FILED
United States Court of Appeals
Tenth Circuit

August 13, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ENES DJURIC,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,*

Respondent.

No. 20-9615
(Petition for Review)

ORDER AND JUDGMENT**

Before **MATHESON**, **BRISCOE**, and **CARSON**, Circuit Judges.

Enes Djuric, a native of the former Yugoslavia and a citizen of Bosnia and Herzegovina, petitions for review of the Board of Immigration Appeals' ("BIA") decision denying his motion to reopen to seek relief under the Convention Against

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* On March 11, 2021, Merrick B. Garland became Attorney General of the United States. Consequently, he has been substituted for Robert M. Wilkinson as Respondent, per Fed. R. App. P. 43(c)(2).

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Torture ("CAT"). Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny the petition.

BACKGROUND

In 1995, Petitioner, then sixteen years old, entered the United States as a refugee after fleeing the Bosnian War along with his mother, a Yugoslav Muslim, and his father, a Serbian Orthodox Christian. Petitioner's status was adjusted to lawful permanent resident in 1998, retroactive to his date of entry. Two years later, however, he pleaded guilty in Idaho state court to felony robbery in violation of Idaho Code § 18-6501. *See State v. Salato*, 47 P.3d 763, 766-67 (Idaho Ct. App. 2001) (discussing Petitioner's role in several armed robberies). He was sentenced to a fixed term of five years followed by an indeterminate term of twenty years. Petitioner served approximately six months in jail and was placed on probation.

In 2009, the federal government charged him with removability under 8 U.S.C. § 1227(a)(2)(A)(iii) as a noncitizen who had been convicted of an aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G) and an aggravated felony crime of violence under § 1101(a)(43)(F). Petitioner admitted the allegations and applied for asylum, withholding of removal, and CAT relief. After a hearing in September 2009, an Immigration Judge ("IJ") denied Petitioner's applications and ordered his removal, concluding that he was ineligible for asylum or withholding of removal because of his conviction and that he failed to carry his burden on his CAT claim. The BIA affirmed.

In April 2019, Petitioner filed a motion with the IJ to reopen his proceedings, seeking deferral of removal under the CAT and alleging changed country conditions in Bosnia and Herzegovina. He contended that he would be subjected to torture in any part of the country due to rising ethnic and religious tensions and his status as the child of a mixed Muslim-Christian marriage. Following a hearing, an IJ issued a one-page form order denying the motion for the reasons stated by the federal government. Petitioner appealed, and the BIA remanded the matter to the IJ for findings of fact and conclusions of law. The IJ issued a written decision denying the motion, finding that Petitioner had not established changed country conditions or prima facie eligibility for deferral of removal under the CAT. The BIA then dismissed Petitioner's appeal, finding no error in the IJ's decision.

DISCUSSION

I. Standard of Review

We review the denial of Petitioner's motion to reopen for abuse of discretion. *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017). "The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir. 2004) (internal quotation marks omitted). In addition, we review legal conclusions de novo and findings of fact for substantial evidence. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 645 (10th Cir. 2012). Findings of fact are thus binding "unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the

contrary." *Id.* (internal quotation marks omitted). Because a single BIA member upheld the IJ in a brief order, the BIA's order is the final decision, but we "may consult the IJ's decision to give substance to the BIA's reasoning." *Razkane v. Holder*, 562 F.3d 1283, 1287 (10th Cir. 2009).

II. Motions to Reopen

A noncitizen may file a motion to reopen his removal proceedings. 8 U.S.C. § 1229a(c)(7)(A). The motion must be filed within ninety days of the removal order unless the noncitizen intends to apply for asylum, withholding of removal, or protection under the CAT and the motion "is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding." 8 C.F.R. § 1003.23(b)(1), (b)(4)(i). The motion must "state the new facts that will be proven at a hearing to be held if the motion is granted, and . . . be supported by affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(7)(B). The "new facts . . . must demonstrate that if proceedings before the IJ were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Maatougui v. Holder*, 738 F.3d 1230, 1240 (10th Cir. 2013) (brackets and internal quotation marks omitted); *see also INS v. Abudu*, 485 U.S. 94, 104 (1988) (noting the BIA may deny a motion to reopen for failure to establish a prima facie case for the relief sought). Even if the noncitizen establishes a prima facie case, the IJ still has discretion to deny the motion. 8 C.F.R. § 1003.23(b)(3). Ultimately, motions to reopen are

"disfavored," and a noncitizen has "a heavy burden" in showing an abuse of discretion. *Maatougui*, 738 F.3d at 1239 (brackets and internal quotation marks omitted).

III. Analysis

Petitioner moved to reopen his proceedings in order to pursue deferral of removal under the CAT. *See* 8 C.F.R. § 1208.17(a); *see also id.* § 1208.16(c)(2) (requiring the noncitizen "to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal"). The BIA upheld the IJ's dual determinations that Petitioner failed to show either: (1) materially changed country conditions, so as to excuse the untimeliness of the motion; or (2) prima facie eligibility for deferral of removal under the CAT. The first ground for the denial of Petitioner's motion is supported by substantial evidence and does not constitute an abuse of discretion. We therefore need not address the second ground.

