

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4915
Summary Calendar

OLATOYE BAKARE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A93 073 802)

(March 14, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Olatoye Bakare ("Bakare"), a native and citizen of Nigeria, seeks to avoid deportation to his native land. He appeals to this court the decision of the Board of Immigration Appeals ("BIA"), which found him deportable under two provisions of the Immigration and Nationality Act of 1952 ("the Act"). 8 U.S.C. §§ 1101-1557

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

(1970 & Supp. 1993). He also appeals the BIA's denial of asylum and withholding of deportation. Because we find that the decision of the BIA is supported by substantial evidence, we affirm.

I

Bakare, a native and citizen of Nigeria, entered the United States in 1985. In December 1991, he was convicted of one count of forgery in the first degree. A few months later, in March 1992, he was convicted again, this time of two counts of forgery in the first degree. In the light of Bakare's convictions, the INS issued an Order to Show Cause on May 28, 1992, charging that Bakare was deportable under the Act.

On June 11, 1992, Bakare appeared pro se at his deportation hearing, and he was granted a continuance so that he could obtain counsel. On June 25, Bakare again appeared, and again he was granted a continuance. Finally, on November 9, Bakare's deportation hearing was held. A short time after this hearing, the immigration judge ("IJ") held that Bakare was deportable under two separate provisions of the Act. Specifically, the IJ held that Bakare was deportable under § 1251(a)(1)(B) as an alien who entered the United States without inspection. 8 U.S.C. § 1251(a)(1)(B) (Supp. 1993). The IJ further held that Bakare was deportable under § 1251(a)(2)(A)(ii) as an alien who had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. 1993).

In addition to those two findings, the IJ also denied Bakare's request for asylum and for withholding of deportation.

Bakare appealed the IJ's decision to the BIA, arguing that the IJ's findings on all three issues were erroneous and that he had been denied due process because the IJ refused to grant him a third continuance to allow him to obtain additional evidence supporting his asylum claim. On May 26, 1993, the BIA issued an opinion affirming the IJ's decision in all respects. Bakare then appealed to this court.

II

On appeal, Bakare presents essentially three issues for consideration, all of which ultimately challenge the sufficiency of the evidence supporting the BIA's findings. First, Bakare argues that the BIA's finding that he is deportable as an alien who entered the United States without inspection is not supported by substantial evidence. Next, he contends that the BIA's finding that he is deportable based on his convictions of crimes of moral turpitude is not supported by substantial evidence. Finally, Bakare asserts that the BIA's finding that he is ineligible for a grant of asylum or withholding of deportation is not supported by substantial evidence. We will in turn address each of these arguments.

III

First, however, we should discuss the applicable standard of review. In this appeal, we are authorized to review only the order

of the BIA, not the decision of the immigration judge. Castillo-Rodriguez v. INS, 929 F.2d 181, 183 (5th Cir. 1991). In reviewing the BIA's actions, we examine the factual findings to determine if they are supported by substantial evidence. INS v. Elias-Zacarias, ___ U.S. ___, 112 S.Ct. 812, 815, 117 L.Ed.2d 38 (1992); Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991). The substantial evidence standard requires only that the BIA's conclusion be based upon the evidence presented, and that the findings be substantially reasonable. Rojas v. INS, 937 F.2d at 189. Thus, the BIA's decision can be reversed only if Bakare can show that the evidence he presented was "so compelling that no reasonable factfinder could fail to find" for Bakare. INS v. Elias-Zacarias, 112 S.Ct. at 817.

A

Turning to the merits, Bakare first contends that the BIA erred in affirming the IJ's finding that Bakare entered the United States without inspection. During the proceedings before the IJ, Bakare testified and presented documentary evidence in support of his contention that he properly entered the United States. Conflicting evidence was presented that Bakare entered under a business visa, a student visa, and a visitor's visa. Additionally, one official document--the I-213 Record of Deportable Alien--contained an admission that Bakare entered the United States illegally without inspection. The BIA noted that there is a presumption of regularity attending official acts by public officials. United States v. Aviles, 623 F.2d 1192, 1198 (7th Cir.

1980). The BIA held that because Bakare presented no affirmative evidence proving the existence of an irregularity in the completion of the I-213, the admission contained within the document was presumed correct. Although we note that the evidence in the record is conflicting, the BIA's decision is supported by substantial evidence.

