UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1546

LILIAN MARIA ESCOBAR-HERNANDEZ; B.M.Y.E.; D.J.M.E.,

Petitioners,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals.

Argued: October 26, 2023 Decided: November 28, 2023

Before KING, THACKER, and RICHARDSON, Circuit Judges.

Denied by unpublished per curiam opinion.

ARGUED: Payman Ali Habib, SHERMAN-STOLTZ LAW GROUP, PLLC, Verona, Virginia, for Petitioners. Andrew B. Insenga, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Brian Boynton, Principal Deputy Assistant Attorney General, Anthony P. Nicastro, Assistant Director, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

PER CURIAM:

Lilian Escobar-Hernandez ("Petitioner") and her two children[1] are natives and citizens of Honduras. Petitioner seeks review of an order of the Board of Immigration Appeals ("BIA") dismissing her appeal of the decision of the immigration judge ("IJ") denying her applications for asylum, withholding of removal, and protection pursuant to the Convention Against Torture (the "CAT"). Petitioner contends that the IJ and BIA disregarded country condition evidence and credible testimony and that substantial evidence compels the conclusion that the government of Honduras was unwilling or unable to protect her from her persecutors.

We discern no reversible error in the manner in which the IJ and BIA assessed Petitioner's evidence and conclude that there is substantial support in the record for the IJ and BIA's denial of Petitioner's claims for relief. Therefore, we deny the petition for review.

I.

A.

In 2014, Petitioner fled Honduras to save herself and her family from threats of violence at the hands of two individuals -- Luis Collidres ("Luis") and Samuel Antunez ("Samuel").

[1] Petitioner's minor children, B.Y.M.E. and D.J.M.E., are derivative applicants from Petitioner's application for asylum since they did not submit independent applications. *See* 8 U.S.C. § 1158(b)(3).

1.

Petitioner feared Luis, a drug dealer in Petitioner's neighborhood, who tried to persuade Petitioner's son D.J.M.E. to sell drugs. D.J.M.E. would come home crying and distraught after refusing Luis' offers. Petitioner attempted to stop Luis from recruiting her son, but Luis would respond aggressively, including threatening to cut out Petitioner's tongue. Luis also threatened to kill Petitioner and her family with Samuel's assistance. Petitioner never contacted the police about Luis' recruitment of her son or Luis' threats toward her and her family.

2.

Petitioner also feared Samuel, the abusive, long-term partner of Petitioner's stepdaughter, Keydi Chavvaria Pavon ("Keydi"). Keydi relied on Petitioner for protection from Samuel, sometimes staying with Petitioner after Samuel would beat her. In 2013, Samuel smashed through Petitioner's fence with a machete to retrieve Keydi and threatened to burn Petitioner's house down. Petitioner contacted the police, who were unsuccessful in apprehending Samuel because he had fled to the mountains. When Samuel eventually returned, he threatened to kill Petitioner and her family. On a separate occasion on July 24, 2014, Petitioner and Keydi attended a birthday party. Samuel arrived drunk and on drugs, and he grabbed a knife and stabbed Keydi in the abdomen. Keydi was hospitalized for five days, during which time Samuel threatened to kill her and Petitioner if they filed a police report. Instead of returning home, Petitioner decided to stay out of town with a relative. Keydi ultimately filed a police report in March 2015 regarding the July 2014 stabbing, but it is not clear from the record what, if any, action the Honduran

authorities took against Samuel. However, it is undisputed that whenever Petitioner or Keydi had called the police about Samuel prior to the stabbing, the police arrived each time, although they were often delayed an hour.

Due to Samuel's threats, Petitioner decided to flee to the United States with her children.

B.

Petitioner's removal proceedings began on October 1, 2014, when the Department of Homeland Security served separate Notices to Appear on Petitioner and each of her two children. The Notices to Appear charged that Petitioner and her children had entered the United States without being admitted or paroled and therefore were subject to removal.

1.

On May 22, 2015, Petitioner appeared before the IJ and, through counsel, conceded to service of the Notices to Appear and admitted the Notices' factual allegations. Petitioner then filed an application for asylum, withholding of removal, and protection pursuant to the CAT.

On August 9, 2018, the IJ held a hearing to consider Petitioner's claims for relief. Petitioner appeared at this hearing and, through a translator, testified about her experiences in Honduras and the circumstances giving rise to her decision to flee to the United States with her two children. Petitioner's son D.J.M.E. also testified about his experiences in Honduras. In addition to this testimony, Petitioner offered two country condition reports into evidence which indicated that Honduran police were often delayed in responding to violent crime. One report also stated that most serious crimes were never solved. However,

another report chronicled the protections for women who experienced gender-based violence.

