FILED
United States Court of Appeals
Tenth Circuit

November 12, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HUNG QUOC NGO,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 21-9517
(Petition for Review)

ORDER AND JUDGMENT*

Before **HOLMES**, **PHILLIPS**, and **EID**, Circuit Judges.

Hung Quoc Ngo, a native and citizen of Vietnam, petitions for review of the decision of the Board of Immigration Appeals (BIA) dismissing his appeal from the denial of his application for deferral of removal under the Convention Against Torture (CAT). We deny the petition in part and dismiss in part for lack of jurisdiction.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND

In 1990, when he was ten-years old, Mr. Ngo was admitted to the United States as a lawful permanent resident as the relative of an Amerasian who had been born in Vietnam or had adjusted status to a lawful permanent resident. In 2016, Mr. Ngo was charged with several crimes and eventually pled guilty to violating Colorado Revised Statutes §§ 18-3-402(1)(a) (sexual assault where the actor causes submission of the victim against the victim's will) and 18-3-203(1)(g) (assault with the intent to cause bodily injury that results in serious bodily injury). Mr. Ngo was sentenced to seven years in prison, three years mandatory parole, and ten years of probation, and was ordered to register as a sex offender. He served three years of his sentence before being released on parole in 2019.

Following his release from prison, the Department of Homeland Security commenced removal proceedings, charging Mr. Ngo with removability as a non-citizen convicted of an aggravated felony. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Mr. Ngo appeared before an Immigration Judge (IJ) and conceded removability based on his convictions of two aggravated felonies. *See* 8 U.S.C. § 1101(a)(43)(A). The parties agreed Mr. Ngo's convictions for the aggravated felonies made him ineligible for any type of relief other than deferral of removal under the CAT.

Mr. Ngo's case was based on the following chain of assumptions and fear of what might happen upon his return to Vietnam: he would be detained upon entering Vietnam or shortly thereafter due to his bisexuality, Chinese ethnicity, criminal record, and refugee status; sent to a reeducation camp or prison; and tortured by

government officials. In addition to his testimony at the merits hearing, Mr. Ngo submitted hundreds of pages of materials about country conditions and generalized crime, discrimination, and harassment existing in Vietnam.

As to his bisexual orientation, Mr. Ngo testified he is free to have sex with other men in the United States, but in Vietnam, "if I have sex [with other men] and then people find out they might call the government and they might come and then take me because of my sexual orientation and it's a big deal for them and people are not ready to accept it." Admin. R. at 99. "Even the cops, police, . . . sometime[s] . . . they follow by the laws but sometime[s] they really hate it and then you're, they just come and . . . [the] government talk[s] to the police on us." *Id.* at 99-100.

Regarding his Chinese ethnicity, Mr. Ngo admitted he is only half Chinese and does not know anything about the treatment of ethnically Chinese people in Vietnam. As to his status as a refugee, Mr. Ngo testified he "heard, read [i]n the news . . . when people went back [to Vietnam] . . . they send [them] back to education camp and that's when . . . people can start [to] fear for their life and then the people in there . . . the police . . . torture them and that's what I'm afraid to, for fearing my life if I go back there." *Id.* at 100. "[T]hey think we betrayed them." *Id.* at 96. As support, he cited a country report noting that criminal charges are sometimes filed against peaceful dissidents who have fled abroad in opposition to the Vietnamese government. However, he offered no evidence that a child who left Vietnam at age ten and received lawful permanent resident status in the United States as the relative

of an Amerasian, would be viewed as someone who sought political asylum in another country and in need of reeducation upon his return to Vietnam.

Mr. Ngo also testified he and his mother made a month-long trip to Vietnam in 2010 to visit his sister in Ho Chi Minh City. Mr. Ngo acknowledged he was able to pass into and out of Vietnam without incident using a green card issued by the United States government and did not suffer torture or discrimination of any kind during his stay. Indeed, Mr. Ngo conceded his fear of torture was based solely upon what he read in newspapers or online and not any actual harm or torture that he suffered or would suffer at the hands of the Vietnamese government.

The IJ denied Mr. Ngo's request for CAT protection because he failed to meet his burden to establish it was more likely than not that he would be tortured upon his return to Vietnam. First, the IJ found Mr. Ngo failed to establish a clear probability that even the first step, let alone each step in his hypothetical chain of events, was more likely than not to occur. Second, the IJ found Mr. Ngo's materials concerning generalized reports of discrimination, harassment, stigmatization, and even torture of certain groups of individuals within Vietnam, failed to satisfy his burden to show that *he* would more likely than not be tortured upon his return.

Mr. Ngo appealed the IJ's denial of his request for deferral of removal, raising two issues: "First, the [IJ] misinterpreted and incorrectly applied the 'substantial grounds' standard of proof in evaluating [Mr. Ngo's] claim for protection. Second, the [IJ] committed clear error in failing to properly consider the overwhelming record evidence, which supports [Mr. Ngo's] specific fear of future torture." *Id.* at 11.