B

Next, Bakare contends that the BIA erred in affirming the IJ's finding that Bakare is deportable as an alien who had been convicted of two or more crimes of moral turpitude¹ not arising out of a single scheme of criminal misconduct. See 8 U.S.C. § 1252(a)(2)(A)(ii) (Supp 1993). Specifically, Bakare contends that his two convictions arose out of a "single scheme" based upon an expansive definition of "single scheme." The INS, on the other hand, argues that under a more restricted definition of "single scheme," the two forgery convictions were separate and distinct crimes.

Section 1252(a)(2)(A)(ii) states that "[a]ny alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."

¹At one point in his brief, Bakare appears to argue that forgery is not a crime of moral turpitude. This argument is without merit. See United States v. Smith, 420 F.2d 428, 432 (5th Cir. 1970); Morasch v. INS, 363 F.2d 30, 31 (9th Cir. 1966).

8 U.S.C. § 1252(a)(2)(A)(ii) (Supp 1993).² A "single scheme," as the INS has consistently interpreted the term, is present in cases where "two crimes flow from and are the natural consequence of a single act of criminal conduct." Matter of D----, 5 I & N Dec. 728, 729-30 (BIA 1954). In other words, "technically there are two separate and distinct crimes, but morally the transaction constitutes only a single wrong. For example, a counterfeiter may be indicted in one count for possessing a bill, and in another for passing it, though he cannot pass it without having possession[.]" Id. Under this line of cases, however, if the alien performs an act that in and of itself constitutes a complete, individual and distinct crime then he becomes deportable when he again commits another such an act, provided he is convicted of both. Id.; see also, Matter of Z----, 6 I & N Dec. 167 (BIA 1954); Matter of J----, 6 I & N Dec. 382 (BIA 1954); Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), cert. denied, 430 U.S. 985, 97 S.Ct. 1683, 52 L.Ed.2d 380 (1977). Although there is a split in the circuits concerning the definition of "single scheme,"³ we have accepted and followed

²The burden of proving by clear and convincing evidence that criminal conduct did not arise out of a "single scheme" is on the government. E.g., Nason v. INS, 394 F.2d 223, 226 (2d Cir. 1968), cert. denied, 393 U.S. 830, 89 S.Ct. 98, 21 L.Ed.2d 101 (1968); Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959).

³The other line of cases adopts a more expansive interpretation of "single scheme." Under this interpretation, so long as "the two predicate crimes were planned at the same time and executed in accordance with that plan, [the court] must hold that the government has failed" to prove that the two crimes did not arise out of a "single scheme." Gonzalez-Sandoval v. United States

the interpretation adopted by the INS. Iredia v. INS, 981 F.2d 847, 848 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 203, 126 L.Ed.2d 160 (1993).

Applying the narrower interpretation of "single scheme," it becomes clear that there is substantial evidence supporting the BIA's affirmance of the IJ. Over the course of several months, Bakare was convicted in two separate proceedings of three counts of forgery in the first degree. On December 5, 1991, Bakare was convicted in DeKalb County, Georgia of one count of forgery stemming from the possession of one check for \$216, drawn on the account of Peter N. Compton and payable to Kenneth Lucas. Several months later, in March 1992, Bakare was convicted in Cobb County, Georgia of two counts of forgery. One count stemmed from Bakare's possession of a check in the amount of \$213.94 drawn on the account of Peter N. Compton and payable to Kenneth Lucas. The second count arose out of Bakare's possession of a credit card application form containing information about Kenneth A. Lucas in such a manner that the application appeared to have been made with the consent or authority of Lucas. The BIA held that the possession of the two checks constituted separate and distinct offenses and that "the fact that the offenses involved forgery by the same person within a narrow time frame[] is not decisive." We agree. However, even if the forgery of the possession of the two checks could be

INS, 910 F.2d 614, 616 (9th Cir. 1990)(citing Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959)).

considered a "single scheme," Bakare's argument nevertheless fails. As the BIA noted, Bakare was also convicted of a third count of forgery for the possession of the credit application--a crime that is materially different from the crime of possession of a forged negotiable instrument. Thus, Bakare was convicted of at least two crimes of moral turpitude that could not be considered part of a "single scheme." On this record, we conclude that the BIA's decision is supported by substantial evidence.