The IJ denied Petitioner's claims for asylum, withholding of removal, and protection pursuant to the CAT. The IJ found Petitioner's and D.J.M.E.'s testimony credible. But, despite concluding that Petitioner had established that she suffered harm rising to the level of persecution in the past, the IJ held that Petitioner failed to show that the government of Honduras was unable or unwilling to control Luis and Samuel. The IJ highlighted the times that Petitioner and Keydi reported Samuel to the police and that the police arrived, even if they did not succeed in apprehending Samuel. Responding to Petitioner's contention that the police were ineffective in controlling Samuel, the IJ explained that "[j]ust because the criminal justice system did not obtain an outcome that the respondent would have preferred is not evidence of the government being unwilling or unable to protect her." A.R. at 83.[2] The IJ held that Petitioner met her burden of delineating a cognizable particular social group ("PSG") -- members of the nuclear family of Lilian M. Escobar Hernandez -- but concluded that both Luis' and Samuel's threats were not related to her PSG. The IJ further concluded that Appellant did not show that she was persecuted on account of a statutorily protected ground.

Regarding withholding of removal, the IJ held that Petitioner failed to meet the higher standard for withholding of removal inasmuch as Petitioner did not establish it was more likely than not that she would be persecuted on account of a statutorily protected

[2] Citations to the "A.R." refer to the Administrative Record filed in this appeal.

ground. On Petitioner's CAT claim, the IJ determined that Petitioner had not established it was more likely than not that she would be subject to torture if she was removed to Honduras.

2.

Petitioner then appealed to the BIA, challenging the IJ's finding that the government of Honduras was not unwilling or unable to protect her from Luis and Samuel. She also argued that there was a nexus between her persecution and her statutorily protected ground. Specifically, Petitioner argued that Luis targeted her on account of her maternal authority over her son, which she asserted met the nexus requirement. Regarding Samuel, Petitioner asserted that Samuel's violence toward her and her family was on account of her familial PSG because Samuel would not have threatened Petitioner but for her familial bond with Keydi.

A single member of the BIA dismissed Petitioner's appeal. The BIA held that the IJ had not clearly erred when it found that Petitioner did not sufficiently establish that Honduran authorities were unable or unwilling to protect her from Luis and Samuel. The BIA underscored the fact that despite not being able to apprehend Samuel, the police responded to Petitioner's calls about Samuel and that Petitioner never attempted to contact the police about Luis at all. While the BIA acknowledged that Petitioner believed the Honduran authorities would not protect her, it pointed to the country condition reports submitted by Petitioner, which indicated that Honduras was taking affirmative steps to combat gender-based violence. Because the BIA held that Petitioner did not establish the essential element that the Honduran authorities were unwilling or unable to protect her, the

BIA declined to address whether Petitioner's past harm was on account of a protected ground. And because Petitioner had "not appealed" the IJ's denial of protection pursuant to the CAT, the BIA deemed that claim "waived on appeal." A.R. at 15 n.2.

3.

Petitioner filed a timely petition for review of the BIA's order. On appeal, Petitioner argues that the IJ and BIA disregarded credible testimony and country condition evidence and therefore erred in finding that the Honduran authorities were not unable or unwilling to protect Petitioner. She also argues that her past harm was on account of a protected ground and that she was entitled to withholding of removal and relief pursuant to the CAT.

II.

We may not disturb the BIA's determinations on asylum eligibility so long as those determinations "are supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Tassi v. Holder*, 660 F.3d 710, 719 (4th Cir. 2011) (citing *Jian Tao Lin v. Holder*, 611 F.3d 228, 235 (4th Cir. 2010)).

When the BIA "adopts and affirms the IJ's decision and supplements it with its own opinion, we review both decisions." *Nolasco v. Garland*, 7 F.4th 180, 186 (4th Cir. 2021) (quoting *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014)). "Whether a government is 'unable or unwilling to control' private actors . . . is a factual question that must be resolved based on the record in each case." *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 951 (4th Cir. 2015) (quoting *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011)). Factual questions are reviewed "under the substantial evidence standard, meaning that they

are conclusive 'unless any reasonable adjudicator would be compelled to conclude to the contrary.'" *Id.* at 948 (quoting *Cordova*, 759 F.3d at 337).

