FILED
United States Court of Appeals
Tenth Circuit

November 9, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULIUS SAHON TOBO,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 23-9500
(Petition for Review)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Petitioner Julius Sahon Tobo is a native and citizen of Nigeria and a lawful permanent resident of the United States. In 2022 the Department of Homeland Security served him with a Notice to Appear (NTA) charging that he had been convicted of an aggravated felony and was therefore subject to removal from this country. In removal proceedings before an immigration judge (IJ), Mr. Tobo applied for asylum, withholding of removal, and relief under the Convention Against Torture

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

(CAT). The IJ determined his conviction for a particularly serious crime made him ineligible for asylum and withholding of removal. She also denied deferral of removal under the CAT, finding insufficient evidence that it was more likely than not that Mr. Tobo would be tortured upon returning to Nigeria. The Board of Immigration Appeals (BIA) agreed with the IJ's reasoning, adopted and affirmed her decision, and dismissed Mr. Tobo's appeal. Mr. Tobo, proceeding pro se,[1] seeks review of the BIA's order. Exercising jurisdiction under 8 U.S.C. § 1252, we deny his petition for review.

BACKGROUND

Mr. Tobo entered this country without lawful immigration status in 1997. Soon after his arrival, he married a United States citizen. His wife filed a family-based immigrant visa petition and he adjusted his status to a lawful permanent resident in September 2001. Mr. Tobo separated from his wife in 2010.

In November 2017, a California court convicted Mr. Tobo of willful infliction of corporal injury upon a cohabitant in violation of California Penal Code § 273.5(a). Section 273.5(a) provides that

> [a]ny person who willfully inflicts corporal injury resulting in a traumatic condition upon a [cohabitant] is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment.

[1] Because Mr. Tobo appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

The state court initially suspended imposition of a prison sentence and granted Mr. Tobo probation. In November 2021, however, the court revoked his probation because he had violated his restraining order by communicating with and being with the victim. He was sentenced to two years' imprisonment.

At his IJ hearing, Mr. Tobo admitted the allegations in the NTA, except for the allegation that he had been sentenced to two years' imprisonment for the violation of § 273.5(a). He argued his two-year sentence was for violating his probation, not for the § 273.5(a) conviction. The IJ rejected this argument and found the evidence supported the allegation.

At the hearing, Mr. Tobo also presented his account of the circumstances leading to his conviction. He stated he met the victim in 2011. In 2014 she moved in with him. R., vol. 1 at 172. Mr. Tobo described his relationship with the victim. He recalled he had been arrested four times for domestic violence, but the prior cases were dismissed because the victim failed to appear. Mr. Tobo explained that he "kept letting [the victim] back into [his] life and anytime she's angry, she throws [a] tantrum." *Id.* at 178. He complained that since his conviction the victim kept hitting him and threatened to have him sent back to jail. *See id.* He stated the victim was "very nice" but had "anger management problems." *Id.* at 179. He opined that "she's very good at playing the victim." *Id.* at 185.

Mr. Tobo stated the conduct underlying the § 273.5(a) conviction occurred on July 1, 2017, when he encountered the victim in a parking lot. She accused him of seeing someone else and of failing to answer his phone. She began hitting Mr. Tobo.

After she hit him on the side of his head with her purse, which contained a battery charger, he hit her back "instinctively." *Id.* at 175. As a result, she sustained bruised lips. A witness saw him hit the victim, and he was arrested and later pled guilty to the § 273.5(a) offense.

After hearing his testimony, the IJ stated she did "not find [Mr. Tobo] credible as to his criminal history." R., vol. 1 at 110. She noted his "long, evasive answers" to questions about his domestic violence arrests and 2017 conviction, which indicated "that he was not being forthcoming or truthful about these incidents"; his "implausible and inconsistent" testimony; and his refusal "to take accountability for his actions." *Id.* at 110-11. The IJ denied his application for asylum and withholding of removal, finding his conviction for a particularly serious crime disqualified him from these forms of relief.

Mr. Tobo also testified at the hearing about the persecution he believed he would face if he returned to Nigeria. The IJ summarized his testimony as follows:

> [T]he respondent does not fear he will be tortured by Nigerian government officials. The respondent fears that, with government acquiescence, he will be tortured by people who are angry that his father won a lawsuit against the Nigerian Central Bank over twenty-five years ago. He also fears members of Boko Haram and other "Islamic militants" will target him because he is Catholic. Additionally, he is afraid that his wealth and status as a deportee from the United States will make him a target for torture in Nigeria.