Because he filed his motion to reopen more than ninety days after his original removal order, Petitioner was required to produce material evidence that was not available at the time of his previous proceeding and that demonstrated conditions in Bosnia and Herzegovina had materially changed between his September 2009 merits hearing and his April 2019 motion to reopen. *See Matter of S-Y-G-*, 24 I. & N. Dec. 247, 253 (B.I.A. 2007) (noting that, in assessing whether there has been a material change in country conditions, the BIA compares the conditions "that existed at the time of the merits hearing" with "the evidence of country conditions submitted with

the motion"). In support of his motion, Petitioner submitted country reports, news articles, his own affidavit, and an affidavit from Dr. Refik Sadikovic, a professor of education and Bosnian language and cultures at Boise State University. The BIA determined that the evidence did not show changed country conditions supporting Petitioner's CAT claim based on having Muslim and Orthodox Christian parents.

First, the BIA found no error in the IJ's findings that: (1) the country reports and news articles did "not reference changed country conditions related to how the Bosnian government mistreats or permits [the] mistreatment of individuals from mixed Muslim and Orthodox Christian marriages"; and (2) the "discrimination against ethnic and religious minorities" referenced in the reports was not "materially different from the discrimination mentioned in the [report] that the [IJ] considered" at Petitioner's hearing in 2009. Admin. R. at 47 (alterations and internal quotation marks omitted). *See Wei v. Mukasey*, 545 F.3d 1248, 1254 (10th Cir. 2008) (noting the petitioner's evidence for country conditions was not materially different from the evidence during the initial removal proceedings). The BIA also found no error in the IJ's findings regarding Petitioner's affidavit, including that: (1) Petitioner largely related experiences prior to the 2009 merits hearing; and (2) to the extent he expressed concerns about current conditions in Bosnia and Herzegovina, the affidavit was not based on personal knowledge and was entitled to "little evidentiary value." Admin. R. at 47. Petitioner has not contested the findings regarding the country reports, the news articles, and his affidavit, and he thus has waived any challenge to

them. *See Krastev v. INS*, 292 F.3d 1268, 1280 (10th Cir. 2002) (noting issues not raised are deemed waived).

In his brief, Petitioner contests only the BIA's treatment of Dr. Sadikovic's affidavit. Dr. Sadikovic described a rise in "national tensions," quoted several diplomats as expressing concern over the country's direction, and characterized the situation in the country as being "worse than at any point after the Bosnian war of [the] 1990s." Admin. R. at 99. He also noted a rise in far-right activity and rhetoric in the Republic of Srpska, the portion of the country where the residents are primarily Serbian and Orthodox Christian, and asserted that Muslims are "brutally beaten and tortured" in that region. *Id.*[1] But as the IJ observed, Dr. Sadikovic's statements regarding conditions in Bosnia and Herzegovina did not address individuals from mixed Muslim and Orthodox Christian marriages or evidence a change in country conditions for such individuals. *See* 8 C.F.R. § 1003.23(b)(4)(i) (noting the evidence of changed country conditions must be "material").

Dr. Sadikovic further asserted that, whereas a Muslim would be safer in the Federation of Bosnia and Herzegovina and an Orthodox Christian would be safer in the Republic of Srpska, a child of parents representing both ethnicities and religions would "have no safe place anywhere in Bosnia and Herzegovina and his/her life [would] be in danger." Admin. R. at 99. The IJ gave this assertion "little weight" because Dr. Sadikovic did not explain the basis for his expertise or how he had

[1] Petitioner, whose last name is Orthodox Christian, considers himself an Orthodox Christian and baptized his children as such.

"drawn this conclusion from the news articles he cite[d] in his affidavit that merely discuss some far-right political activity without mentioning the treatment of individuals from mixed marriages." *Id.* at 48. To the extent Petitioner challenges the weight afforded to Dr. Sadikovic's opinion, "it is not our prerogative to reweigh the evidence." *Neri-Garcia v. Holder*, 696 F.3d 1003, 1009 (10th Cir. 2012) (internal quotation marks omitted).[2]

Lastly, Petitioner contends the BIA's decision cannot be "factually supported" because the federal government offered no rebuttal evidence. Pet'r's Br. at 10. But he cites no authority for this argument. *See Palma-Salazar v. Davis*, 677 F.3d 1031, 1037 (10th Cir. 2012) (noting the court does not consider perfunctory arguments unsupported by legal authority). In any event, Petitioner bore the burden on his motion, and we cannot say any reasonable adjudicator would be compelled to conclude that he carried his burden of establishing that country conditions in Bosnia and Herzegovina materially changed between 2009 and 2019. Accordingly, we find no basis to disturb the BIA's denial of Petitioner's motion to reopen.

[2] Petitioner contends that facts in an affidavit for a motion to reopen must be accepted as true unless "inherently unbelievable" and that the IJ and BIA should have accepted Dr. Sadikovic's statements as true. Pet'r's Br. at 8-9 (internal quotation marks omitted). But Petitioner did not make this argument to the BIA, and we thus do not consider it. *See Sidabutar v. Gonzales*, 503 F.3d 1116, 1118 (10th Cir. 2007).

CONCLUSION

The petition for review is denied.

Entered for the Court

Mary Beck Briscoe
Circuit Judge