IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41240

Summary Calendar

JAVIER OLAECHEA LEDESMA, ET AL.,

Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of a Final Order
of the Board of Immigration Appeals
(A 70 440 055, A70 440 056 & A70 440 058)

September 5, 1995

Before HIGGINBOTHAM, DUHÉ, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Javier Olaechea Ledesma petitions for review of a final order of the Board of Immigration Appeals denying requests for asylum and withholding of deportation by Javier, his wife, and her sister. We have jurisdiction over this timely filed petition pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1105a, and we affirm the decision of the BIA.

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

The Immigration and Naturalization Service commenced deportation proceedings against petitioners Javier Olaechea, his wife, Dora Mercedes Madico-Noriega, and her sister, Ines Idelsa Madico-Noriega, alleging that petitioners had remained in the United States after their non-immigrant visas had expired. Petitioners conceded deportability before the immigration judge but sought asylum pursuant to 8 U.S.C. § 1158(a) and withholding of deportation pursuant to 8 U.S.C. § 1253(h). On July 22, 1991, the immigration judge denied their applications but granted voluntary departure.

The petitioners, a Peruvian family, claimed asylum asserting fear of persecution by the Sendero Luminoso, the Shining Path,[1] pointing to familial ties to former members of the Peruvian military. Augusto Madico-Escudero, the father of Mrs. Madico de Olaechea and Ms. Madico, testified before the immigration judge that he retired from the Peruvian Army as a major in 1983 and taught at a Peruvian military academy from 1985 until 1988; that between 1986 and 1988, he and his family began receiving threatening telephone calls and letters believed to be from the Sendero Luminoso. Major Madico believed that the Sendero Luminoso

[1] The Sendero Luminoso "is a highly organized guerilla organization with a Maoist communist ideology dedicated to the violent overthrow of Peru's democratic government and social structure. The organization has a history of violence in Peru, including assassinations of political and community leaders, candidates for government office, and opponents of its goals or methods." Sotelo-Aquije v. Slattery, 17 F.3d 33, 35 (2d Cir. 1994).

had targeted his family because of his military background and because Ms. Madico worked as a secretary for an aide to the president of Peru. Ms. Madico and Mr. Olaechea also testified that they received threatening telephone calls during this time period. Mr. Olaechea was the son of an air force colonel now deceased. He testified that he believed that the threats were made because of his family's close relationship to high-ranking military officers.

On September 1, 1994, the Board dismissed petitioners' appeal of the immigration judge's decision, concluding that they failed to demonstrate a well-founded fear of persecution in Peru based on membership in a particular social group. The Board granted the family thirty days in which to voluntarily depart the United States. The petition for review followed.

II.

The petition contends that both the immigration judge and the BIA erred in denying asylum and withholding deportation. In immigration cases, we review the decision of the BIA, not the decision by the immigration judge. Ogbemudia v. I.N.S., 988 F.2d 595, 598 (5th Cir. 1993); Castillo-Rodriguez v. I.N.S., 929 F.2d 181, 183 (5th Cir. 1991). We are not persuaded any errors of the immigration judge affected or prejudiced the decision of the BIA. Accordingly, we review only the decision of the BIA.

A.

The Refugee Act of 1980 added section 208(a) to the Immigration and Nationality Act of 1952. Section 208(a) provides that an alien determined by the Attorney General to be a refugee

may be granted asylum in her discretion. 94 Stat. 105, 8 U.S.C. § 1158(a). To qualify as a "refugee," a person must prove that he has been persecuted or that he possesses a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ." 94 Stat. 102, 8 U.S.C. § 1101(a)(42).

Petitioners challenge the BIA's decision, alleging that the Board incorrectly applied the more stringent standard for withholding deportation to petitioners' request for asylum. Petitioners correctly note that a "well-founded fear of persecution" may exist without a "clear probability of persecution." I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987). The BIA did not, however, demand proof of a clear probability of persecution on return to Peru. Quite to the contrary, the Board noted that a well-founded fear of persecution exists if an alien shows that "a reasonable person in his circumstances would fear persecution." See Guevara Flores v. I.N.S., 786 F.2d 1242, 1249 (5th Cir. 1986), cert denied, 480 U.S. 930 (1987); Matter of Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987). The Board acknowledged that "[a] reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable." The Board applied the correct rule of law, requiring an alien to prove that his fear of persecution is both subjectively genuine and objectively reasonable. Guevara Flores, 786 F.2d at 1249; Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1579 (9th Cir. 1986).

The petitioners next contend that the immigration judge erred by requiring proof that petitioners would be singled out for individual persecution. As we explained, we are not reviewing any errors of the immigration judge. The BIA did not require such an individualized showing of persecution. Rather, the Board acknowledged I.N.S. regulations providing that an alien need not demonstrate that he would be singled out individually for persecution if "[h]e establishes that there is a pattern or practice in his country of nationality or last habitual residence of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion" and he proves "his own inclusion in and identification with such group of persons such that his fear of persecution upon return is reasonable." 8 C.F.R. § 208.13(b)(2)(i).

B.