Id. at 114.

The IJ concluded Mr. Tobo "was never threatened, harmed, or tortured in Nigeria in the past" and was able to openly practice his Catholic faith there without

issue. *Id.* Although there was evidence of "sometimes violent conflict between some factions of Christians and Muslims in certain areas of the country," the Nigerian government had protections in place and appeared to be actively working to address the issues. *Id.* at 114-15. Evidence concerning his father's lawsuit, a cousin's kidnapping, and occasionally aggressive scam emails Mr. Tobo received from Nigerians between 2006 and 2012 also failed to meet his burden to establish he would more likely than not be tortured upon returning to Nigeria. The IJ therefore denied deferral of removal under the CAT.

On appeal, the BIA upheld the IJ's finding that Mr. Tobo was ineligible for asylum and withholding relief because of his conviction for a particularly serious crime. The BIA also upheld the denial of CAT relief.

DISCUSSION

1. Standard of review

When, as here, the BIA affirmed the immigration judge's decision in an order issued by a single judge, "we review the BIA's decision as the final agency determination and limit our review to issues specifically addressed therein." *Diallo v. Gonzales*, 447 F.3d 1274, 1279 (10th Cir. 2006). We are not, however, "precluded from consulting the IJ's more complete explanation of those same grounds" in order "to understand the grounds provided by the BIA." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). "[R]esort to the IJ's decision is appropriate in situations where [as here] the BIA incorporates the IJ's rationale or a summary of its reasoning." *Diallo*, 447 F.3d at 1279.

"We review the BIA's legal determinations de novo, and its findings of fact for substantial evidence." *Aguayo v. Garland*, 78 F.4th 1210, 1216 (10th Cir. 2023). "Under the substantial-evidence standard, our duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Id.* (internal quotation marks omitted). The agency's factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

2. Issues Raised

Mr. Tobo presents multiple issues for our review. We decline to consider his issues that are inadequately briefed, irrelevant, and/or unexhausted before the agency. Ultimately, the relevant and dispositive issues are: (1) whether his conviction under § 273.5(a) made him removable from the United States and ineligible for asylum and withholding relief, and (2) whether substantial evidence supports the agency's denial of CAT relief.

A. Effect of § 273.5(a) Conviction

We first consider our jurisdiction. We lack jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. 8 U.S.C. § 1252(a)(2)(C). We may, however, determine whether Mr. Tobo in fact committed an aggravated felony that makes him removable, *see Tapia Garcia v. INS*, 237 F.3d 1216, 1220 (10th Cir. 2001), and may reach other "constitutional claims or questions of law" he has raised, *see* § 1252(a)(2)(D).

i. Removal

"Any alien who is convicted of an aggravated felony at any time after admission is [remov]able." 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony" includes "a crime of violence (as defined in [18 U.S.C. § 16] . . .) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). To determine whether a prior conviction qualifies as an "aggravated felony" we apply a categorical approach. *See Pugin v. Garland*, 599 U.S. 600, 603 (2023). Under the categorical approach, we examine the elements of the statute of conviction, not the facts of the individual defendant's conduct, *see id.* at 603-04; and we then determine "whether the state statute defining the crime of conviction categorically fits within the generic federal definition," *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (internal quotation marks omitted).

A felony conviction under § 273.5(a) satisfies the generic federal definition of a "crime of violence," which includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. § 16(a). Section 273.5(a) requires willful infliction of "corporal injury resulting in a traumatic condition" on the victim. As the Ninth Circuit has reasoned, a conviction under this statute is therefore encompassed within the federal definition of a "crime of violence." *See, e.g.*, *Olea-Serefina v. Garland*, 34 F.4th 856, 863 (9th Cir. 2022).

Mr. Tobo argues, however, that § 273.5(a) is broader than the generic federal definition because a conviction under § 273.5(a) can result in a jail sentence of less

than a year. Therefore, he argues, not all convictions under the statute are aggravated felonies. *See* Pet'r Opening Br. at 10 (citing *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1083 n.1 (9th Cir. 2010)). For this reason, he urges us to treat § 273.5(a) as a "divisible" statute and to apply a "modified categorical approach" to his conviction. *See Johnson v. Barr*, 967 F.3d 1103, 1107 (10th Cir. 2020) (explaining that where a statute is overbroad, we must consider whether it is "divisible" and, if so, we apply a "modified" form of the categorical approach).

