NOT RECOMMENDED FOR PUBLICATION
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No. 19-4156

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMER FASO,	)	
	)	
Petitioner,	)	
	)	
v.	)	ON PETITION FOR REVIEW FROM THE UNITED STATES BOARD OF IMMIGRATION APPEALS
	)	
WILLIAM P. BARR, Attorney General,	)	
	)	
Respondent.	)	
	)	

BEFORE: GRIFFIN, KETHLEDGE, and THAPAR, Circuit Judges.

GRIFFIN, Circuit Judge.

Amer Faso, a native and citizen of Iraq, petitions this court for review of a Board of Immigration Appeals order. The Board's order dismissed Faso's appeal of an Immigration Judge (IJ) decision that denied his application for deferral of removal under the Convention Against Torture (CAT). For the reasons that follow, we deny his petition.

I.

In 2000, Faso was admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act (8 U.S.C. § 1157). He became a lawful permanent resident of the United States on August 19, 2003. On December 2, 2003, Faso was convicted of attempting to possess—with intent to distribute—marijuana in violation of Michigan law. *See* Mich. Comp. Laws § 333.7401(2)(d)(iii). Based on that conviction, the Department of Homeland Security issued Faso a notice to appear, charging him as removable on three bases. Faso did not contest his

removability, but he requested (1) withholding of removal pursuant to 8 U.S.C. § 1231(b)(3); (2) withholding of removal pursuant to the Convention Against Torture; and (3) deferral of removal pursuant to the Convention Against Torture. In September 2004, the Immigration Judge denied Faso's requests and ordered him to be removed.

Faso did not appeal that IJ decision to the Board of Immigration Appeals, but years later, in 2017, he moved to reopen the proceedings in Immigration Court.[1] He sought relief under the Convention Against Torture and claimed changed country conditions. Faso argued that conditions in Iraq had deteriorated and if he were removed there, he would face an "increased risk of being tortured and killed." Homeland Security opposed the motion. The IJ granted the motion to reopen, but cautioned Faso that it did not "find that [he] ha[d] met his burden to prove that it is more likely than not that he will be tortured by or with the acquiescence of the Iraqi government." The more-likely-than-not determination, the IJ indicated, would "be addressed at an evidentiary hearing."

Faso argued that the IJ should "grant[ ] [him] [d]eferral under the Convention Against Torture because he w[ould] more likely than not suffer torture if removed to Iraq." To make his case, he offered evidence, including declarations from Rebecca Heller and Daniel Smith. Faso wanted the IJ to treat Heller and Smith as experts, but the IJ declined to do so. Ultimately, the IJ found that Faso had failed to meet his burden to demonstrate that it was more likely than not that he would be tortured if he returned to Iraq and thus denied Faso's application for deferral of

[1]Ordinarily, a petitioner must move to reopen his immigration proceedings "within 90 days of the date of entry of a final administrative order of removal." *See* 8 U.S.C. § 1229a(c)(7)(C)(i); *Trujillo Diaz v. Sessions*, 880 F.3d 244, 249 (6th Cir. 2018). However, that deadline does not apply in some circumstances, such as if (1) "the basis of the motion is to apply for . . . withholding of removal under the Convention Against Torture" and (2) the motion "is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding." 8 C.F.R. § 1003.23(b)(4)(i); *Bi Feng Liu v. Holder*, 560 F.3d 485, 490–91 (6th Cir. 2009).

removal under the Convention Against Torture. Accordingly, the IJ ordered Faso removed to Iraq based on the charges in his notice to appear.

Faso appealed the IJ's decision to the Board. He argued, among other things, that the IJ committed legal error when it refused to qualify Heller and Smith as experts. Homeland Security opposed the appeal. It contended that the IJ's refusal to qualify Heller and Smith as experts was not error. Faso did not persuade the Board; it dismissed the appeal and denied the remand request. This timely petition followed.

II.

We review Faso's factual challenge under the "substantial-evidence standard," which means the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[2] *Nasrallah*, 140 S. Ct. at 1692 (quoting 8 U.S.C. § 1252(b)(4)(B)). "Questions of law and constitutional questions are subject to de novo review, with deference to the [Board]'s reasonable interpretation of the statutes and regulations." *Lin v. Holder*, 565 F.3d 971, 976 (6th Cir. 2009). When the Board reviews an "immigration judge's decision and issues a separate opinion, rather than summarily affirming the immigration judge's decision, we review the [Board's] decision as the final agency determination." *Khalili v. Holder*, 557 F.3d 429, 435 (6th Cir. 2009). But "[t]o the extent the [Board] adopted the immigration judge's reasoning," we "also review[ ] the immigration judge's decision." *Id.*

[2]The parties disagree on whether some of petitioner's claims are factual challenges to the Board's decision, and on that basis, are not within our jurisdiction to review. A recent Supreme Court case, *Nasrallah v. Barr*, resolved a circuit split on that question and clarified the scope of our subject-matter jurisdiction in the context of challenges to Board decisions that resolve requests for CAT relief. 140 S. Ct. 1683 (2020). Based on the Supreme Court's clarification, we have subject-matter jurisdiction to adjudicate the factual, legal, and constitutional challenges in this case. *See id.* at 1687–88, 1691–93; *Kilic v. Barr*, — F.3d —, No. 19-4076, 2020 WL 3888178, at *2 (6th Cir. July 10, 2020).

A.

To be eligible for CAT relief, a petitioner must "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2); *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1139 (6th Cir. 2010). To satisfy that burden, Faso offers one argument: If the Board had qualified two of his witnesses—Heller and Smith—as experts, his "request for [CAT] relief likely would have been granted." He does not explain what torture he believes awaits him in Iraq nor the evidence for that belief. He does not even articulate how Heller's and Smith's declarations—if given expert weight—would affect the result. Instead, Faso baldly asserts that he "likely would have" received CAT relief. Thus, Faso has given us no reason to disturb the Board's affirmance of the IJ's finding that he "did not meet his burden of proof for protection pursuant to the Convention Against Torture." Accordingly, Faso has not met his burden to establish that it is "more likely than not" that he would be tortured if he were removed to Iraq. *See Bonilla-Morales*, 607 F.3d at 1139.

B.

Faso asserts that the Board "committed legal error and acted arbitrarily by treating [his] evidence differently than how it treated the same evidence in factually similar cases." We disagree.

For two of the three cases Faso relies upon to establish inconsistent treatment, "the reasons for the inconsistent outcomes are readily apparent." *Ishac v. Barr*, 775 F. App'x 782, 789 (6th Cir. 2019). In those two cases, the Board remanded because the IJ did not sufficiently explain why it did not qualify the witnesses as experts. In the first case, the Board concluded that the IJ "did not provide sufficient analysis as to why the declarants" did not warrant qualification as experts. The Board, in the second case, determined that the IJ "d[id] not clearly address whether [the witnesses] [we]re expert witnesses or 'percipient' witnesses," and directed the IJ "to more fully

discuss whether the various witnesses presented [we]re expert witnesses and if not, why not." Faso's case is materially different from those two because the Board adopted the IJ's reasons for not qualifying Heller and Smith as experts. Regarding Heller, the IJ reasoned that "it [wa]s unclear when was the last time Heller . . . visited Iraq, if ever," "most of Heller's declaration [wa]s based on second-hand stories she [had] collected during her litigation efforts, not from her first-hand knowledge of and experiences in Iraq," and "[h]er declaration also predate[d] many significant events in Iraq." As for Smith, the IJ explained that "while Smith lives in Iraq, the [IJ] does not believe [Smith's] journalistic experience qualifications merit affording expert-level weight to [Smith's] declaration," "Smith's statements are largely based on anonymous conversations," and "the anonymity [of Smith's sources] diminishes the [IJ's] ability to assess the evidence objectively." Faso does not articulate errors in the IJ's reasoning regarding Heller and Smith, and we see none. Thus, there is no inconsistency between Faso's case and the first two cases he relies on.

That leaves the third case. There, the Board squarely disagreed with the IJ regarding expert status for Heller and Smith:

> While we acknowledge the Immigration Judge's reasoning, we respectfully conclude that Ms. Heller and Mr. Smith's credentials are not qualitatively or considerably different from those that were deemed experts. On remand, therefore, the Immigration Judge should consider Ms. Heller and Mr. Smith as expert witnesses and afford their testimony due weight.

