

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 10-10513
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCTOBER 8, 2010
JOHN LEY
CLERK

Agency No. A070-574-307

BENITO VELASQUEZ,

Petitioner,

versus

UNITED STATES ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(October 8, 2010)

Before EDMONDSON, CARNES and MARTIN, Circuit Judges.

PER CURIAM:

Benito Velasquez seeks review of the Board of Immigration's orders

denying his application for asylum, withholding of removal, and relief under the United Nations Convention Against Torture. Velasquez contends that he established that he suffered past persecution due to his Mayan ancestry and his refusal to join an anti-government guerrilla group. He also argues that he has established a well-founded fear of persecution and a likelihood of being tortured if he returns.

I.

Velasquez, a native and citizen of Guatemala, illegally entered the United States in 1991 at age fifteen. He was fleeing Guatemala after an anti-government guerrilla group beat him while he was serving on a government sanctioned citizen patrol of his town. According to Velasquez, he was beaten because he would not join the guerrilla group. His brother, who was also serving as a citizen patroller, was murdered by the guerrillas during the attack.

In 1992 Velasquez filed his application for asylum, withholding of removal, and CAT relief. In his application he contended that he was targeted by the guerrillas for refusing to join them, and if he returned to Guatemala, the guerrillas would kill him. There was no ruling on that application until after the removal proceedings began against Velasquez in 1999. Because he failed to appear at the removal hearing, he was found to be removable in 1999.

In 2002 Velasquez filed, and the Immigration Judge granted, a motion to reopen his case. After multiple extensions, in 2005 the IJ granted Velasquez's application for asylum because she found that he was credible, that he had suffered past persecution because he was beaten for refusing to join the guerrillas, and that he was likely to suffer future persecution upon return because of the long Guatemalan history of violence against persons of Mayan ancestry. The IJ did not rule on Velasquez's request for CAT relief.

The government filed an appeal to the BIA. The BIA found that Velasquez had established only harm and fear from general conditions of violence and unrest in Guatemala instead of harm and fear from persecution based on a statutorily-protected ground. For that reason, the BIA vacated the IJ's decision on asylum and withholding of removal but remanded the case to the IJ to determine whether Velasquez was entitled to CAT relief.

On remand the IJ (a different one) found that Velasquez was not entitled to CAT relief. He found that the single beating Velasquez suffered did not amount to torture, that Velasquez had not shown he would likely be tortured if he returned, and that the Guatemalan government opposed the guerrillas instead of supported them. The BIA summarily affirmed the IJ's decision.

II.

“Where the BIA issues a decision, we review that decision, except to the extent that it expressly adopts the IJ’s opinion.” Chen v. United States Att’y Gen., 463 F.3d 1228, 1230 (11th Cir. 2006). “Insofar as the BIA adopts the IJ’s reasoning, we review the IJ’s decision as well.” Id. Here, we review the BIA’s decision on asylum and withholding of removal because the BIA vacated the IJ’s decision and issued its own. We review the IJ’s decision on CAT relief because it was summarily affirmed by the BIA.

We review factual findings under a “highly deferential” substantial evidence test whereby we “must affirm the BIA’s decision if it is ‘supported by reasonable, substantial, and probative evidence on the record considered as a whole.’” Al Najjar v. Ashcroft, 257 F.3d 1262, 1283–84 (11th Cir. 2001) (quoting Lorisme v. INS, 129 F.3d 1441, 1444–45 (11th Cir. 1997)). Put another way, we will reverse the BIA only if we find that the record compels reversal. See Fahim v. United States Att’y Gen., 278 F.3d 1216, 1218 (11th Cir. 2002).

To establish eligibility for asylum, an applicant “must, with specific and credible evidence, establish (1) past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion; or (2) a well-founded fear of future persecution on account of a statutorily-protected ground.” Chen, 463 F.3d at 1231 (11th Cir. 2006). Simply refusing to join an

anti-government group is not a statutorily-protected ground. See INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992) (explaining a petitioner must show that his fear is “the guerrillas will persecute him because of that [statutorily-protected ground], rather than because of his refusal to fight with them.”)

To be eligible for relief under the CAT, “an applicant must establish ‘that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.’” Sanchez Jimenez v. United States Att’y Gen., 492 F.3d 1223, 1239 (11th Cir. 2007) (quoting 8 C.F.R. § 208.16(c)(2)). The torture must “be ‘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. (quoting 8 C.F.R. § 208.18(a)(1)).

III.

In this case, the BIA reasonably found that Velasquez does not qualify for asylum relief. Velasquez did not prove that he had suffered past persecution based on a statutorily-protected ground. The record supports the BIA’s finding that Velasquez was beaten by the guerrillas because he refused to join them, which is not a protected ground. See Elias-Zacarias, 502 U.S. at 483 (1992). Velasquez never testified that he was beaten because of his Mayan ancestry, or because of any other protected ground, and the record does not indicate that he was.

Velasquez has also failed to establish that he has a well-founded fear of future persecution based on a statutorily-protected ground. According to Velasquez, his future fear is based on refusing to join the guerrillas, which is not a statutorily-protected ground. Additionally, it seems unlikely he will be persecuted based on his Mayan ancestry because his mother and siblings have been living in the same town of Guatemala since he left.

Because Velasquez did not meet the standard of proof for asylum relief he cannot meet the higher standard for eligibility for withholding of removal. See Sepulveda v. United States Att’y Gen., 401 F.3d 1226, 1232–33 (11th Cir. 2005) (explaining that standard for withholding of removal is more stringent than the standard for asylum relief).

The BIA also reasonably found that Velasquez does not qualify for CAT relief. His fear of torture stems from the guerrillas instead of from a government entity or government-supported entity. The evidence shows that the guerrillas who beat Velasquez—the same ones he fears upon return—are not supported by the Guatemalan government. In fact, when Velasquez was attacked, he was working for the government against the guerrillas.

PETITION DENIED.