

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-60065

United States Court of Appeals
Fifth Circuit

FILED

June 26, 2019

Lyle W. Cayce
Clerk

EFRAIN CHAVEZ MALDONADO,

Petitioner

v.

WILLIAM P. BARR, U. S. ATTORNEY GENERAL,

Respondent

Appeal for Review of Orders
of the Board of Immigration Appeals
BIA No. A071 509 967

Before CLEMENT, DUNCAN, and OLDHAM, Circuit Judges.

PER CURIAM:*

Efrain Chavez Maldonado (“Chavez”), a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals’ (“BIA”) order denying his motions to reopen and reconsider its previous ruling against him. Unable to satisfy an exacting abuse-of-discretion standard, we deny Chavez’s petition for review.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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FACTS AND PROCEEDINGS

In 2013, Chavez surrendered himself at the border to make claims for asylum, Withholding of Removal, and protection under the Convention Against Torture. Chavez asserted that Mexican authorities would harm him if he returns because he witnessed the police murder his twin brother, Manuel, which resulted in his being beaten and threatened. Members of Chavez's family have publicly denounced the police, and the murder of Chavez's brother has been covered by American news media. Chavez took a more active part in these political activities after his release from immigration custody. The Government does not dispute the basic facts of Chavez's claim.

In 2014, the immigration judge ("IJ") conducted a hearing. Chavez testified about what happened to him on the night of Manuel's murder. Chavez's sister testified about efforts to recover Manuel's body and to publicize the Mexican government's role in the murder and investigation.

Manuel's widow told of a police commander named Javier Torres Gonzalez ("Commander Torres") who helped the family recover Manuel's body. She testified that Commander Torres told her that he had been kidnapped and threatened by men who wanted to discourage his investigation. But these men eventually told Commander Torres where Manuel's body was buried. There is also some suggestion that Commander Torres's kidnapping may have been "a farce created with the collusion of the cartel members to stop the investigation."

Gambino Gomez Escarcida testified as a fact witness and as an expert human rights advocate. He testified that he helped Manuel's family recover the body. He gave his expert opinion that Chavez would be persecuted by police if he returned to Mexico.

In September 2014, the IJ denied relief. The IJ concluded that Chavez did not show that he was persecuted "because of his race, nationality, religion,

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political opinion, or membership in any particular social group” (“PSG”). Chavez’s proposed PSG, “witnesses to a serious crime whom the government is unable or unwilling to protect,” was not cognizable. The IJ found that Chavez had not been “persecuted on account of his membership in” that proposed PSG, even if it were recognized. The IJ further found that Chavez “was not persecuted on account of an anti-police or anti-corruption political opinion.” The IJ noted that Chavez’s parents, who openly criticized Mexican authorities, had traveled to Mexico at least six times and had not been harmed or threatened. Finally, the IJ concluded that Chavez could safely relocate within Mexico.

On appeal, the BIA remanded for reconsideration of whether Chavez had “established an objectively reasonable fear of future persecution in Mexico on account of imputed political opinion.” Although the IJ had noted that Chavez’s “parents, who openly criticized the Mexican police during two press conferences, traveled to Mexico on many occasions without incident during their efforts to obtain justice for Manuel,” the IJ had not taken into account that the “parents are lawful permanent residents of the United States, and therefore traveled to Mexico with certain protections that [Chavez] himself would not be afforded.” The BIA also noted that the IJ “did not adequately consider the fact that Commander Torres, the chief investigator of Manuel’s murder, was kidnapped and threat[en]ed in connection with his investigation.” The BIA instructed the IJ to “reconsider whether these factors (in addition to any other evidence) support a determination that the respondent has an objectively reasonabl[e] fear of future persecution on account of an anti-police/corruption political opinion.”

The IJ again denied relief. The IJ reasoned that there was no evidence that permanent resident status afforded Chavez’s parents increased safety. The IJ discounted the relevance of the threats against Commander Torres. The

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IJ reemphasized that Chavez could safely live in Mexico outside the state of Chihuahua.

A three-member panel of the BIA affirmed. Chavez filed a motion for reconsideration in which he argued that the BIA had applied the incorrect “clear-error” standard rather than conducting a *de novo* review of the IJ’s legal conclusions. Chavez also filed a motion to reopen based on new evidence, including evidence of his personal political activity.

The BIA denied both motions. The BIA rejected Chavez’s contention that it had committed legal error by applying the wrong standard of review. The BIA discounted as cumulative Chavez’s new evidence of his personal anti-government and anti-corruption activism because the opinions Chavez “has been voicing since his release [from immigration custody] are the same as those he claimed would be imputed to him based on his parents’ public criticism of the Mexican government.” Finally, the BIA said it would not address Chavez’s contention that he could not relocate to other parts of Mexico because he “has not sufficiently demonstrated that he has a well-founded fear of persecution.”