Petitioners next contend that the evidence establishes that they were subject to persecution or possessed a well-founded fear of persecution on account of membership in a particular social group, namely the family members of former military personnel. As an initial matter, petitioners incorrectly frame the applicable standard of review. The question is not whether there is evidence supporting their claims; rather, it is whether substantial evidence supports the finding of the BIA that petitioners lack a well-founded fear of persecution on account of their membership in a particular social group. 8 U.S.C. § 1105a(a)(4); Silwany-Rodriguez

v. I.N.S., 975 F.2d 1157, 1160 (5th Cir. 1992); Estrada-Posadas v. I.N.S., 924 F.2d 916, 918 (9th Cir. 1991).

We must affirm the BIA's conclusion that petitioners were ineligible for asylum unless we are persuaded that the evidence presented to the BIA compelled the conclusion that petitioners had a well-founded fear of persecution on account of their membership in particular social group. I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992). It is not enough that "we disagree with the Board's evaluation of the facts." Castillo-Rodriguez, 929 F.2d at 184.

We are persuaded that substantial evidence supports the determination by the BIA that petitioners did not meet "their burden of establishing persecution based on their familial tie to a former member of the military."[2] Cf. Elias Zacarias, 502 U.S. at 483 (requiring "some" evidence that persecutor targets victim

[2] Respondent I.N.S. contends that "petitioners fail to establish that they belong to a particular social group." The BIA's decision, though not entirely clear upon this point, seems to accept Mr. Olaechea's argument that a familial tie to a former member of the military constitutes membership in a social group within the meaning of that phrase. See Order at 4 ("We have also noted that it is possible that a former member of a law enforcement agency could be considered a member of a particular social group for purposes of asylum and withholding of deportation."). Other circuits have divided over whether membership in a family containing individuals subject to persecution qualifies as membership in a social group. Compare Estrada-Posadas, 924 F.2d at 919 (holding that membership in family of individuals subject to persecution does not constitute a social group) and De Valle v. I.N.S., 901 F.2d 787, 793 (9th Cir. 1990) (holding that family members of deserters does not constitute membership in a social group) with Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (holding that "[t]here can, in fact, be no plainer example of a social group based on common, immutable characteristics than that of the nuclear family"). We do not reach this issue.

because of victim's political opinions). The Board correctly concluded that petitioners failed to demonstrate that the harm they feared as a family of a former member of the military was materially different than that faced by the population as a whole. Aliens fleeing "general conditions of violence and upheaval in their countries" are not persecuted on account of their membership in a particular social group and, hence, are not eligible for asylum. Matter of Mogharrabi, 19 I&N Dec. at 447.

Moreover, the testimony and evidence presented by the petitioners did not demonstrate that the Sendero Luminoso has a "pattern or practice" of targeting family members of former military officers. Major Medico acknowledged that threats against him and his family ended after 1988 when he left the military academy. The State Department's Country Reports on Human Rights Practices for 1989 discusses targets of violence and intimidation by the Sendero Luminoso but does not mention family members of former military officers as among those targeted. At most, petitioners' evidence establishes only that the Sendero Luminoso targets family members of current military officials as part of its attempts to influence governmental policy.

Finally, Mr. Olaechea alleges that the immigration judge erred in discounting the credibility of the petitioners' testimony regarding the threats of violence. Assuming without deciding that

the immigration judge did so,[3] there is no indication that the Board relied upon such a finding in deciding that petitioners had failed to establish a well-founded fear of persecution. Rather, the Board held that crediting petitioners' testimony did not prove that Mr. Olaechea and his family had a well-founded fear of persecution on account of their familial ties to former members of the Peruvian military.

III.

Petitioners also challenge the BIA's determination that they did not meet their burden of proof that they are entitled to withholding of deportation pursuant to section 243(h) of the INA. 8 U.S.C. § 1253(h). Unlike the more generous asylum provisions requiring a showing only of a "well-founded fear of persecution,"[4] the INA requires the alien to prove that he "would be" persecuted on account of one of the enumerated characteristics. 8 U.S.C. § 1253(h)(1). This provision requires that an alien prove that it is "more likely than not" that he would be persecuted on account of his membership in a particular social group. 8 C.F.R. § 208.16(b)(1); I.N.S. v. Stevic, 467 U.S. 407, 424 (1984).

The BIA correctly reasoned that since the petitioners "have not established eligibility for asylum, they are a fortiori

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[3] The immigration judge only expressed "reservations" about the accuracy and credibility of the testimony regarding the nature and extent of the specific threats made against Mr. Olaechea and his family.

[4] In Cardoza-Fonseca, the Supreme Court expressly noted that the asylum provisions of section 208(a) of the INA were more generous than the narrowly defined relief provided by section 243(h). 480 U.S. at 444.

ineligible for withholding of deportation pursuant to section 243(h) of the Act." See, e.g., Ipina v. I.N.S., 868 F.2d 511, 515 (1st Cir. 1989) (noting that denial of withholding of deportation "follows a fortiori" from denial of eligibility for asylum because clear probability of persecution standard requires alien to meet higher burden of proof than well-founded fear of persecution standard). Indeed, petitioners' failure to establish a well-founded fear of persecution "necessarily implies" that they are unable to demonstrate a clear probability of persecution as required by section 243(h). Id.

AFFIRMED. Petitions for review denied.