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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2014

ARGUED: AUGUST 20, 2014
DECIDED: JANUARY 26, 2015

No. 13-203-ag

ALEKSANDR PAN,
Petitioner.

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL
Respondent.

Appeal from the Board of Immigration Appeals.
File: A 093 354 217 – New York, NY.

Before: WALKER, WESLEY, and LIVINGSTON, *Circuit Judges.*

Aleksandr Pan petitions for review of the January 7, 2013 order of the Board of Immigration Appeals (BIA) dismissing his appeal from an immigration judge's (IJ) denial of his applications for asylum, withholding of removal, and relief pursuant to the

1 Convention Against Torture (CAT). For the reasons that follow, we
2 conclude that the IJ and BIA failed to consider significant record
3 evidence related to Pan's claim of past persecution. Therefore, we
4 grant the petition for review, vacate the BIA's order in part, and
5 remand for further proceedings.

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8 JUDY RESNICK, Law Office of Judy Resnick, Far
9 Rockaway, NY, *for Petitioner*.

10 JESSE DAVID LORENZ (Stuart F. Delery, Emily
11 Anne Radford, Thanh Khiet T. Nguyen, Craig A.
12 Newell, Jr., *on the brief*), U.S. Department of
13 Justice, Office of Immigration Litigation,
14 Washington, DC, *for Respondent*.

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17 JOHN M. WALKER, JR., *Circuit Judge*:

18 Aleksandr Pan petitions for review of the January 7, 2013
19 order of the Board of Immigration Appeals (BIA) dismissing his
20 appeal from an immigration judge's (IJ) denial of his applications for
21 asylum, withholding of removal, and relief pursuant to the
22 Convention Against Torture (CAT). For the reasons that follow, we
23 conclude that the IJ and BIA failed to consider significant record
24 evidence related to Pan's claim of past persecution. Therefore, we
25 grant the petition for review, vacate the BIA's order in part, and
26 remand for further proceedings.

BACKGROUND

1
2 Pan, a citizen and native of the Kyrgyz Republic, entered the
3 United States on May 9, 2008, under a visitor non-immigrant visa.
4 On May 8, 2009, Pan filed an asylum request claiming that he was
5 persecuted because he is an ethnic Korean and an Evangelical
6 Christian.

7 At his June 28, 2010 removal proceeding, the IJ noted that Pan
8 credibly testified about several incidents in which he and his family
9 were targeted for mistreatment because of their religion and
10 ethnicity. Pan testified that in his early school years other students
11 beat him because they knew he was an Evangelical Christian. His
12 parents complained to school administrators, but the administrators
13 dismissed the complaints as a “normal phenomenon” in the school.
14 Jt. App’x 120. In 1992, when Pan was about five years old, neighbors
15 hanged his dog from his family’s fence. Later, neighbors lit the fence
16 on fire.

17 After his family moved to a new apartment, Pan’s father
18 began holding religious services in their home. When Pan was seven
19 or eight, the police interrupted his father’s services. They detained
20 and questioned his father and the other attendees for five hours. In
21 1997, the family moved again because of harassment. In 1998, Pan’s
22 father built and opened a new church outside of Bishkek, and Pan
23 began proselytizing on its behalf.

1 In April 2004, during Pan's final year of high school, some
2 classmates attacked him and called him a "sectant face." Jt. App'x
3 302. After this attack, Pan missed a week of school. In 2005, four men
4 beat Pan and a friend as they handed out church pamphlets in the
5 marketplace. A crowd stood by and watched the men beat Pan, and
6 no one called the police. Pan explained that he did not call the police
7 after this incident because the Kyrgyz police are "very corrupt" and
8 "if they're going to do something for you they're going to want
9 something in exchange." Jt. App'x 136. Pan added that he feared he
10 would only get in further trouble if the police learned that he had
11 been handing out Christian pamphlets. In July 2007, Pan left the
12 church late after helping with a youth seminar. While he was
13 walking home, an unknown assailant struck Pan from behind on the
14 head. Pan lost consciousness for a few hours, went to the hospital,
15 and was diagnosed with a concussion. Pan reported this attack to
16 the police, but they told Pan they would not investigate because he
17 had not seen his assailant.

