FILED
United States Court of Appeals
Tenth Circuit

October 8, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PRATEEP BHANDARI,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 20-9639
(Petition for Review)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **CARSON**, Circuit Judges.

Prateep Bhandari, a native and citizen of Nepal, petitions for review of a decision by the Board of Immigration Appeals (BIA) affirming the denial of asylum by the Immigration Judge (IJ).[1] We dismiss the petition.

Mr. Bhandari entered the United States unlawfully in 2014. He was apprehended a few days later. During his credible-fear interview he expressed fear that if returned to Nepal, he would be killed by Maoists because of his political

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Mr. Bhandari also applied for withholding of removal and protection under the Convention Against Torture. But he does not challenge the statement by the BIA that he has preserved for review only his asylum claim.

support for the Nepali Congress Party. The asylum officer found Mr. Bhandari's fear credible and a hearing was set before an IJ.

At his hearing in immigration court, Mr. Bhandari conceded removability but applied for asylum. *See generally* 8 U.S.C. § 1101(a)(42)(A) (defining *refugee* as someone who is "unable or unwilling to return to" his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); 8 C.F.R. § 1208.13 (describing process by which asylum-seeker can prove he is a "refugee"). The IJ denied Mr. Bhandari's asylum application on two grounds. First, he found that the government had rebutted the presumption of a well-founded fear of persecution by demonstrating a change in circumstances in Nepal: namely, that "the circumstances have changed in Nepal with respect to the political climate, and that [Mr. Bhandari's] fear of being targeted by political opponents, such as the Maoists, is not well-founded." Certified Administrative Record (CAR) at 62. *See* 8 C.F.R. § 1208.13(b)(1)(i)(A) (government may rebut presumption of a well-founded fear of persecution by showing a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality"). Second, he found that Mr. Bhandari had failed to show that the Nepalese government would be unable or unwilling to control his persecutors. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012) (alien attempting to show refugee status via past persecution must prove, among other things, that persecution "is committed by the government or forces the government is either

unable or unwilling to control"); *Krastev v. INS*, 292 F.3d 1268, 1275–79 (10th Cir. 2002).

On appeal to the BIA, Mr. Bhandari attacked only the IJ's first ground for denying relief: that circumstances in Nepal had changed so that he did not have a well-founded fear of being persecuted by Maoists. Noting that the unchallenged alternative holding would bar relief even if Mr. Bhandari were to succeed on the argument he did make, the BIA dismissed the appeal based on waiver of any challenge to the unable-or-unwilling holding.

In this court Mr. Bhandari argues that the IJ's unable-or-unwilling holding was not supported by substantial evidence. But he is too late. We "may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right . . . ." 8 U.S.C. § 1252(d)(1). "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." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010). A litigant "may not add new theories seriatim as the litigation progresses from the agency into the courts." *Id*. at 1238. And to be preserved, an argument must have been adequately presented and developed. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). For example, a petitioner's citations to a statute and two cases, "without specifically explaining why" those authorities entitled him to relief, "did not fairly present his legal theory to the BIA." *Birhanu v. Wilkinson*, 990 F.3d 1242, 1254 (10th Cir. 2021).

Mr. Bhandari contends that he preserved his unable-or-unwilling argument in his brief to the BIA when he included the following sentence: "The police also do not protect us, alleged the Congress Party President." CAR at 17. But this sentence was not included, or even referenced, in the argument section of his BIA brief. It appears in the section entitled "The Merits Hearing," which summarizes the hearing before the IJ. A naked statement of fact does not present a legal argument any more than does a naked citation to a statute or judicial opinion. We have repeatedly held, for example, that a party does not preserve an issue in an appellate brief by simply mentioning a factual predicate for the issue; the issue itself must be addressed and fully developed. *See, e.g.*, *Wurm v. Ford Motor Co*., 849 F. App'x 766, 768–69 (10th Cir. 2021) (issue waived where appellant provided factual background and recited legal standards without explaining how district court erred); *Robinson v. Barrett*, 823 F. App'x 606, 610 (10th Cir. 2020) (issue waived where appellant mentioned relevant facts in opening brief's statement of facts but never developed issue); *Maynard v. Colo. Sup. Ct. Off. of Att'y Regul. Couns*., 499 F. App'x 793, 796 (10th Cir. 2012) (issue waived where appellant mentioned relevant facts in opening brief's background section, requested reversal on issue in summary-of-argument section, but ignored issue entirely in argument section).

Mr. Bhandari therefore failed to exhaust his unable-or-unwilling argument before the BIA, and we lack jurisdiction to consider that issue. Because that issue is dispositive of Mr. Bhandari's asylum claim—no matter what we might hold on the exhausted issues—we must affirm the decision below. *See Rodas-Orellana v.*

Holder, 780 F.3d 982, 991–92 n.10 (10th Cir. 2015) (petitioner contended that he had been persecuted because of his membership in a group that, in his view, qualified as a "particular social group"; because court determined that the group failed to satisfy one of the requirements for being a "particular social group," it had no need to consider whether a separate requirement was satisfied); *Shook v. Bd. of Cnty. Comm'rs of Cnty. of El Paso*, 543 F.3d 597, 613 n.7 (10th Cir. 2008) (Gorsuch, J.) ("[W]here a district court's disposition rests on alternative and adequate grounds, a party who, in challenging that disposition, only argues that one alternative is erroneous necessarily loses because the second alternative stands as an independent and adequate basis, regardless of the correctness of the first alternative.").

We **DISMISS** the petition for review.

Entered for the Court

Harris L Hartz
Circuit Judge