FILED
United States Court of Appeals
Tenth Circuit

July 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERWIN ARAUJO-SOTELO,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9524
(Petition for Review)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Petitioner, Erwin Araujo-Sotelo, is a citizen of Mexico.[1] In removal proceedings, he applied for protection under the Convention Against Torture. The immigration judge denied his application, and the Board of Immigration Appeals

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[1] Petitioner refers to himself as Mr. Araujo in his brief, so we too will refer to him by that name.

(Board) dismissed his appeal. He now petitions for review of the Board's decision. We deny his petition.

I. Background

Mr. Araujo first came to the United States in the early 2000s, when he was a child. He returned to Mexico in 2004, before reentering in 2006 when his parents divorced and his mother "couldn't afford having [Mr. Araujo] so she sent [him] back" to the United States. R. vol. 1 at 447. In 2014, he returned to Mexico when his mother became ill. After she died, he tried to enter the United States using a passport card that did not belong to him. In the removal proceedings that followed, he applied for protection under the Convention Against Torture.[2]

An applicant for relief under the Convention Against Torture bears the burden to prove "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). Torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted . . . by, or at the instigation of, or with the consent or acquiescence of, a public official." *Id.* § 1208.18(a)(1). "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." § 1208.18(a)(2).

To evaluate an application for protection under the Convention Against Torture, an immigration judge must consider all evidence bearing on the possibility

[2] Mr. Araujo also applied for asylum and restriction on removal, but he has abandoned those applications. *See* Pet. Opening Br. at 14 n.7.

of future torture, including evidence of past torture suffered by the applicant, evidence that "the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured," evidence of "gross, flagrant or mass violations of human rights within the country of removal," and evidence describing the "conditions in the country of removal." § 1208.16(c)(3).

The main dispute before us is whether the agency erred when it found Mr. Araujo had not suffered past torture in Mexico.[3] Mr. Araujo's claim of past torture stems primarily from two encounters he had with Mexican federal police. In the first encounter, Mr. Araujo was traveling on a bus when police boarded it. Once they discovered that he was from the Mexican State of Guerrero and that he spoke English, they assumed (incorrectly) that he worked for a cartel. They took his belongings and interrogated him before ultimately letting him go. In the second encounter, shortly after the first, police stopped Mr. Araujo on his way to the border in Ciudad Juarez. When the police learned he was from Guerrero, they interrogated him about cartels. Unsatisfied that Mr. Araujo knew nothing about the cartels, four officers beat him with batons. They left him bleeding from his nose, lip, and eyebrow, and with bruises all over his body.

The immigration judge acknowledged this beating inflicted harm but ultimately found that it did not amount to torture. The immigration judge further

[3] Although past torture is relevant to the likelihood of future torture, it does not create a presumption of future torture or automatically make the victim eligible for protection under the Convention Against Torture. *See Niang v. Gonzales*, 422 F.3d 1187, 1202 (10th Cir. 2005).

found that Mr. Araujo's fear of future torture relied on a string of hypothetical events, and that he had failed to show that each event was likely to happen. These findings led the immigration judge to conclude that Mr. Araujo fell short of his burden to show he would likely be tortured in Mexico. *See In re J-F-F-*, 23 I. & N. Dec. 912, 918 n.4 (A.G. 2006) ("An alien will never be able to show that he faces a more likely than not chance of torture if one link in the chain cannot be shown to be more likely than not to occur.").

The Board agreed that Mr. Araujo's beating did "not rise to the level of torture." R. vol. 1 at 5. The Board also concluded Mr. Araujo did not meaningfully challenge the finding that his fear of future torture rests on a chain of hypothetical events that he had not proven likely to happen, and so he waived any argument against that finding. For those reasons, the Board affirmed the immigration judge's determination that Mr. Araujo did not show that he will likely be tortured if he returns to Mexico.

II. Discussion

Where, as here, a single Board member issued a brief order affirming the immigration judge's decision, we review the Board's decision and any parts of the immigration judge's decision that it relies on. *See Dallakoti v. Holder*, 619 F.3d 1264, 1267 (10th Cir. 2010). We review the Board's legal conclusions de novo. *Id.* And we review its factual findings for substantial evidence, meaning we will treat those findings as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* (internal quotation marks omitted).

Mr. Araujo raises three issues here. First, he disputes the agency's finding that he had not suffered past torture in Mexico. Second, he argues that the agency erred when it found he will not likely be tortured in the future if he returns to Mexico. And third, he claims the agency denied him due process by ignoring evidence about the conditions in Mexico.

A. The record does not compel the finding that Mr. Araujo suffered past torture in Mexico.

An application for protection under the Convention Against Torture "involves factual determinations reviewed for substantial evidence." *Htun v. Lynch*, 818 F.3d 1111, 1118 (10th Cir. 2016).

We must uphold the Board's conclusion that Mexican police did not torture Mr. Araujo. Indeed, we have upheld findings that similar abuse did not qualify as persecution, a less severe form of harm than torture.[4] *See Sidabutar v. Gonzales*, 503 F.3d 1116, 1124 (10th Cir. 2007) (upholding a finding of no persecution where the petitioner testified that he had been beaten repeatedly), *abrogated in part on other grounds by Santos-Zacaria v. Garland*, 143 S. Ct. 1103 (2023)[5]; *Kapcia v. INS*, 944 F.2d 702, 704–05, 708 (10th Cir. 1991) (same where the petitioners testified that

[4] Persecution inflicts "suffering or harm," *Zhi Wei Pang v. Holder*, 665 F.3d 1226, 1231 (10th Cir. 2012) (internal quotation marks omitted), whereas torture inflicts "*severe* pain or suffering," § 1208.18(a)(1) (emphasis added). *See also Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004) (explaining that relief is available under the Convention Against Torture only if "the persecution at issue would be so severe as to rise to the level of torture").

