[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12761
Non-Argument Calendar

Agency No. A077-361-246

ERWIN WHITTER,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

(September 28, 2021)

Before WILSON, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

Erwin Whitter petitions for review of a decision of the Board of Immigration Appeals (BIA). In a final order, the BIA affirmed the Immigration Judge's (IJ) denial of Whitter's application for asylum, withholding of removal, and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The BIA also affirmed the denial of Whitter's motion for a continuance while he pursued collateral relief for a criminal conviction. Whitter seeks review only of the decision to affirm the denial of his motion for a continuance. He argues that the IJ and the BIA erred by misapplying the legal standard for granting a continuance. After careful review, we deny the petition.

Whitter is a native and citizen of Bermuda who entered the United States in December 2000. He became a lawful permanent resident in 2002. In June 2014, he was indicted in South Carolina state court for attempted murder and possession of a weapon during the commission of a violent crime. Whitter pleaded guilty to assault and battery of a high and aggravated nature and possessing a knife during the commission of a violent crime. The judge accepted his plea and sentenced him to 20 years of imprisonment as to the assault and battery conviction and 5 years as to the possession of a knife conviction. The sentences were to run concurrently.

In June 2019, as Whitter served his sentence, the Department of Homeland Security (DHS) commenced removal proceedings against him by filing a Notice to

Appear. DHS alleged that Whitter had been convicted of assault and battery of a high and aggravated nature and charged him with removability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). It noted that he had been convicted of an aggravated felony under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), which was a crime of violence under 18 U.S.C. § 16(a), for which the term of imprisonment was at least one year.

Whitter appeared pro se before the Atlanta Immigration Court in June 2019, where he indicated that he wanted to seek representation for the proceedings. The IJ granted a continuance and provided a list of attorneys and organizations. Over the next several months, the IJ granted Whitter three more continuances. In October 2019, Whitter informed the IJ that he was not able to secure counsel and decided to proceed pro se.

When proceedings before the IJ commenced, Whitter admitted that he was convicted of the offense of assault and battery of a high and aggravated nature in South Carolina. The IJ then sustained the charge of removability for an aggravated felony. After Whitter expressed a fear of returning to Bermuda, the IJ gave him an application for asylum, withholding of removal, and CAT protection. The IJ also continued the case to provide Whitter additional time to apply for relief from removal. Whitter filed his application for asylum, withholding of removal and CAT relief.

At the merits hearing in December 2019, Whitter again requested a continuance, stating that he was waiting for a response from a South Carolina state court. The IJ stated, in relevant part, that seeking a continuance while pursuing collateral relief on a criminal conviction is "something that's done quite often," but that "the appellate court tells Immigration Judges that . . . [there is no] . . . basis to continue a removal proceeding" in that circumstance. The IJ added that "maybe if the [state] court . . . takes some action . . . , you may be able to ask that the deportation case be reopened, but I cannot continue today's hearing for that purpose that you've told me about."

Regarding his application for relief, Whitter testified that he feared gang violence in Bermuda. However, in an oral decision, the IJ denied Whitter's applications for asylum, withholding of removal, and CAT protection, and ordered his removal to Bermuda. Whitter appealed the IJ's decision to the BIA. He asserted, in part, that the IJ should have granted his request for a continuance so that he could obtain documents from his country for use in a collateral attack on his criminal conviction. The BIA affirmed the IJ's decision and dismissed Whitter's appeal. With regard to Whitter's argument that the proceedings should have been adjourned while he pursued post-conviction relief for his 2014 criminal conviction, the BIA stated that "a pending collateral attack on a criminal conviction is too

tentative and speculative to support a continuance of removal proceedings."

Further, the BIA noted:

> [T]he respondent has not provided documentary evidence to indicate that his conviction has been vacated or materially modified in any way by the appropriate court. The respondent's mere speculation that his conviction may be invalid does not change the finality of the conviction for immigration purposes, unless and until it has been overturned by a criminal court.

Whitter then filed a petition for review.[1]

We review the BIA's decision as the final judgment, unless the BIA expressly adopted the IJ's decision. *Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 403 (11th Cir. 2016) (per curiam). Here, the BIA agreed with the IJ's reasoning for denying the motion for continuance, so we review the decisions of both to the extent of the agreement. *See id.*

Under the criminal alien bar, our jurisdiction to review a petition is limited when a noncitizen is ordered removed for having been convicted of an aggravated felony. *See* INA § 242(a)(2)(C); 8 U.S.C. § 1252(a)(2)(C). We retain jurisdiction, however, to review constitutional claims and questions of law that have been exhausted. *See* INA § 242(a)(2)(D); 8 U.S.C. § 1252(a)(2)(D). Questions of law include questions about whether the BIA applied the correct legal standard. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020). Whitter argues that the

[1] Whitter filed his petition with the Ninth Circuit Court of Appeals. The petition was then transferred to our court.

BIA and the IJ failed to apply the correct legal standard. He contends that the IJ and the BIA are bound by decisions of the AG, and that they misapplied the AG's guidance—which is binding on them—by creating a bright-line rule that a continuance can never be granted while a respondent seeks collateral relief.

The correct legal standard, the parties agree, is set forth in 8 C.F.R. § 1003.29 and further explained in *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018). An immigration judge may grant a motion for a continuance "for good cause shown." 8 C.F.R. § 1003.29. And in *Matter of L-A-B-R-*, the Attorney General (AG) explained that immigration judges must apply "a multifactor analysis," focusing "on the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings." 27 I&N Dec. at 406, 412. "[C]ontinuances should not be granted when a respondent's collateral pursuits are merely speculative." *Id.* at 414.

More specifically, the AG also addressed collateral attacks on criminal convictions, as opposed to other forms of collateral relief such as visa petitions. With regard to attacks on criminal convictions, the AG cited decisions from federal appellate courts stating that a respondent's "pending collateral attack on a criminal conviction is too 'tentative' and 'speculative' to support a continuance of removal proceedings." *Id.* at 417 (citing *Palma-Martinez v. Lynch*, 785 F.3d 1147, 1150

(7th Cir. 2015); *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011)).

Because Whitter is challenging whether the IJ and the BIA applied the correct legal standard—a question of law—we have jurisdiction to review his petition. *See Guerrero-Lasprilla*, 140 S. Ct. at 1067. As to the merits of Whitter's argument, he correctly asserts that the BIA is bound by decisions of the AG. *See* 8 C.F.R. § 1003.1(g)(1). However, we disagree with Whitter that the IJ and BIA applied a rule that was inconsistent with the AG's decision. In *Matter of L-A-B-R-*, the AG established that a pending collateral attack on a criminal conviction is simply too speculative to support a continuance, which is precisely why the BIA affirmed the IJ's decision. 27 I. & N. Dec. at 417–18. Accordingly, we reject Whitter's argument that the BIA and the IJ applied the wrong law in finding that Whitter failed to establish good cause for a continuance, and thus we deny the petition.

PETITION DENIED.