FILED
United States Court of Appeals
Tenth Circuit

October 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAMON DE JESUS SALAS-MONTERO,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 22-9564
(Petition for Review)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Ramon de Jesus Salas-Montero petitions for review of an order of the Board of Immigration Appeals (BIA) affirming, without opinion, the decision of an immigration judge (IJ) finding him removable and denying his application for asylum.[1] Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny the petition.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] The IJ also denied Mr. Salas-Montero's applications for withholding of removal and relief under the United Nations Convention Against Torture (CAT). Although Mr. Salas-Montero's opening brief mentions those applications in passing,

I. BACKGROUND

Mr. Salas-Montero is a native and citizen of Venezuela. He entered the United States in 2018 and requested asylum at the border. He was placed in removal proceedings because he had sought admission without a visa or other document authorizing admission. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I). He then applied for asylum.

Mr. Salas-Montero had a hearing before an IJ. According to his testimony, which the IJ found credible, Mr. Salas-Montero was the president of a postal workers' union in Caracas and a neighboring state. The Venezuelan government paid his salary. He was also a member of the executive board of a political party (Primero Justicia) opposed to the governing administration.

In 2018, Mr. Salas-Montero's supervisor ordered that he would be giving priority to and expediting certain mail (mostly bank-related) from the United States. Mr. Salas-Montero thought his supervisor lacked the authority to do so. He also developed concerns about irregularities with the security code and weight of mail shipments arriving in Caracas from the United States. He filed a complaint about these concerns with the United States Embassy and the Venezuelan national assembly. The same day, his supervisor learned about the complaint and soon

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he advances no argument that the BIA erred in upholding the IJ's denial of withholding or CAT relief. He has therefore waived our review of those rulings. *See Kabba v. Mukasey*, 530 F.3d 1239, 1248 (10th Cir. 2008) (raising an aspect of the agency's ruling "only in passing in [an] opening brief" without "any argument . . . specifically challeng[ing] [that] aspect" waives our review of that aspect).

thereafter took Mr. Salas-Montero "off an active position," R. at 120:12, effectively forcing his retirement. The supervisor and other members of the union aligned with the governing party also threatened to make Mr. Salas-Montero "disappear," which he understood to mean they were "going to cause [him] great harm" and "make sure that [he was] not around." R. at 124:12–13. When Mr. Salas-Montero attempted to return to the postal service, security services turned him away and told him not to come around anymore.

Mr. Salas-Montero remained in Venezuela for several months before traveling to the United States. He was not harmed during that time. He receives his government pension. His wife, who is also active in the same political party as him, continues to work as an office manager in the Venezuelan postal service, but postal officials have threatened to fire her, and since his departure, people have been "surrounding [his] house," R. at 133:24.

The IJ found that Mr. Salas-Montero did not demonstrate past persecution or a well-founded fear of future persecution on account of a protected ground, as required for asylum, *see Addo v. Barr*, 982 F.3d 1263, 1269 (10th Cir. 2020) ("To qualify for asylum, a noncitizen must demonstrate either past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." (internal quotation marks omitted)). The IJ found that although Mr. Salas-Montero was a member of an opposition party, his supervisor effectively forced retirement on him because of a disagreement about how the mail should be handled, not on account of his political opinion. The IJ also

found that being forced to retire from his position and receiving the threats did not constitute past persecution because Mr. Salas-Montero continued to receive his pension, he remained in Venezuela for several months without harm, and no one had come to his house. Finally, the IJ found that Mr. Salas-Montero failed to establish an objectively reasonable fear of future persecution. The IJ noted that although Venezuelan politics are "chaotic," R. at 48, it did not appear that Mr. Salas-Montero's "political activism motivated his complaint to the United States Embassy," R. at 47. And despite enduring "a great deal of psychological pressure because of his actions," his wife continues to live in Venezuela without harm. *Id.*

Pursuant to 8 C.F.R. § 1003.1(e)(4), the BIA affirmed without opinion the result of the IJ's decision.

II. DISCUSSION

Because the BIA affirmed the IJ's decision without opinion, the IJ's decision is the agency's final determination. *See* § 1003.1(e)(4). We therefore review the IJ's decision. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1203 (10th Cir. 2006).