Although the IJ did not explicitly apply a modified categorical approach, she determined Mr. Tobo was convicted of "*felony* willful infliction of corporal injury," and that this conviction qualified categorically as an aggravated felony. R., vol. 1 at 112 (emphasis added). Mr. Tobo did not challenge that determination by arguing to the BIA that § 273.5(a) is overbroad and divisible based on the statute's sentencing range or that the IJ was therefore required to conduct a full modified categorical inquiry. *See* R., vol. 1 at 6-28 (Mr. Tobo's BIA brief).[2] He therefore failed to exhaust this issue before the agency. *See* 8 U.S.C. § 1252(d)(1) (requiring noncitizen to exhaust all administrative remedies available to him as of right).

"To satisfy § 1252(d)(1), an alien must present the same *specific legal theory* to the [agency] before he or she may advance it in court." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) (internal quotation marks omitted), *abrogated on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411, 413-14 (2023).

[2] Mr. Tobo mentioned the modified categorical approach in his BIA brief, *see* R., vol. 1 at 20, but did not make the argument he now seeks to raise.

As a mandatory claim-processing rule, *see Santos-Zacaria*, 598 U.S. at 421-23, § 1252(d)(1) should be enforced where, as here, the government timely and properly objects. We therefore decline to reach this issue.[3] We conclude Mr. Tobo's conviction made him subject to removal as a noncitizen convicted of an aggravated felony.

ii. Asylum and Withholding Relief

The BIA also upheld the IJ's determination that Mr. Tobo's conviction under § 273.5(a) was for a "particularly serious crime" that made him ineligible for asylum and withholding relief. Asylum and withholding of removal are unavailable to noncitizens convicted of particularly serious crimes. 8 U.S.C. § 1158(b)(2)(A)(ii) (asylum); § 1231(b)(3)(B)(ii) (withholding of removal). In reviewing this issue, we may not reweigh the evidence to determine whether the crime was particularly serious but can determine whether the BIA applied the correct legal standard in making its determination. *See N-A-M- v. Holder*, 587 F.3d 1052, 1055 n.2 (10th Cir. 2009).

An aggravated felony conviction is by definition a particularly serious crime for asylum purposes. 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i). The BIA applied the correct legal standard in determining that Mr. Tobo's conviction made him ineligible

[3] Mr. Tobo also argues that § 273.5(a) is divisible because it distinguishes between convictions for corporal injury to a spouse, which he says constitutes a conviction involving moral turpitude (CIMT) and corporal injury against a cohabitant, which he claims does not. *See* Pet'r Opening Br. at 11. But neither Mr. Tobo's removal nor his ineligibility for relief depend on whether his conviction was for a CIMT. This argument is therefore irrelevant.

for asylum. We therefore deny the petition to the extent it challenges the denial of asylum relief.

A different standard applies for withholding claims. In the withholding context, an aggravated felony is only considered a particularly serious crime per se if the noncitizen was sentenced to an aggregate term of imprisonment of at least five years. 8 U.S.C. § 1231(b)(3)(B). Mr. Tobo's conviction does not meet this standard. But "[n]otwithstanding the length of sentence imposed," the Attorney General may still conclude the noncitizen has a disqualifying conviction, *id.*, by "determin[ing] on a case-by-case basis whether a conviction is for a particularly serious crime," *Matter of B-Z-R-*, 28 I. & N. Dec. 563, 563 (Att'y Gen. 2022). Thus, "in judging the seriousness of a crime, [adjudicators] look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the respondent is a danger to the community." *Id.* at 564.

The BIA upheld the IJ's conclusion, based on an application of these factors, that Mr. Tobo's § 273.5(a) conviction was particularly serious. The IJ cited Mr. Tobo's failure to testify credibly concerning his criminal history; his conviction for a violent crime and admission to committing a violent act; the fact that crimes against persons are more likely to be characterized as particularly serious; and the language of § 273.5(a), which requires willful infliction of corporal injury resulting in a traumatic condition. R., vol. 1 at 112-13. Although Mr. Tobo urges us to reweigh the evidence, characterizing himself as a "victim of domestic violence" in

his interactions with the victim of his crime, Pet'r Opening Br. at 2; *see also id.* at 6, 9, we cannot do so. *N-A-M-*, 587 F.3d at 1055 n.2; *see also Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021) (where the agency relied on the facts and circumstances of a crime to deny relief, "[s]o long as the record contains . . . evidence that a reasonable factfinder could find sufficient, a reviewing court may not overturn the agency's factual determination" (internal quotation marks omitted)).