The BIA adopted and affirmed the IJ's decision and dismissed the appeal. The BIA also declined to consider Mr. Ngo's argument that ICE's Detention and Deportation Officer's Field Manual (ICE Field Manual) requires United States authorities to provide the Vietnamese government with a copy of the conviction document on which an order of removal is based, because Mr. Ngo "did not raise this issue, or provide such evidence" in the IJ proceedings and the issue was therefore not properly before it on appeal. *Id.* at 4 n.2 (citing *In re Jimenez-Santillano*, 21 I. & N. Dec. 567, 570 n.2 (B.I.A. 1996) (en banc)).

II. LEGAL PRINCIPLES

Aliens like Mr. Ngo who are ineligible for withholding of removal under either the Immigration and Nationality Act or the CAT may nonetheless be eligible for deferal of removal under the CAT. *See* 8 C.F.R. §§ 1208.16(c)(4) & (d)(2), 1208.17(a). To establish eligibility for such relief, an alien must prove "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." *Id.* § 1208.16(c)(2). Torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by, or at the instigation of, or with the consent or acquiescence of, a public official . . . or other person acting in an official capacity." *Id.* § 1208.18(a)(1); *see also Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013) ("Article 3 of the Convention Against Torture prohibits the return of an alien to a country where it is more likely than not that he will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." (internal quotation marks omitted)). The petitioner

bears the burden to show he has met the requirements for CAT relief. *See Escobar-Hernandez v. Barr*, 940 F.3d 1358, 1362 (10th Cir. 2019).

An applicant cannot establish eligibility for deferral of removal by stringing together a series of suppositions to show torture is more likely than not to occur unless the evidence shows each step in the hypothetical chain of events is more likely than not to occur. *See In re J-F-F-*, 23 I. & N. Dec. 912, 917-18 (A.G. 2006) (An applicant must establish every step "is more likely than not to happen" in order to prove "the entire chain will come together to result in the probability of [his] torture."); *see also In re M-B-A-*, 23 I. & N. Dec. 474, 479 (B.I.A. 2002) (en banc) (same). Moreover, to meet the burden of proof, an applicant must demonstrate he is personally at risk of torture. *See In re J-E-*, 23 I. & N. Dec. 291, 303 (B.I.A. 2002) (en banc) ("The United Nations Committee Against Torture has consistently held that the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular county does not, as such, constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon his return to that country." Instead, "[s]pecific grounds must exist that indicate the individual would be personally at risk." (footnote omitted)), *overruled on other grounds by Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004).

III. STANDARD OF REVIEW

In evaluating Mr. Ngo's petition for review "[w]e . . . review the BIA's legal determinations de novo," *Birhanu v. Wilkinson*, 990 F.3d 1242, 1251 (10th Cir.

2021), and its factual findings under a substantial-evidence standard, *Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020).[1]

"Although a noncitizen may obtain judicial review of factual challenges to CAT orders, that review is highly deferential. . . ." *Id.* Under the substantial-evidence standard, "[the agency's] findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *see also Nasrallah*, 140 S. Ct. at 1692; *Birhanu*, 990 F.3d at 1252. We must affirm the agency's decision if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Yuk v. Ashcroft*, 355 F.3d 1222, 1233 (10th Cir. 2004) (internal quotation marks omitted); *see also Htun v. Lynch*, 818 F.3d 1111, 1119 (10th Cir. 2016).

IV. ANALYSIS

Mr. Ngo raises three legal issues in his petition for review: (1) whether the case should be remanded to the BIA because it failed to address his argument that the IJ erred in applying the standard of review to the facts of the case; (2) whether the BIA misapplied its waiver rule when it refused to consider the ICE Field Manual raised for the first time on appeal; and (3) whether the BIA was required to take administrative notice of a 2008 Repatriation Agreement raised for the first time in

[1] The bar against judicial review of orders against an alien who is removable by reason of having committed a criminal offense covered in 8 U.S.C. § 1227(a)(2)(A)(iii), does not apply to bar judicial review of CAT claims because an order denying a CAT claim is distinct from an order of removal, *see Nasrallah*, 140 S. Ct. at 1690-91; *Birhanu*, 990 F.3d at 1252.

this court. We conclude Mr. Ngo failed to exhaust issues one and three and dismiss those claims for lack of jurisdiction. We deny the second claim on the merits.

First, Mr. Ngo argues the BIA misunderstood his argument to be that the IJ applied the wrong standard of proof to his claim, when in fact his argument was the IJ misapplied the standard of proof to the facts. As a result of the misunderstanding, Mr. Ngo maintains the BIA did not resolve the claim and we should remand the case to the BIA to consider the issue. Although Mr. Ngo insists otherwise, our review of his brief at the BIA leads us to conclude he bears some responsibility for the misunderstanding.

