

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41239
Summary Calendar

MARIANA RODRIGUEZ-BARBERENA,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals
(A29 964 022)

August 16, 1995

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Mariana Rodriguez-Barberena ("Rodriguez") petitions for review of an order of the Board of Immigration Appeals ("BIA") denying her asylum and denying the withholding of deportation. Finding no error, we deny the petition for review.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Rodriguez, a citizen of Nicaragua, was born there in 1966 and entered the United States without inspection in 1989. In 1990, she applied for asylum, alleging that her family was closely affiliated with the former government of Anastacio Somoza and that, if she were to return to Nicaragua, she would suffer persecution at the hands of the Sandinista government.

Following a hearing, the immigration judge ("IJ") denied the application for asylum and Rodriguez's application for withholding of deportation and granted her application for voluntary departure. The BIA affirmed.

II.

The communist Sandinistas overthrew dictator Somoza in 1979. In 1990, noncommunist Violeta Chamorro was elected president. See Gomez-Mejia v. INS, 56 F.3d 700, 701 (5th Cir. 1995); Silwany-Rodriguez v. INS, 975 F.2d 1157, 1159 n.4 (5th Cir. 1992); Rivera-Cruz v. INS, 948 F.2d 962, 667 (5th Cir. 1991).

III.

A.

Rodriguez argues that the BIA erred in finding that she did not establish a well-founded fear of persecution. The Attorney General has the discretion to grant asylum to refugees. 8 U.S.C. § 1158(a); Jukic v. INS, 40 F.3d 747, 749 (5th Cir. 1994). A refugee is a person who is outside of his country and is unable

or unwilling to return "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.'" Jukic, 40 F.3d at 749 (quoting 8 U.S.C. § 101(a)(42)(A)). Proof of a "well-founded fear of persecution" requires the petitioner to show that a reasonable person in the same circumstances would fear persecution if deported. Id.

We uphold the BIA's factual findings if they are supported by substantial evidence. Id. The petitioner has the burden to "show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.'" Id. (quoting INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992)). We will not upset a BIA order merely because we differ with the BIA's evaluation of the facts. Id. The petitioner must show that the BIA's action was arbitrary, capricious, or an abuse of discretion. Id.

Rodriguez argues that she established past persecution on the basis of her support of the Somoza government. She also argues that she established a rebuttable presumption that persecution will occur in the future, a contention that, she contends, the BIA improperly rebutted by administratively noticing that the accused persecutors were no longer in power.

1.

The BIA examined Rodriguez's claims that she feared persecution because of her family's connections to Somoza. Her mother

was a private secretary to Somoza, and four of her brothers were in the national guard. Rodriguez alleged that, once the Sandinistas came to power, they denied her admission to the national medical school, denied her a nursing certificate, and shot her.

The BIA administratively noticed the assumption of power by the elected anti-Sandinista Chamorro government. As the Sandinistas no longer controlled the government, the BIA ruled, Rodriguez had not established a well-founded fear of persecution by the Sandinistas.

The BIA recited that Rodriguez had contended that the Sandinistas continued to control the Nicaraguan military and security forces. The BIA responded by stating that Rodriguez gave no indication that, after Chamorro's inauguration, the Sandinistas sought to harm any Somoza supporter who returned to Nicaragua.

The BIA further recited that Rodriguez alleged that the Sandinistas had interrogated her and her mother and searched her mother's home repeatedly between 1982 and 1985 and mistreated her in 1985. The BIA found that Rodriguez had shown no past persecution based upon any of the grounds enumerated for the granting of asylum. See id.

2.

Rodriguez testified at the hearing before the IJ as follows: Her mother was a secretary to Somoza. The Sandinistas interro-

gated the mother about documents and personnel and kept her from getting another job. The mother subsequently started her own business.

One of Rodriguez's brothers was killed in a conflict involving Sandinistas. The Sandinistas imprisoned two other brothers. The United States granted one brother political asylum. One brother lives in remote mountains in Nicaragua under an assumed name.

The Sandinistas denied Rodriguez professional opportunities, but she had not met their agricultural service requirements. Even so, she was allowed to attend a private nursing school, and she graduated. She was not allowed to work as a nurse, because she refused to serve in the revolutionary guard or perform other such service under the Sandinista regime.

She received a gunshot wound in 1985, though she did not mention the incident in her initial application for asylum. She was visiting her brother in prison, and he gave her a letter to his girlfriend for Rodriguez to smuggle out of the prison. When officers confronted Rodriguez, a commotion ensued and a bullet hit her leg, though it is uncertain that anyone intended to shoot her.

The Sandinistas frequently interrogated Rodriguez and her mother between 1979 and 1985. From 1985 until she left Nicaragua in 1989, however, she was never interrogated.

All of the evidence is equivocal. Rodriguez suffered a bullet wound, but there is no indication that it was intentional or, if it was, that it was based upon her support of the former government. Rodriguez was denied some professional opportunities, but she was allowed others, and she did not fulfill national service requirements. Rodriguez was interrogated frequently but never after 1985, and she was never injured in the process.

Rodriguez argues, as she did before the BIA, that the Sandinistas remain a significant force in Nicaragua. She has not presented any proof that they are actually persecuting former Somoza supporters now. It was not improper for the BIA to take administrative notice that the Chamorro government is now in power and that the Sandinistas are not. Rivera-Cruz, 948 F.2d at 967.

Rodriguez has failed to show that her evidence was so compelling that "no reasonable factfinder could fail to find the requisite fear of persecution." Jukic, 40 F.3d at 749 (quoting Elias-Zacarias, 502 U.S. at 484). Accordingly, the BIA's determination that she was not entitled to asylum must be upheld. See id.

Regarding the asylum issue, Rodriguez also argues that deporting her would be inhumane. The BIA found no compelling humanitarian reason for granting asylum. Past persecution alone can warrant asylum even without the likelihood of future persecution if the past persecution was so severe that return to the country of persecution would be inhumane. Rivera-Cruz, 948 F.2d

at 965-66. The equivocal nature of Rodriguez's evidence supports the BIA's finding, however.

B.

Rodriguez also avers that the BIA erred in denying her a withholding of deportation. Congress has proscribed the deportation of an alien whose life or freedom would be threatened on account of race, religion, nationality, or membership in a social group. 8 U.S.C. § 1253(h)(1); Jukic, 40 F.3d at 749. A petitioner "must demonstrate a clear probability of persecution on one of the enumerated grounds." Id. The showing that is required to prove such a probability is greater than that required to prove a well-founded fear of persecution under the asylum remedy. Id. at 750. Because Rodriguez failed to prove that she was entitled to asylum, a fortiori she is ineligible for withholding of deportation. Id.

The petition for review is DENIED.