III.

A.

Pursuant to the Immigration and Nationality Act, authorities may grant "asylum" to any non-citizen who qualifies as a "refugee." 8 U.S.C. § 1158(b)(1)(A). The burden of proving eligibility for asylum rests with the applicant. *See id.* § 1158(b)(1)(B). To establish her eligibility for asylum, Petitioner must prove that (1) she has a well founded fear of persecution; (2) on account of a protected ground; (3) by an organization that the Honduran government is unable or unwilling to control. *Hernandez-Avalos*, 784 F.3d at 948–49. We start and end our analysis with the third requirement: whether the Honduran authorities were unable or unwilling to control Luis and Samuel. Because the evidence does not compel a finding that the government of Honduras was unable or unwilling to control Petitioner's persecutors, Petitioner fails to establish that she is entitled to asylum.

"When an applicant claims that she fears persecution by a private actor, she must also show that the government in her native country is 'unable or unwilling to control' her persecutor." *Diaz de Gomez v. Wilkinson*, 987 F.3d 359, 365 (4th Cir. 2021) (quoting *Orellana v. Barr*, 925 F.3d 145, 151 (4th Cir. 2019)).

Government efforts to combat violence in general do not excuse the IJ and BIA's duties to support their decisions with the proper legal and factual analysis of Petitioner's specific circumstances. *Portillo Flores v. Garland*, 3 F.4th 615, 635 (4th Cir. 2021). And, generally, "[e]vidence of empty or token 'assistance' cannot serve as the basis of a finding

that a foreign government is willing and able to protect an asylum seeker." *Orellana*, 925 F.3d at 153. Finally, "there is no requirement that an applicant persist in seeking government assistance when doing so (1) 'would have been futile' or (2) 'subjected [her] to further abuse.'" *Id.* (alteration in original) (quoting *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006)).

Petitioner argues that she met her burden of establishing that the government of Honduras was unwilling or unable to protect her from her two persecutors – Luis and Samuel. Because Petitioner took different actions to report Luis and Samuel to the Honduran authorities, we discuss them separately.

1.

At oral argument, Petitioner urged that we should consider the threats and violence perpetrated by Luis and Samuel conjunctively, looking to the failure of the Honduran authorities to apprehend Samuel to explain why Petitioner never contacted the authorities about Luis. First, Petitioner did not make this argument before the IJ, the BIA, or in her briefing before us. Therefore, we may deem it waived. *See West Virginia GWP Fund v. Stacy*, 671 F.3d 378, 389 (4th Cir. 2011) ("Because petitioner made this contention for the first time at oral argument, we hold that it [is] waived.").

In any event, "an applicant who relinquishes a protective process without good reason will generally be unable to prove her government's unwillingness or inability to protect her." *Orellana*, 925 F.3d at 153. And nothing in Petitioner's testimony compels the conclusion that the police would not have responded to calls about Luis' recruitment of Petitioner's son, particularly when they did respond to her calls about Samuel. Even if we

were to make that inference, the IJ's conclusion that the Honduran authorities were willing and able to protect Petitioner does not rise to the level of error. *Mulyani*, 771 F.3d at 197 (explaining that even if the record plausibly could support two results, the one the IJ chose and the one the petitioner advances, reversal is only appropriate where the evidence compels petitioner's conclusion).

2.

When evidence in the record could be interpreted one of two ways, we must uphold the BIA's interpretation so long as it is supported by reasonable, substantial, and probative evidence. *Mulyani v. Holder*, 771 F.3d 190, 197 (4th Cir. 2014). Petitioner's testimony established that the Honduran authorities were unsuccessful in apprehending Samuel, which could lend some support in concluding that the authorities were unable to protect Petitioner. However, this testimony does not compel the finding that the authorities were unable or unwilling to help Petitioner since (1) the police responded when called and (2) Samuel fled after the police were called, which indicates that Samuel himself thought they would be effective. *See Mulyani*, 771 F.3d at 199 (explaining that persecutors who "scattered when they heard police sirens . . . believed the government was indeed willing and able to crack down" on violence).

Although the Honduran authorities ultimately failed to apprehend Samuel, this evidence alone does not compel the finding that the Honduran authorities were unable or unwilling to protect Petitioner, especially when we typically require far more to show that reporting threats and violence to the authorities would have been pointless or dangerous. *See, e.g.*, *Portillo Flores*, 3 F.4th at 635–36 (remanding where a minor did not file a police

report after being threatened by members of the MS-13 gang, who showed up alongside police officers to recruit the minor); *Hernandez-Avalos*, 784 F.3d at 947–48, 953 (remanding when the petitioner credibly testified that gang members were often released from jail and retaliated against those who reported them to the authorities).