Throughout his brief at the BIA, Mr. Ngo repeatedly referred to the standard of proof as substantial grounds, which is how Congress first described the standard in the implementing legislation. But the regulations giving effect to the legislation explained "substantial grounds" should be construed to mean "more likely than not" and is analogous to the "clear probability of persecution" standard. *In re H-M-V-*, 22 I. & N. Dec. 256, 269 (B.I.A. 1998) (en banc) (internal quotation marks omitted). Moreover, the regulations themselves provide the standard is "more likely than not." *See* 8 C.F.R. §§ 1208.16-1208.17. As a result, the standard is ubiquitously referred to as more likely than not, and Mr. Ngo's repeated use of substantial grounds led the BIA to believe the standards are different and the IJ applied the wrong standard by using more likely than not.

But regardless of blame, the issue is whether Mr. Ngo can ask this court to remand the case to the BIA to consider the correct issue without first raising the

alleged error with the BIA. We conclude that he cannot, and Mr. Ngo's failure to properly exhaust the argument with the BIA means we lack jurisdiction to consider the issue on appeal.

"A court 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). Under 8 C.F.R. § 1003.2, an alien has the right to file a motion to reopen or reconsider. Thus, we have held the exhaustion requirement includes claims that could have been, but were not, raised in a motion to reopen or to reconsider. *See Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1094 (10th Cir. 2008) ("[O]bjections to procedural errors or defects that the BIA could have remedied must be exhausted."); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1121, 1122 (10th Cir. 2007) (noting the "exhaustion requirement permits the BIA the opportunity to apply its specialized knowledge and experience to the matter, and to resolve a controversy or correct its own errors before judicial intervention," and concluding claims challenging defects in the BIA's decision "should have been brought before the BIA in the first instance through a motion to reconsider or reopen" (citation and internal quotation marks omitted)). We therefore lack jurisdiction to consider Mr. Ngo's argument that was not exhausted at the BIA.

Next, Mr. Ngo maintains the BIA improperly relied on the waiver rule in *Jimenez-Santillano* when it declined to consider the ICE Field Manual. We disagree. For the first time on appeal to the BIA, Mr. Ngo argued Vietnamese officials would become aware of his bisexuality, criminal convictions, and request for protection

under the CAT because pursuant to the Field Manual, United States immigration officials are required to provide a copy of the conviction document on which an order of removal is based to officials in the country of removal. However, the BIA declined to consider the issue under the doctrine of administrative waiver because Mr. Ngo failed to raise it in the IJ proceedings.

"The BIA's waiver rule, as with most appellate bodies, is wholly consistent with its rules of practice." *Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1023 (10th Cir. 2007). "As we have noted in analyzing the waiver doctrine in a different context[,] . . . [p]arties must be encouraged to give it everything they've got at the trial level. Thus, an issue must be presented to, considered and decided by the trial court before it can be raised on appeal." *Id.* (internal quotation marks omitted). "These reasons apply with equal force to the BIA. Like circuit courts, the BIA's ability to engage in fact-finding is limited . . . and the failure to raise an issue before the IJ properly waives the argument on appeal to the BIA." *Id.* Therefore, when "the BIA determines an issue [is not] administratively-ripe to warrant its appellate review, we will not second-guess that determination" because the "touchstone of administrative law [is] that the formulation of procedures is basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Sidabutar*, 503 F.3d at 1120 (brackets and internal quotation marks omitted). We will not second-guess the BIA's application of its waiver rule.

Last, we reject Mr. Ngo's argument the case should be remanded to the BIA to consider a 2008 Repatriation Agreement that was never raised in either the IJ

proceedings or on appeal to the BIA. We decline to address the issue because generally, we only consider arguments a petitioner properly presents to the BIA. *See id.* at 1118. Mr. Ngo's failure to raise this argument at the BIA means we lack jurisdiction to consider the issue.

Also unexhausted is Mr. Ngo's further claim that the BIA's failure to consider the ICE Field Manual and 2008 Repatriation Agreement violated due process. A review of his brief before the BIA reveals Mr. Ngo never argued the issue at the BIA nor did it *sua sponte* consider such a claim. Therefore, the issue is unexhausted and beyond this court's review. *See id.*

More to the point, any error was harmless because the agency did not evaluate the likelihood of torture based on an assumption the Vietnamese government would not be aware of Mr. Ngo's bisexuality, criminal convictions, or refugee status; instead, it found that none of these reasons would make it more likely than not Mr. Ngo would be tortured upon his return to Vietnam. *See Nazaraghaie v. INS*, 102 F.3d 460, 465 (10th Cir. 1996) ("[E]ven assuming *arguendo* that the BIA failed to weigh certain pieces of evidence fully, the result . . . would be no different.").

V. CONCLUSION

For the foregoing reasons, Mr. Ngo's petition is denied in part and dismissed in part for lack of jurisdiction.

Entered for the Court

Allison H. Eid
Circuit Judge