The only adequately developed constitutional claim we can make out in Mr. Tobo's opening brief is his assertion that the IJ found him not credible without providing him with due process. He claims the IJ should have given him notice that he would be required to present evidence corroborating his credibility and an opportunity to present such evidence before making an adverse credibility finding. Mr. Tobo claims he attempted to submit "now available corroborating evidence" concerning his credibility with his appeal to the BIA but the BIA refused to consider it. *See* Pet'r Opening Br. at 19.

We discern no constitutional violation.[4] Even if the agency should have provided him with notice and an additional opportunity to submit evidence to bolster

[4] Mr. Tobo also presents a statutory version of his "notice and opportunity" argument. To the extent this argument involves a reviewable "question of law," it is meritless. His argument runs as follows. Section 1158(b)(1)(B)(ii) provides that "[w]here the trier of fact determines that the applicant should provide evidence that corroborates *otherwise credible testimony*, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence" (emphasis added). Mr. Tobo cites cases interpreting this statute to require that once an IJ determines corroborating evidence is required, a noncitizen must be given a notice and opportunity to present such evidence. *See, e.g.*, *Ren v. Holder*, 648 F.3d 1079, 1090-92 (9th Cir. 2011). But the plain language of the statute says it applies

his credibility, Mr. Tobo has not demonstrated prejudice from the alleged violation of his due process rights. *See Lucio-Rayos v. Sessions*, 875 F.3d 573, 576 (10th Cir. 2017) ("In order to prevail on his due process claim, [a noncitizen] must establish both that he was deprived of due process and that th[e] deprivation prejudiced him.").

The IJ's analysis focused on the nature and circumstances of Mr. Tobo's crime. *See Matter of B-Z-R-*, 28 I. & N. Dec. at 564 (requiring adjudicator to focus on circumstances of crime in determining whether it was particularly serious). Mr. Tobo has failed to show that the additional evidence he submitted to the BIA about prior incidents involving the victim, *see* R., vol. 1 at 29-67, which did not directly corroborate his account of the nature and circumstances of his § 273.5(a) offense, "potentially . . . affect[ed] the outcome of the proceedings." *Lucio-Rayos*, 875 F.3d at 577. This constitutional claim therefore lacks merit.

B. CAT Claim

Noncitizens like Mr. Tobo who are ineligible for withholding of removal may still be eligible for deferral of removal under the CAT. 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a). To establish eligibility for deferral, an alien must prove "it is more likely

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when evidence is needed to corroborate "otherwise *credible* testimony." Here, the IJ did not find Mr. Tobo's testimony credible. In fact, she gave additional, independent reasons for her conclusion that his testimony was not credible, *besides* the lack of corroboration. Mr. Tobo has not shown that all these independent reasons lack substantial evidence. This being the case, he fails to show his testimony was "otherwise credible," and thus that the statute requires prior notice and an opportunity to submit corroborating evidence. *See Bhattarai v. Lynch*, 835 F.3d 1037, 1043 (9th Cir. 2016).

than not that he or she would be tortured if removed to the proposed country of removal." § 1208.16(c)(2). In assessing the likelihood of torture, the factfinder must consider "all evidence relevant to the possibility of future torture . . . including, but not limited to[] . . . [e]vidence of past torture"; the applicant's ability to relocate "to a part of the country of removal where he or she is not likely to be tortured"; "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal"; and "[o]ther relevant information regarding conditions in the country of removal." *Id.* § 1208.16(c)(3)(i)-(iv).

The IJ analyzed the evidence and explained at length her reasons why Mr. Tobo failed to establish a claim for deferral of removal under the CAT. The BIA agreed with and adopted her analysis. Having carefully reviewed Mr. Tobo's argument concerning this issue under the applicable review standards, *see* Pet'r Opening Br. at 3-4, we discern no reversible error. We therefore deny the petition for review concerning the CAT claim.

CONCLUSION

The petition for review is denied. We grant Mr. Tobo's motion to proceed without prepayment of costs or fees.

Entered for the Court

Bobby R. Baldock
Circuit Judge