Additionally, as the BIA noted, the country condition reports in the record indicate that Honduras was taking steps to combat gender-based violence. Petitioner argues that the BIA's reference to gender-based violence in the country condition reports indicates that the BIA ignored other aspects of the reports that weigh in her favor. But Petitioner did not identify for the BIA anything in particular in the country condition reports that Petitioner believes supports her position. Therefore, we do not fault the BIA for considering the aspects of the report that highlighted why substantial evidence supported the IJ's initial findings.

All told, there is substantial evidence to conclude that the Honduran authorities were not unable or unwilling to assist Petitioner. And, because Petitioner must establish this element to succeed on her asylum claim, we need not reach whether Petitioner's harm was on account of her PSG.[3]

[3] Even if we had the occasion to reach the issue of whether Petitioner established a nexus between her claim of past persecution and a protected ground, the BIA declined to address this alternative finding in its decision. Therefore, this issue is not properly before us. 8 U.S.C. § 1252(d)(1).

B.

To the extent Petitioner challenges the IJ and BIA's determinations that she was not eligible for withholding of removal, her arguments fail for the same reasons as her asylum claim.

To qualify for withholding of removal, Petitioner must make the same showing as she would need to qualify for asylum, that she "(1) has a well-founded fear of persecution; (2) on account of a protected ground; (3) by an organization that the [Honduran] government is unable or unwilling to control." *Hernandez-Avalos*, 784 F.3d at 949. However, to qualify for withholding of removal, this showing must be made subject to a higher standard of proof, requiring Petitioner to establish a "clear probability" of persecution, rather than the "well-founded fear" of persecution. *Marynenka v. Holder*, 592 F.3d 594, 600 (4th Cir. 2010). Therefore, an "applicant 'who has failed to establish the less stringent well-founded fear standard of proof required for asylum relief is necessarily also unable to establish and entitlement to withholding of removal.'" *Id.* (quoting *Anim v. Mukasey*, 535 F.3d 243, 253 (4th Cir. 2008)). Again, because the record does not compel the conclusion that the government of Honduras was unwilling or unable to protect Petitioner, she cannot establish that she is entitled to withholding of removal.

C.

The BIA determined that Petitioner had waived her CAT argument. Specifically, the BIA concluded that Petitioner's CAT claim was "waived on appeal" because she "ha[d] not appealed the [IJ's] denial of protection under the regulations implementing the [CAT]." A.R. 15 n.2. A petitioner must exhaust all administrative remedies before petitioning for

review of a final order of removal. 8 U.S.C. § 1252(d)(1). The Supreme Court has recently held that "§ 1252(d)(1)'s exhaustion requirement is not jurisdictional." *Santos-Zacaria v. Garland*, 598 U.S. 411, 423 (2023). Even so, § 1252(d)(1) remains a "mandatory claim-processing rule" that can be a basis for denying review of a claim. *Tepas v. Garland*, 73 F.4th 208, 213 (4th Cir. 2023) (citing *Santos-Zacaria*, 598 U.S. at 422–23). And we have held that a petitioner fails to exhaust her administrative remedies when she fails to raise an argument in briefing before the BIA and the BIA does not address the argument. *Id.* at 214.

Petitioner argues that she raised her CAT claim implicitly in her brief by discussing the country conditions of Honduras, which she argues are relevant to her CAT claim. She further argues that she explicitly raised her CAT claim in her notice of appeal to the BIA. We are unconvinced. Petitioner's brief to the BIA does not connect the country conditions to her CAT claim, nor explain how the IJ erred in its CAT analysis. And although Petitioner notes in her notice of appeal that she qualifies for CAT protection, her brief is the operative document through which any issues that Petitioner wishes to be considered must be raised. *Claudio v. Holder*, 601 F.3d 316, 319 (5th Cir. 2010).

Since Petitioner failed to adequately raise her CAT claim before the BIA, and because the BIA deemed the issue waived and declined to address it on the merits, we conclude that Petitioner has failed to exhaust her administrative remedies, as required by § 1252(d)(1). Therefore, we deny review of her CAT claim.

IV.

For the foregoing reasons, the petition for review is

DENIED.