C

Finally, Mr. Bakare contends that the BIA erred in affirming the IJ's decision not to grant asylum under 8 U.S.C. § 1158(a).⁴ Under this statute, the Attorney General, through the Commissioner of the INS, may in his discretion grant asylum to any alien who is physically present in the United States so long as the alien meets the statutory definition of "refugee." 8 C.F.R. § 208.13(a)

⁴Bakare originally sought both asylum and withholding of deportation. These are two distinct remedies and the standards for eligibility are different. An alien is entitled to withholding of deportation as a matter of right upon a showing of a "clear probability" of persecution. Farzad v. INS, 802 F.2d 123, 125 (5th Cir. 1986). Because withholding of deportation requires a stricter standard of proof than a request for asylum, cf. Farzad v. INS, 802 F.2d at 125 (holding that withholding of deportation requires a showing of clear probability of persecution) and Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991)(qualifying for asylum requires a showing that persecution is a reasonable possibility), if an alien fails to meet the standards for asylum, then the alien necessarily fails to meet the more stringent standard for withholding of deportation. Rojas v. INS, 937 F.2d at 189; Farzad v. INS, 802 F.2d at 125 n.3. In this case, both the IJ and the BIA held that Bakare failed to meet the statutory requirements for asylum. Because we agree that Bakare did not prove his eligibility for asylum, it is unnecessary to address withholding of deportation.

(1993). The statute defines "refugee" as "a person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself . . . of the protection of, [the country of origin] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. § 1101(a)(42)(A) (Supp. 1993). Thus, refugee status, and hence eligibility for asylum, rests on two alternate grounds: past persecution, or a well founded-fear of future persecution. 8 C.F.R. § 208.13(b) (1993). However, even if the alien meets the definition of "refugee," the Attorney General still retains the discretion to grant or withhold asylum. Ganjour v. INS, 796 F.2d 832, 836 (5th Cir. 1986). The alien bears the burden of proving eligibility for asylum. INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987).

Bakare argues that his testimony at his asylum hearing demonstrated that he had suffered persecution in the past, and that he had a well founded fear of persecution in the future. To establish past persecution, the asylum applicant must show that he was harmed on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.13(b)(1); Castillo-Rodriguez v. INS, 929 F.2d 181, 184 (5th Cir. 1991). To prove a well founded fear of future persecution, Bakare need only show that such persecution is a "reasonable

possibility." INS v. Cardoza-Fonseca, 480 U.S. at 440; In re Mogharrabi, 19 I & N Dec. 439 (BIA 1987).

In this case, Bakare testified that he has been persecuted in the past because he was a member of the National Association of Nigerian Students, a student organization in Nigeria. According to Bakare, because he was an active member in that organization, he was arrested and detained. He claims that during this detention, he was tortured and generally "made to suffer." Later, he was placed under house arrest, but ultimately he fled to the United States. Bakare later returned to Nigeria because of his mother's failing health, and he again arrested and detained before he fled the country. His mother was then arrested and she ultimately died in custody. Moreover, because of his brother's participation in a failed coup attempt and because of his father's former position as a high ranking civil servant, Bakare testified that he would be subject to persecution upon his return to Nigeria.

After receiving this testimony, the IJ held that Bakare had failed to prove his eligibility for refugee status, and the BIA agreed. Both the IJ and the BIA stated that Bakare was not a credible witness because on numerous points he provided conflicting testimony. Specifically, the IJ stated that contradictory statements concerning his father, Bakare's apparent ability to enter and depart Nigeria at will in spite of Bakare's claims of persecution, and his general evasiveness concerning the manner in which he entered the United States led the IJ to conclude that

Bakare's claims of past and future persecution were not credible. The BIA noted that Bakare's "claim of persecution is not believable and, certainly, is undermined by his failure to explain why he never applied for asylum in 1985 when he first arrived here after months of detention and torture or in 1989 after several weeks of detention and torture." As a reviewing court, we are required to afford substantial weight to the IJ's credibility determinations. See In re Pula, 19 I & N Dec. 467 (BIA 1987). After affording such deference, we find that there is substantial evidence in the record to support the BIA's decision. Thus, we affirm.⁵

IV

For the foregoing reasons, the decision of the Board of Immigration Appeals is hereby

A F F I R M E D.

⁵Even if, however, Bakare had been able to demonstrate that he was entitled to refugee status, he has not met his statutory burden for asylum. The BIA held that in the light of Bakare's convictions for forgery, a matter bearing on his good moral character under 8 U.S.C. § 1101(f)(3) (1970), Bakare also failed to demonstrate that he was deserving of asylum purely as a matter of discretion. Because this finding is supported by substantial evidence in the record, we affirm.