In his opening brief, Mr. Salas-Montero argues that (1) his conduct was an expression of his political opinion because he blew the whistle on government corruption and was affiliated with an opposition party; (2) the threats he received amount to past persecution; and (3) he has a well-founded fear of future persecution on account of his political opinion. The government argues that Mr. Salas-Montero failed to exhaust these arguments and therefore we may not review them. We agree that Mr. Salas-Montero failed to exhaust arguments (1) and (3). And because of his

failure to exhaust those arguments, he lacks any preserved challenge to the IJ's nexus finding. Thus, in the absence of any tie to a protected ground, his second argument—whether the threats were severe enough to rise to the level of persecution—is irrelevant.

Under 8 U.S.C. § 1252(d)(1), "[a] court may review a final order of removal only if . . . (1) the alien has exhausted all administrative remedies available to the alien as of right."[2] To exhaust, "[i]t is not enough to go through the procedural motions of a BIA appeal, or to make general statements in the notice of appeal to the BIA, or to level broad assertions in a filing before the [BIA]." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) (internal quotation marks omitted), *abrogated on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411 (2023). "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." *Id.* "[P]resenting a *conclusion* or

[2] Until earlier this year, and prior to the filing of the government's response brief in this appeal, the exhaustion rule in this circuit was that the failure to raise an issue on appeal to the BIA deprived this court of jurisdiction to review that issue. *See, e.g.*, *Robles-Garcia v. Barr*, 944 F.3d 1280, 1283 (10th Cir. 2019). Thus, the government argued that Mr. Salas-Montero's failure to exhaust deprived us of jurisdiction to review the unexhausted issues. But in *Santos-Zacaria v. Garland*, 598 U.S. 411, 423 (2023), the Supreme Court held that "§ 1252(d)(1)'s exhaustion requirement is not jurisdictional" and therefore "subject to waiver and forfeiture." Nonetheless, the rule remains a "mandatory one[]." *Id.* at 421; *see Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1209 (10th Cir. 2007) ("Exhaustion under [§ 1252(d)(1)] is statutory and therefore mandatory, rather than prudential."); *cf. United States v. Palomar-Santiago*, 593 U.S. ---, 141 S. Ct. 1615, 1621 (2021) ("When Congress uses mandatory language in an administrative exhaustion provision, a court may not excuse a failure to exhaust." (internal quotation marks omitted)). And the government neither waived nor forfeited it here.

request for relief to the BIA isn't enough to exhaust every potential *argument* for reaching that conclusion or winning that relief." *Id.* at 1238.

In his notice of appeal to the BIA, Mr. Salas-Montero described the reason for his appeal as involving only the IJ's future-persecution finding: "The IJ erred in finding that [Mr. Salas-Montero] did not have a well-founded fear of persecution where [he] received death threats due to his actions as a leader in a labor union." R. at 36. He indicated that he planned to file a separate written brief or statement, but his counsel withdrew his request for briefing and told the BIA it could decide the case on the record. Counsel also submitted an "amended statement of grounds for [the] appeal." R. at 19. In full, it read:

> The [IJ] erred when he found that [Mr. Salas-Montero] was not persecuted on account of his political opinion, where [Mr. Salas-Montero] was a known member of the political party that opposed the Maduro administration and, by reporting mishandling of mail originating in the United States, [Mr. Salas-Montero] took action that showed his alignment with [the] United States and was thereafter ousted from his job and received death threats from government officials.

Id.

We might view the amended statement as presenting nothing more than a broad assertion of error or a conclusion rather than any specific legal theory, thus resulting in the failure to exhaust administrative remedies as to *any* argument presented for review in this court. *See Garcia-Carbajal*, 625 F.3d at 1237–38. But even affording the amended statement a more charitable interpretation, it refers only to *past* persecution, not to whether the IJ erred in finding that Mr. Salas-Montero failed to demonstrate a well-founded fear of *future* persecution. And the amended

statement argues that Mr. Salas-Montero's forced retirement and the death threats he received stemmed from conduct showing that he was aligned with the United States, not from blowing the whistle on government corruption. We therefore conclude that § 1252(d)(1) bars review of his future-persecution and whistleblower arguments.

Our conclusion leaves Mr. Salas-Montero with only one other argument—that his forced retirement and the death threats were severe enough to amount to past persecution. But mistreatment amounts to persecution only when it occurs on account of a protected ground. *See Addo*, 982 F.3d at 1269. And Mr. Salas-Montero has no exhausted argument that the IJ erred in finding that neither his forced retirement nor the death threats were on account of his political opinion. Therefore, his argument about the severity of his mistreatment is irrelevant, and we need not decide if he exhausted it.

III. CONCLUSION

We deny the petition for review.

Entered for the Court

Nancy L. Moritz
Circuit Judge