider, the petitions will be consolidated for appellate purposes. *See, e.g., Ali-Ani v. Gonzales*, 171 Fed. App'x 715, 717 (10th Cir. 2006) ("The INA, by its terms, contemplates two petitions for review and directs the courts to consolidate the petitions."). But because he did not file a timely petition for review challenging the BIA's denial of his appeal, the scope of our review is limited to the denial of his motion to reconsider. Mr. Giron-Lopez did not present the subjective intent argument in his motion to reconsider, and we therefore will not consider it.

of persecution" on a statutorily protected ground. Elzour v. Ashcroft, 378 F.3d 1143, 1149 (10th Cir. 2004).

Mr. Giron-Lopez contends that in addressing his motion to reconsider, the BIA should have considered whether his proposed social groups—family members of his brother Marvin and individuals believed to have celebrated Mr. Ponce's arrest—were legally cognizable. But as the BIA explained, even if Mr. Giron-Lopez's proposed social groups were legally cognizable, he had failed to establish a clear probability of persecution because there was no evidence of harm or threat of harm to similarly situated family members belonging to those proposed social groups.[2] It was therefore unnecessary for the BIA to analyze whether his proposed social groups were cognizable.

Mr. Giron-Lopez also argues the BIA should have granted his motion to reconsider because, in affirming the IJ's decision, the BIA incorrectly found that his family members had not been harmed since his brother's death. He points to his testimony that Mr. Ponce took his father's land, R. Vol. I at 321 ("[Mr. Ponce] took . . . land from my father[]."), but he provided no further information. The record does not show what happened to his father's land, when it was taken, or how Mr. Ponce may have been involved. Because Mr. Giron-Lopez must establish a clear

[2] He also argues that the BIA erred on reconsideration by relying upon the lack of harm to his aunts and uncles, who were not included in his proposed social groups. Because there was no evidence of harm to any family member, we fail to see how this constitutes an abuse of discretion.

probability of persecution, Elzour, 378 F.3d at 1149, the BIA acted within its discretion in denying his motion to reconsider.

Finally, Mr. Giron-Lopez asserts the BIA "erroneously conflat[ed] the past or future persecution analysis and nexus analysis." Opening Br. at 33. He did not make this argument in his motion to reconsider, however, and it is therefore beyond the scope of his petition for review.

C. ***CAT Protection***

"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) (quotations and brackets omitted).

Mr. Giron-Lopez argues the IJ and the BIA ignored his evidence of country conditions. He contends this evidence shows the Guatemalan government is unwilling or unable to control criminal organizations and thus acquiesces in torture. He also argues the evidence shows that Mr. Ponce and his cartel are acting "under color of law" within the meaning of the CAT regulation, 8 C.F.R. § 1208.18(a)(1), and therefore can be deemed an "other person acting in an official capacity," id. But to qualify for CAT protection, he must first show it is more likely than not that he will be tortured. Uanreroro v. Gonzales, 443 F.3d 1197, 1202 (10th Cir. 2006). The BIA found that he failed to do so, and we see no error in the BIA's

refusal to reconsider that determination. We therefore need not address his arguments based on the evidence of country conditions.

In sum, the BIA committed no abuse of discretion in denying the motion to reconsider Mr. Giron-Lopez's CAT claim.

III. CONCLUSION

We uphold the BIA's denial of Mr. Giron-Lopez's motion to reconsider and deny his petition.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge