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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEVORG GRIGOR MATEVOSYAN, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 18-72710 19-71079 Agency No. A070-384-361 MEMORANDUM*

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

Argued and Submitted November 9, 2022
Pasadena, California

Before: MURGUIA, Chief Judge, and PARKER** and LEE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

Gevorg Matevosyan, a native and citizen of Armenia, appeals the Immigration Judge's (IJ) negative reasonable fear determination and reinstated removal order. He first challenges his 2004 removal order that formed the basis for the reinstatement of removal. Because Matevosyan has not shown that he suffered a gross miscarriage of justice in the 2004 proceeding, this court lacks jurisdiction to review that order. Matevosyan also argues that the IJ deprived him of his statutory right to counsel at his reasonable fear hearing and that the IJ's reasonable fear determination was not supported by substantial evidence. This court assumes jurisdiction under 8 U.S.C. § 1252(a)(1) and denies Matevosyan's petition.[1] *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958–59 (9th Cir. 2012).

1. We cannot review the 2004 removal proceeding because there was no gross miscarriage of justice. 8 U.S.C. § 1231(a)(5) generally bars collateral review of a prior order of removal underlying a reinstatement order unless there has been a gross miscarriage of justice in that earlier proceeding. *See Lopez v. Garland*, 17 F.4th 1232, 1234 (9th Cir. 2021) (describing the "gross miscarriage of justice" standard as

[1] Shortly before oral argument, the Government brought to this court's attention a recent Second Circuit decision, *Bhaktibhai-Patel v. Garland*, which held, contrary to this court's holding in *Ortiz-Alfaro*, that decisions made during a withholding-only proceeding are not final orders of removal subject to judicial review. 32 F.4th 180, 189–93, 196–97 (2d Cir. 2022). The Government, however, has conceded this court's statutory jurisdiction over this petition. We thus assume jurisdiction and deny the petition on the merits. *See De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1291 (9th Cir. 2022).

"a high one"). Matevosyan argues that his conviction for making a false statement to the government (under 8 U.S.C. § 1001) was not an "aggravated felony" (under 8 U.S.C. § 1101(a)(43)(M)(i)) and thus that could not have been a valid basis for his 2004 removal.

We reject this argument. In *Kawashima v. Holder*, the Supreme Court held that 8 U.S.C. § 1101(a)(43)(M)(i) "refers . . . to offenses that 'involv[e]' fraud or deceit—meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." 565 U.S. 478, 483–84 (2012) (alteration in original). The IJ reasonably determined that Matevosyan's conviction under 18 U.S.C. § 1001 "necessarily entail[ed] . . . deceitful conduct." *See Ogden v. United States*, 303 F.2d 724, 742 (9th Cir. 1962) ("18 U.S.C. § 1001 was intended to . . . protect[] governmental functions from frustration and distortion through deceptive practices."). *See also Brogan v. United States*, 522 U.S. 398, 403 (1998); *Hubbard v. United States*, 514 U.S. 695, 707 (1995). This court thus lacks jurisdiction to review the 2004 removal order underlying Matevosyan's petition. *See Garcia de Rincon v. DHS*, 539 F.3d 1133, 1137 (9th Cir. 2008); 8 U.S.C. § 1231.

2. The IJ did not violate Matevosyan's right to counsel. "[N]on-citizens whose removal orders have been reinstated are statutorily entitled to counsel under [8 U.S.C.] § 1362, at no expense to the government, at their reasonable fear hearings before an IJ." *Orozco-Lopez v. Garland*, 11 F.4th 764, 777 (9th Cir. 2021). In

Orozco-Lopez, this court noted, in dicta, that "counsel's role is largely to help her client testify convincingly about her fear so that the IJ will find it reasonable." *Id.* at 778. But reasonable fear hearings "are not full evidentiary hearings." *Bartolome v. Sessions*, 904 F.3d 803, 813 (9th Cir. 2018). Rather, "the immigration judge sits in an appellate capacity, reviewing the written record prepared by the first-instance decision-maker (the asylum officer)." *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1195 (9th Cir. 2021).

In this case, Matevosyan exercised his right to counsel at his reasonable fear hearing before the IJ. *Cf. Rivera Vega v. Garland*, 39 F.4th 1146, 1157 (9th Cir. 2022) ("*Orozco-Lopez* cabined this right to only being notified of the right to counsel and given the opportunity to obtain counsel."). Although the IJ did not permit Matevosyan's counsel to question Matevosyan during the reasonable fear hearing, his counsel was allowed to submit evidence, answer questions in support of Matevosyan's claim, and make a closing statement—all of which helped Matevosyan present his case to the IJ. The IJ thus did not deny Matevosyan's due process right to counsel at the reasonable fear proceedings.

3. The IJ's negative reasonable fear determination is supported by substantial evidence. This court recognizes that "whistleblowing 'may constitute political activity sufficient to form the basis of persecution on account of political opinion.'" *Singh v. Barr*, 935 F.3d 822, 825 (9th Cir. 2019) (quoting *Grava v. INS*, 205 F.3d

1177, 1181 (9th Cir. 2000)). Among the factors that an IJ considers when reviewing a whistleblowing claim are (1) whether "the alien's actions were 'directed toward a governing institution' or against 'aberrational' corruption" and (2) whether the petitioner has been targeted because of an anticorruption political opinion, rather than "to line the official's pockets, to avenge his wounded pride, or to seek 'personal retribution.'" *Singh*, 935 F.3d at 826.

Here, substantial evidence supports the IJ's determination that Matevosyan reported the corrupt acts of a single individual, General Grigoryan, "not a 'scheme of corruption entrenched in the ruling party.'" *Id.* at 824. Substantial evidence also supports the IJ's conclusion that the threats to Matevosyan were not motivated by any perceived anticorruption political beliefs but rather by a personal vendetta (i.e., as revenge for reporting Grigoryan). Finally, as for Matevosyan's CAT claim, the regime change in Armenia and Grigoryan's prompt arrest provide substantial evidence to support the IJ's determination that the Armenian government would not engage in, consent to, or acquiesce in Matevosyan's torture.

DENIED.