[5] At our direction, the parties have filed supplemental briefs addressing *Santos-Zacaria*.

they had been detained and beaten). We cannot say that the record compels the finding that Mr. Araujo's mistreatment amounted to torture.

Mr. Araujo also asserts he suffered torture from smugglers who helped him try to cross the border. He told the immigration judge the smugglers took his belongings, kept him in a house without food or water for four days, forced him to try to cross the border using someone else's passport, and threatened to kill him if they ever saw him in Mexico.[6] The record does not compel the finding this mistreatment constituted torture. *Cf. Dandan v. Ashcroft*, 339 F.3d 567, 574 (7th Cir. 2003) (holding that evidence the petitioner had been detained, beaten, and deprived of food for three days did not compel the finding that he had been persecuted).

B. Mr. Araujo failed to exhaust his arguments against the agency's finding that he will not likely suffer future torture in Mexico.

Mr. Araujo makes several arguments challenging the finding that he will not likely be tortured if he returns to Mexico. The government responds Mr. Araujo failed to exhaust any challenge to the agency's finding about the likelihood of future torture. Mr. Araujo did not file a reply to contest the government's position. In any event, we conclude the government's position is correct.

[6] Mr. Araujo gave somewhat conflicting descriptions about his mistreatment by the smugglers. In the same affidavit claiming the smugglers held him for four days with no food or water, he also said they held him for three days and "barely" gave him any food and water. R. vol. 1 at 143. But on the record before us and under the applicable standard of review, this discrepancy is of little import here.

We "may review a final order of removal only if" the noncitizen has exhausted all administrative remedies available "as of right." 8 U.S.C. § 1252(d)(1).[7] This statute requires a noncitizen to do more than "level broad assertions in a filing before the Board." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) (internal quotation marks omitted), *abrogated in part on other grounds by Santos-Zacaria*, 143 S. Ct. 1103. We consider an argument exhausted only if the noncitizen presented "the *same specific legal theory* to the" Board. *Id.*

Mr. Araujo asserts the record compels the finding he will likely be tortured in the future if he returns to Mexico. In his view, the record shows Mexico suffers from "violence and corruption" and that its government "is unable, or unwilling, to control the cartels and other criminal elements." Pet. Opening Br. at 21. And he says the record shows "instances of official misconduct and involvement in events constituting torture." *Id.* at 27. But he did not present this theory to the Board, so he did not exhaust it.

Nor did he exhaust his current contention that the immigration judge failed to consider all relevant evidence before ruling against him, for he did not present it to the Board.[8]

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[7] In *Santos-Zacaria*, the Supreme Court held that § 1252(d)(1)'s exhaustion requirement is not jurisdictional; it is instead a claim-processing rule. 143 S. Ct. at 1114. The government has invoked the rule in response to Mr. Araujo's challenges to the agency's finding about the likelihood that he will suffer future torture, so we will enforce it.

[8] Mr. Araujo asserts that the Board also ignored relevant evidence. Exhaustion presents no obstacle for this assertion because the alleged error did not arise until the

The same is true of his claim that the agency should not have applied the principle that a prediction of future torture based on a chain of hypothetical events can succeed only if each link in the chain is likely to happen. The Board found that Mr. Araujo waived any argument against the immigration judge's application of this principle because he made no meaningful challenge to it. Mr. Araujo does not argue here that the Board erred when it found that he waived this issue, and the record confirms that it did not.

C. The agency did not violate Mr. Araujo's due-process rights.

Mr. Araujo argues that the immigration judge and the Board denied him due process by ignoring a Human Rights Report about Mexico.[9] We review constitutional claims de novo. *See Alzainati v. Holder*, 568 F.3d 844, 851 (10th Cir. 2009).

Board issued its decision, and § 1252(d)(1) did not require Mr. Araujo to move the Board to reconsider, *see Santos-Zacaria*, 143 S. Ct. at 1116–20, 1119 n.9. The record refutes Mr. Araujo's assertion, however, that the Board's "decision makes no reference to any exhibits or documents in the record in affirming the denial" of his application for relief under the Convention Against Torture. Pet. Opening Br. at 24. The Board cited exhibits when outlining Mr. Araujo's allegations. True enough, the Board did not cite *every* exhibit, or even most of them. But it did not need to. *See Hadjimehdigholi v. INS*, 49 F.3d 642, 648 n.2 (10th Cir. 1995) (recognizing that the Board need not "discuss every piece of evidence when it renders a decision").

[9] Mr. Araujo says the agency ignored two separate documents, a "Department of State country conditions report on Mexico and the Mexico Human Rights Report." Pet. Opening Br. at 28. But the record does not contain separate documents fitting his descriptions. The record instead contains a "Mexico 2013 Human Rights Report" from a bureau within the United States Department of State. R. vol. 2 at 507–53. What Mr. Araujo identifies as two separate documents, then, appears to be a single document—the Human Rights Report.

Although "an allegation of wholesale failure to consider evidence implicates due process," *id.* (internal quotation marks omitted), the record gives us no reason to think the agency failed to consider the Human Rights Report. The immigration judge explicitly said that he had considered all admitted exhibits (which included the Human Rights Report). And he acknowledged the country conditions in Mexico, describing them as "less than ideal." R. vol. 1 at 70. The most we can say about the Board's decision is that it did not cite the Human Rights Report. While that omission might support a "quarrel about the level of detail" the Board needed to provide in its decision, it does not support "a colorable due process claim." *Alzainati*, 568 F.3d at 851.

III. Conclusion

We deny Mr. Araujo's petition for review.

Entered for the Court

Veronica S. Rossman
Circuit Judge