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United States Court of Appeals
Tenth Circuit

January 13, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EVERARDO COLIN-CARMOLINGA, a/k/a Everardo Collins-Cardenas,

Petitioner,

v.

WILLIAM P. BARR, United States Attorney General,

Respondent.

No. 18-9575
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **BACHARACH**, Circuit Judges.

Everardo Colin-Carmolinga petitions for review of a final order of removal. Exercising jurisdiction pursuant to 8 U.S.C. § 1252(a), we deny his petition for review.

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. Background

Colin-Carmolinga is a native and citizen of Mexico. Although he was previously granted lawful permanent resident status in the United States, he was deported in 1997 after being convicted of drug offenses. He subsequently reentered the United States without inspection, and he was served with a notice to appear (NTA) in 2011. After an immigration judge (IJ) found him removable, he applied for deferral of removal under the Convention Against Torture (CAT).

In support of his CAT application, Colin-Carmolinga testified at a hearing before the IJ that he had been the victim of a violent crime in Salt Lake City in 1995. Three assailants shot and seriously wounded him and killed his friend. Colin-Carmolinga knew the identity of the assailants, as well as a fourth person who had planned the shooting, but no one was immediately arrested.

In 2005 and 2006, Colin-Carmolinga cooperated with law enforcement and testified in the criminal trials of three defendants involved in the crime. All three were convicted and imprisoned. But one of the assailants, Rodrigo Ojeda, has been released from prison and deported to Mexico. Another assailant, known as Acapulco, was never tried and he has also returned to Mexico. Colin-Carmolinga believes that Ojeda and Acapulco are involved in drug cartels in Mexico. He fears that they would consider him a snitch, would want to seek revenge, and would have the means to harm him if he returned to Mexico. He further believes that the police in Mexico would not protect him because they are corrupt, and he lacks funds to pay for protection.

The IJ found that Colin-Carmolinga was a credible witness, but denied relief under the CAT, finding that he did not meet his burden to establish it was more likely than not that he would be tortured if he is removed to Mexico. The IJ noted his testimony that he has had no communication since 1995—threatening or otherwise—from Ojeda or Acapulco, even though he has been in regular contact with Ojeda's brother-in-law through business dealings in Salt Lake City. And although Colin-Carmolinga did have some contact with Ojeda during his criminal trial, that occurred more than a decade before the IJ hearing. The IJ stated there was "no evidence whatsoever that either of these two individuals cares about the location of [Colin-Carmolinga], much less that they are actively seeking him out in order to do him harm." Admin. R. at 85. Thus, the IJ concluded that Colin-Carmolinga's belief that these two men were still looking for him amounted to speculation, which was insufficient to demonstrate a likelihood of torture.

The IJ also found that Colin-Carmolinga failed to show that any harm would be inflicted upon him with the consent or acquiescence of the Mexican government. The IJ acknowledged the evidence of pervasive violence in Mexico, in particular, violence related to drug trafficking. But the IJ concluded that evidence of widespread lawlessness and violence was insufficient to obtain relief under the CAT. Further, although there was evidence that the police in some areas of Mexico have been corrupted by the cartels, there was also evidence that the Mexican government and the national and local police are aggressively targeting drug trafficking and the cartels. The IJ concluded: "Even the specifics of [Colin-Carmolinga's] case, which

shows that he testified against two individuals who may have cartel connections, is not enough for the court to find, first, that he will be tortured by these individuals, or second, that it would be at the acquiescence of the Mexican government or the Mexican police." *Id.* at 85-86.

On appeal, the BIA adopted and affirmed the IJ's decision. It held that the IJ did not clearly err in finding that Colin-Carmolinga's fears are based on speculation, given the passage of time and the absence of any threats by the two men. The BIA also agreed that the existence of cartel-related violence in Mexico is insufficient to warrant relief under the CAT, and that the IJ did not clearly err in finding that Mexican authorities are aggressively targeting the drug cartels. The BIA concluded that Colin-Carmolinga had not met his burden to show a likelihood he would be tortured with the acquiescence of the Mexican government.

The BIA also denied Colin-Carmolinga's motion to remand to the IJ to terminate proceedings. It rejected his contention that, under the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the IJ lacked jurisdiction in his removal proceedings because the NTA was defective.

II. Discussion

A. Denial of Motion to Remand

Colin-Carmolinga first argues that, because the NTA did not include the date and time of his removal hearing, as required by 8 U.S.C. § 1229(a)(1)(G)(i), it was legally defective and therefore insufficient to initiate removal proceedings against

him. And without a proper NTA, he argues, the IJ lacked jurisdiction to order his removal.

Colin-Carmolinga raised this issue in a motion to remand to the IJ, which the BIA denied. We review the BIA's denial of a motion to remand for an abuse of discretion. *Neri-Garcia v. Holder*, 696 F.3d 1003, 1011 (10th Cir. 2012). "An abuse of discretion occurs when the BIA's decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Id.* (internal quotation marks omitted). "Committing a legal error . . . is necessarily an abuse of discretion." *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 n.9 (10th Cir. 2004).

Colin-Carmolinga argues that the BIA erred as a matter of law in construing the Supreme Court's decision in *Pereira*. We disagree. *Pereira* did not hold that an IJ lacks jurisdiction if the NTA failed to specify the time of the removal hearing.