18 Pan's aunt, Galina Pan, also testified on Pan's behalf. Galina
19 Pan, who lived in the same town as Pan and attended his father's
20 church, was granted asylum in the United States in 2006. Galina Pan
21 testified to an attack on the church by five men in 2001. The attackers
22 injured her and many other many parishioners. The parishioners
23 filed a complaint with the police, but, "[t]here was no reaction

1 whatsoever, as [was] usually the case.” Jt. App’x 155. Galina Pan’s
2 affidavit in support of her 2006 asylum application was also received
3 into evidence. The affidavit described, among other incidents, an
4 occasion on which the police ordered Galina Pan to report to the
5 precinct and answer questions about her faith, Pan’s father, and
6 other parishioners. The police warned her that they would take
7 action against the members of the church “who attract people to
8 church” if more ethnic Kyrgyzes joined the church. The affidavit
9 also described how, in July 2004, three men attacked Galina Pan
10 outside her house and gave her a concussion. The hospital alerted
11 the police, and a policeman came to the hospital and wrote a report
12 but investigated no further.

13 Finally, Pan submitted secondary materials that included
14 reports from the U.S. State Department. In particular, the State
15 Department’s 2009 Human Rights Report describes corruption as
16 “endemic” at all levels of Kyrgyz society and how “officials engaged
17 in corrupt practices with impunity.” Jt. App’x 271. The report also
18 describes a 2009 law that banned proselytizing, religious
19 conversions, private religious education, and all activities by
20 unregistered religious organizations, while at the same time
21 enlarging the membership necessary to register as a religious
22 organization.

1 On October 14, 2010, Immigration Judge Sandy K. Hom
2 denied Pan's applications. The IJ credited Pan's and Galina Pan's
3 testimony, but found that the mistreatment Pan suffered
4 "represented, at best, hate crimes." *In re Aleksandr Pan*, No. A 093 354
5 217 (Immig. Ct. N.Y.C. Oct. 14, 2010). The IJ also found that Pan
6 failed to establish that the Kyrgyz government failed to protect Pan,
7 Koreans, or Evangelical Christians because many of the incidents
8 were not reported to the police, and Pan was unable to identify the
9 attacker in the one incident he did report. The IJ disregarded Galina
10 Pan's testimony and affidavit because they did not tend to establish
11 persecution of Pan.

12 The BIA affirmed the IJ's decision and dismissed Pan's appeal.
13 Reviewing the IJ's decision *de novo*, the BIA found that "private
14 citizens targeted [Pan] on account of his Korean ethnicity or his
15 religious beliefs," but that "the verbal and physical abuse he
16 experienced was [not] sufficiently egregious to rise to the level of
17 past persecution." *In re Aleksandr Pan*, No. A 093 354 217 (B.I.A. Jan.
18 7, 2013). Like the IJ, the BIA did not discuss Galina Pan's testimony
19 or affidavit. Based on the evidence it did consider, the BIA
20 concluded that Pan failed to demonstrate that the Kyrgyz
21 government is unable or unwilling to protect him from the harm
22 that he fears. *Id.* Thus, though for somewhat different reasons, the

1 BIA agreed with the IJ that Pan failed to show that he suffered past
2 persecution or had a well-founded fear of future persecution. *Id.*

3 Pan timely petitioned this court for review of the denial of his
4 claim for asylum and withholding of removal, but not his claim
5 under the CAT.

6 DISCUSSION

7 Because the BIA did not expressly adopt the IJ's decision, but
8 "its brief opinion closely track[ed] the IJ's reasoning," we have
9 reviewed the opinions of both the IJ and the BIA "for the sake of
10 completeness." *Zaman v. Mukasey*, 514 F.3d 233, 237 (2d Cir. 2008)
11 (internal quotation marks omitted). We review the IJ's factual
12 findings under the substantial evidence standard, treating them as
13 "'conclusive unless any reasonable adjudicator would be compelled
14 to conclude to the contrary.'" *Id.* (quoting 8 U.S.C. § 1252(b)(4)(B)).
15 Questions of law and the agency's application of law to fact are
16 reviewed *de novo*. *Centurion v. Holder*, 755 F.3d 115, 119 (2d Cir.
17 2014).