But, based on what petitioner has provided to us, we do not know why the IJ in the third case refused to qualify Heller and Smith as experts. Without that information, we are unable to conclude that Faso was similarly situated to that applicant.[3] But even if Faso were similarly

[3]Faso's case is also materially different from *Kada v. Barr*, 946 F.3d 960 (6th Cir. 2020), another case involving allegations that the Board acted inconsistently. First, in that case, the applicants were similarly situated, *id.* at 966–67, while here, Faso fails to establish similarity.

situated, "some degree of inconsistency 'is unavoidable—after all, administrators are not automatons.'" *Nissan v. Barr*, 788 F. App'x 365, 367 (6th Cir. 2019) (per curiam) (quoting *Henry v. INS*, 74 F.3d 1, 5–6 (1st Cir. 1996)). In other words, "[j]ust as 'one swallow doesn't make a summer,' 'one inconsistent precedent' doesn't make a decision arbitrary and capricious." *Id.* (quoting *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1160 (5th Cir. 1977)). That holds true here.

Moreover, Faso's three cases are unreported and the Board "accords no precedential value to its unreported decisions." *Jomaa v. United States*, 940 F.3d 291, 298 (6th Cir. 2019) (quoting *De la Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327, 1336 (11th Cir. 2009)). Thus, his claim cannot be that the Board failed to follow its own binding cases. *See Ishac*, 775 F. App'x at 788.

Finally, "[a]n agency decision is arbitrary and capricious if the agency fails to examine relevant evidence or articulate a satisfactory explanation for the decision." *Jomaa*, 940 F.3d at 296. Here, Faso does not argue that the Board failed to consider relevant evidence; instead, he claims that the Board improperly weighed evidence by not qualifying Heller and Smith as experts. Therefore, this path to demonstrating arbitrariness and capriciousness is unavailing. Regarding the other path, petitioner contends that the Board "offered no rationale to explain how it decided the value of th[e] testimony [of Heller and Smith]." But, as we discussed above, the Board adopted the IJ's reasoning for not qualifying these witnesses as experts. And moreover, Faso has not

Second, in *Kada*, the heart of the inconsistency dispute was whether applicants, with purportedly similar evidence, were receiving different outcomes on the substantive question of whether certain evidence could lead an IJ to grant CAT relief. *Id.* Faso, however, only claims inconsistency about the evidentiary issue of whether to qualify witnesses as experts.

identified any errors in the IJ's reasoning, and we see none.[4] Accordingly, Faso's inconsistency argument fails.

C.

One potential issue remains. Faso asserts, in his statement of issues, that "the [Board] unfairly prejudiced [his] efforts to establish that he would 'more likely than not' be tortured if removed to Iraq" "by failing to qualify [Heller and Smith] [as expert] witnesses . . . ." Although Faso does not mention any constitutional provisions in his brief, we believe—based on our knowledge of immigration law and his use of the term "prejudiced"—his position is that the Board's refusal to qualify Heller and Smith as experts violated his Fifth Amendment right to due process.

For a due process claim to succeed, a petitioner must show—among other things—"that he was prejudiced by the violation." *Moreno-Martinez v. Barr*, 932 F.3d 461, 464 (6th Cir. 2019). To establish prejudice, a petitioner "must demonstrate a reasonable probability that, but for [the due process violation], he would have been entitled to remain in the United States." *Kada*, 946 F.3d at 965. Here, after Faso identifies the prejudice issue, he fails to develop an argument to support it. Instead, he merely declares that given "the particular circumstances surrounding Mr. Faso's case," the Board "would have decided [his] case differently" if it had "acted in a consistent manner" by qualifying Heller and Smith as experts. That is not enough. "A party may not present a skeletal argument, leaving the court to put flesh on its bones." *McGrew v. Duncan*, 937 F.3d 664, 669 (6th Cir. 2019). Faso's "failure to develop a cogent argument" renders it abandoned.

[4]To the extent Faso argues that the IJ's (and—by extension—the Board's) analysis regarding the qualification of experts was flawed because it yielded a purportedly inconsistent result, we have already addressed and rejected that argument.

Burley v. Gagacki, 834 F.3d 606, 618 (6th Cir. 2016). Accordingly, we provide no further review of Faso's purported due process claim.

III.

For these reasons, we deny Faso's petition for review.