> In *Pereira*, the Court decided only whether a defective notice to appear had interrupted a noncitizen's continuous presence in the United States. The Court did not address the distinct question of whether a defect in the notice to appear would preclude jurisdiction over the removal proceedings. Indeed, the Court expressly declined to address this broader question, emphasizing that the decision was "much narrower."

Lopez-Munoz v. Barr, 941 F.3d 1013, 1018 (10th Cir. 2019) (quoting *Pereira*, 138 S. Ct. at 2113) (citation omitted). "Given this context," we have joined other circuits "in declining to read *Pereira* as an implicit pronouncement on an immigration judge's jurisdiction." *Id.* Therefore, Colin-Carmolinga's "[r]eliance on *Pereira* is misplaced." *Id.* at 1017.

Colin-Carmolinga also appears to contend that, regardless of the Court's holding in *Pereira*, the plain meaning of § 1229(a) itself demonstrates that an IJ lacks jurisdiction where the NTA failed to specify the time of the removal hearing. Our opinion in *Lopez-Munoz* forecloses that argument as well. We observed that "a statutory requirement is jurisdictional only when Congress says it is." 941 F.3d at 1017. And "[§]1229(a) does not refer to jurisdiction or the courts' statutory or constitutional power to adjudicate the case." *Id.* (emphasis and internal quotation marks omitted). We therefore held that the statute "is non-jurisdictional." *Id.* Consequently, the NTA's failure to specify the date and time of Colin-Carmolinga's hearing was not a jurisdictional defect, *see id*. at 1018, and he has not shown that the IJ lacked jurisdiction over his removal proceedings.

Accordingly, Colin-Carmolinga fails to show that the BIA abused its discretion in denying his motion to remand to the IJ to terminate the removal proceedings.

B. Denial of Relief Under the CAT

To obtain relief under the CAT, Colin-Carmolinga had to demonstrate a likelihood that he would be tortured if he is removed to Mexico. *See Elzour*, 378 F. 3d at 1150 ("Pursuant to [the CAT], an alien is entitled not to be removed to a country if he or she can show that it is more likely than not that he or she would be tortured if removed to that country."); *see also* 8 C.F.R. § 1208.16(c)(2). Moreover, torture is defined as harm that "'is inflicted by or at the instigation of or with the consent or acquiescence of a public official.'" *Escobar-Hernandez v. Barr*, 940 F.3d

1358, 1362 (10th Cir. 2019) (quoting 8 C.F.R. § 1208.18(a)(1)). Colin-Carmolinga argues that the BIA erred in holding that he failed to meet this evidentiary burden.

We review the agency's legal determinations de novo and its factual findings under the substantial evidence standard. *Elzour*, 378 F.3d at 1150. Under this deferential standard of review, the agency's fact findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Because a single member of the BIA affirmed the IJ's decision in a brief order, we review the BIA's decision as the final order of removal. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006).

Colin-Carmolinga first argues that the BIA erred by requiring him to provide documentary or other evidence corroborating his testimony that Ojeda and Acapulco intend to harm him. But the BIA did not rest its decision on a lack of corroborating evidence. It simply concluded that the evidence he presented, taken as true, did not establish a likelihood that he would be tortured by these men if he is removed to Mexico. Colin-Carmolinga fails to challenge the BIA's determination that his fear of being harmed by Ojeda and Acapulco is speculative. Nor does he show, as he must, that any reasonable adjudicator would be compelled to conclude that they are likely to torture him if he is removed to Mexico.

Colin-Carmolinga also argues that he presented evidence of human rights violations by Mexican security forces, as well as evidence of pervasive violence in two Mexican states. He maintains that this evidence of violence in Mexico is substantial and clearly demonstrates a likelihood of torture by Mexican authorities or

those they are unwilling to control. For this proposition, Colin-Carmolinga points to 8 C.F.R. § 1208.16(c)(3)(iii), which provides that "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal" is "*relevant to* the possibility of future torture." (emphasis added).

Colin-Carmolinga's contention ignores the BIA's reasoning in holding that he failed to demonstrate a likelihood of torture. Stating that it "[did] not minimize [his] alleged cartel-related fears," Admin. R. at 4, the BIA nonetheless agreed with the IJ that he did not show that the Mexican government will acquiesce in any harm the cartels may inflict. The BIA held that general cartel-related violence in Mexico is insufficient to warrant deferral of removal under the CAT in light of the evidence that the government is aggressively targeting drug cartels and combatting corruption. Colin-Carmolinga's cursory reference to the record[1] does not show that this finding is not supported by substantial evidence. Moreover, consistent with the BIA's decision, we have held that, "by itself, pervasive violence in an applicant's country generally is insufficient to demonstrate the applicant is more likely than not to be tortured upon returning there." *Escobar-Hernandez*, 940 F.3d at 1362.

Colin-Carmolinga has not demonstrated that the BIA erred in denying his application for relief under the CAT based on his failure to present evidence sufficient to show a likelihood that he would be tortured if he is removed to Mexico.

[1] Colin-Carmolinga has not made clear what specific evidence he relies on. He cites 30 pages of a 2015 Human Rights Report regarding Mexico, without pointing to any particular evidence within that report.

III. Conclusion

We deny Colin-Carmolinga's petition for review.

Entered for the Court

Timothy M. Tymkovich
Chief Judge