18 To qualify as a refugee and establish eligibility for asylum or
19 withholding of removal, an applicant must establish that he was
20 persecuted or has a "well-founded fear of persecution on account of
21 race, religion, nationality, membership in a particular social group,
22 or political opinion." 8 U.S.C. § 1101(a)(42). A well-founded fear
23 involves both an objective and subjective component. The subjective

1 component may be based on the applicant's reaction to events, while
2 the objective component must be supported by "proof or objective
3 facts that lend support to the applicant's subjective fear." *Melgar de*
4 *Torres v. Reno*, 191 F.3d 307, 311 (2d Cir. 1999). A showing that the
5 applicant was a victim of past persecution creates a presumption
6 that a well-founded fear of future persecution exists. *Id.* (citing 8
7 C.F.R. § 208.13(b)(1)(i)). Persecution by government actors does not
8 encompass simple harassment, but "violent conduct [amounting to
9 persecution] generally goes beyond the mere annoyance and distress
10 that characterize harassment." *Ivanishvili v. U.S. Dep't of Justice*, 433
11 F.3d 332, 342 (2d Cir. 2006). Private acts can also constitute
12 persecution if the government is unable or unwilling to control such
13 actions. *Pavlova v. I.N.S.*, 441 F.3d 82, 91 (2d Cir. 2006).

14 Here, there was no issue as to Pan's credibility and the IJ
15 found that Pan indeed suffered the mistreatment to which he
16 testified. The IJ concluded, however, that Pan was not a victim of
17 persecution because "the offending events, individually or
18 collectively, represented, at best, hate crimes." The IJ added that "[a]
19 hate crime, *per se*, is a criminal act that is not a sufficient basis to find
20 persecution." *In re Aleksandr Pan*, No. A 093 354 217, slip op. at 13.
21 Similarly, although the BIA found that Pan was targeted for
22 mistreatment "on account of his Korean ethnicity or his religious
23 beliefs," it found that the abuse he experienced was insufficiently

1 egregious to rise to the level of persecution. *In re Aleksandr Pan*, No.
2 A 093 354 217, slip op. at 2.

3 In our view, the record does not support either the IJ's or the
4 BIA's characterization of the abuse Pan suffered. Pan credibly
5 testified about three beatings he received over a four-year period,
6 the last of which resulted in a two-week hospitalization. The BIA has
7 concluded elsewhere that an asylum applicant who suffered similar
8 violence was a victim of persecution. *See In re O-Z- and I-Z-*, 22 I. &
9 N. Dec. 23, 25-26 (B.I.A. 1998) (finding persecution where a father
10 was beaten three times and his son was beaten and humiliated by
11 his classmates). We have also indicated that similar allegations of
12 violence, if found credible, would preclude a finding of mere
13 harassment. *See Ivanishvili*, 433 F.3d at 342 (three violent attacks
14 accompanied by death threats).

15 The IJ and BIA made no attempt to explain how the violence
16 Pan suffered differed from that suffered by other applicants who
17 have been granted asylum. That failure is significant because "it is a
18 fundamental principle of justice that 'similarly situated individuals
19 be treated similarly.'" *Zhang v. Gonzales*, 452 F.3d 167, 173 (2d Cir.
20 2006) (quoting *Njuguna v. Ashcroft*, 374 F.3d 765, 771 n.4 (9th Cir.
21 2004)); *see also Davila-Bardales v. I.N.S.*, 27 F.3d 1, 5 (1st Cir. 1994) ("If
22 an administrative agency decides to depart significantly from its

1 own precedent, it must confront the issue squarely and explain why
2 the departure is reasonable.”).

3 We also take issue with the IJ’s view that “a hate crime, *per se*,
4 is a criminal act that is not a sufficient basis to find persecution.” *In*
5 *re Aleksandr Pan*, No. A 093 354 217, slip op. at 13. Although some
6 hate crimes may not amount to persecution, conduct that rises to the
7 level of persecution either by the government or with its
8 acquiescence may also be a hate crime. Indeed, hatred of a group
9 that manifests itself in violent crimes against members of that group
10 would seem to be at the core of persecution.

11 We also reject the BIA’s alternative finding that Pan failed to
12 establish that the Kyrgyz government was unable or unwilling to
13 protect him. *Cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 161
14 (2d Cir. 2006) (denying a petition challenging a rejection of an
15 asylum claim despite errors committed by the IJ where, *inter alia*,
16 “the IJ explicitly relie[d] on a valid alternative ground for denying
17 relief that [was] not tainted by error”). The IJ observed that Pan
18 failed to report some of the mistreatment to the police and that he
19 was unable to identify his attacker when he did file a report, and the
20 BIA found that the evidence Pan presented failed to establish that
21 the government was unable or unwilling to protect him.

22 We need not decide whether Pan’s unwillingness to confront
23 the police is fatal to his asylum claim because we find that both the IJ

1 and BIA ignored ample record evidence tending to show that the
2 Kyrgyz police were unwilling to investigate the abuse suffered by
3 Pan and his family. *See Yan Chen v. Gonzales*, 417 F.3d 268, 272 (2d
4 Cir. 2005) (granting petition for review and remanding where the IJ
5 and BIA failed to consider relevant evidence).

6 First, Pan testified that he did not report the 2005 marketplace
7 beating because the police were corrupt and would not help without
8 receiving something in exchange and because such a report might
9 get him into further trouble. Pan's testimony about police
10 corruption—which was deemed credible by the IJ—is corroborated
11 by the State Department's 2009 Human Rights report. *See Hong Ying*
12 *Gao v. Gonzales*, 440 F.3d 62, 71 (2d Cir. 2006) (country report stating
13 that efforts to combat trafficking were hampered by corruption
14 supported a finding that government would not protect applicant
15 from private abuse), *judgment vacated on other grounds sub nom.*
16 *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007). Neither the IJ nor the
17 BIA analyzed the impact of police corruption on the government's
18 willingness and ability to protect Pan.

19 Second, the IJ disregarded Galina Pan's testimony because she
20 lacked personal knowledge of Pan's experiences. To be sure, each
21 asylum claim must be considered on its own merits. *In re Mogharrabi*,
22 19 I. & N. Dec. 439, 446 (B.I.A. 1987). However, police unwillingness
23 to protect a similarly-situated refugee may establish that the

1 government is unable or unwilling to protect the applicant. *See, e.g.,*
2 *Abankwah v. I.N.S.*, 185 F.3d 18, 25-26 (2d Cir. 1999) (minister's
3 testimony about inability of Ghanaian government to prevent female
4 genital mutilation supported applicant's claim that she would be
5 subject to FGM); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1117-18 (9th Cir.
6 2004) (police inaction in response to attacks against sons supported
7 mother's asylum claim).

8 Galina Pan testified (and, again, was found to be credible by
9 the IJ) that the police, as usual, did nothing in response to the 2001
10 attack on her (and Pan's) church. Her affidavit also described how
11 the police failed to do anything other than write a report after her
12 2004 beating. Such police inaction in response to the significant
13 violence Galina Pan suffered tends to prove that the government is
14 unwilling to protect its citizens and should have been considered by
15 the adjudicating authorities below. *See in re O-Z- & I-Z-*, 22 I. & N.
16 Dec. at 23 ("[g]overnment was unable or unwilling to control the
17 [applicant's] attackers" where "police . . . took no action beyond
18 writing a report"). Given the similarities between Pan's and Galina
19 Pan's claims of persecution on account of their Korean ethnicity and
20 Evangelical Christianity, it was error for the IJ and BIA to ignore
21 record evidence that the Kyrgyz authorities were unwilling to
22 protect Galina Pan from persecution. *See Yan Chen*, 417 F.3d at 272.