Chavez filed a petition for review. The Government then filed an unopposed motion to remand for the BIA “to further consider whether it employed the ‘de novo’ standard in reviewing the [IJ’s] determination that [Chavez] had not established an objectively reasonable fear of future persecution in Mexico,” and to consider whether conditions had changed sufficiently to warrant reopening. This court granted the motion. On remand, the BIA again said that it had applied the proper *de novo* standard and it concluded that conditions in Mexico were not materially worse than they were in 2014. Chavez now asks that we overturn the BIA’s denial of his motions to reopen and reconsider.

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STANDARD OF REVIEW

As a general matter, we review the final decision of the BIA and also will review the IJ's ruling insofar as it affected the BIA's decision. *Zhu v. Gonzales*, 493 F.3d 588, 593 (5th Cir. 2007). When appealed directly, the BIA's legal conclusions are reviewed *de novo* "unless a conclusion embodies the [BIA's] interpretation of an ambiguous provision of a statute that it administers," in which case deference is required. *Orellana-Monson v. Holder*, 685 F.3d 511, 517 (5th Cir. 2012) (internal quotation marks and citation omitted) (modification in original). We then review findings of fact for substantial evidence. *Sharma v. Holder*, 729 F.3d 407, 411 (5th Cir. 2013).

But, crucially, we review the BIA's denial of a motion to reopen under a "highly deferential" abuse-of-discretion standard, "*regardless of the basis of the alien's request for relief.*" *Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009) (emphasis added). This court "must affirm the BIA's decision as long as it is not capricious, without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible rational approach." *Id.* This court also reviews a denial of a motion to reconsider under this same standard. See *Chambers v. Mukasey*, 520 F.3d 445, 448 (5th Cir. 2008); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005).

Underlying Chavez's claims is a request for asylum. Asylum is discretionary, but to qualify an alien must first demonstrate "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Zhao*, 404 F.3d at 306 (internal quotation marks, citation, and emphasis omitted). "To establish a well-founded fear of future persecution, an alien must demonstrate a subjective fear of persecution, and that fear must be objectively reasonable." *Id.* at 307 (internal quotation marks and citation omitted).

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DISCUSSION

Chavez first argues that the BIA incorrectly engaged in clear-error review, instead of *de novo* review, of legal issues in assessing his asylum claim. The BIA is required to apply the clear-error standard to the IJ's factual findings. *Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 234 (5th Cir. 2009). “However, whether an asylum applicant has established an objectively reasonable fear of persecution . . . is a legal determination” and must be reviewed *de novo*. *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 590–91 (BIA 2015). The Government argues that the BIA applied clear-error review only to the facts underlying its ultimate decision that was the result of *de novo* review.

The BIA cited the proper standards for reviewing the IJ's decision, noting that “questions of law, discretion, and judgment, [are reviewed] under a *de novo* standard.” Nonetheless, the BIA frequently used clear-error language in affirming the IJ's decision.

While we agree with Chavez that the language that the BIA used suggests that it might have incorrectly applied clear-error review, the standard of review ends up swallowing the entire inquiry. Because our review is of a motion to reconsider, as opposed to of the underlying BIA decision, it is highly deferential. We can overturn the BIA decision only if it is “so irrational that it is arbitrary rather than the result of any perceptible rational approach.” *Gomez-Palacios*, 560 F.3d at 358. *See Chambers*, 520 F.3d at 448; *Zhao*, 404 F.3d at 303 (applying this standard to motions to reconsider). And here the BIA's position is not completely irrational.

On remand, the BIA confirmed that it had applied *de novo* review to the relevant legal issues. The BIA presumably knows the standard of review it applied because it was the one engaging in that review. So, for us to conclude that the BIA applied clear-error review, we would have to implicitly hold that the BIA's description of its own behavior, on remand, was knowingly false. And

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while the language that the BIA used suggests that it might have applied the wrong standard, it does not foreclose another conclusion. The decision is not “so irrational” that it is not “the result of any perceptible rational approach.” *Gomez-Palacios*, 560 F.3d at 358. For this reason, we cannot say that the BIA abused its discretion in denying Chavez’s motion to reconsider.

Chavez also contends that the BIA failed to consider new evidence of his political activism and a material uptick in violence against political activists. But because the “continuance of ongoing violence in the home country” does not warrant the grant of a motion to reopen, *Singh v. Lynch*, 840 F.3d 220, 222–23 (5th Cir. 2016) (*per curiam*), the Government argues that the evidence does not show “a significant change in a factor critical to [the] disposition of the case.” Chavez urges that he properly presented material evidence showing that he is similarly situated to political activists who are “at a *critically increased* risk of persecution by the Mexican government.” As the Government notes, the BIA discounted the new evidence as cumulative of the political opinions imputed to him through his parents and held that any change in violence is not material because human rights defenders have faced serious problems in Mexico for a long time.

As in the first issue, the standard of review is too great a hurdle for Chavez to surmount. The BIA’s position is not completely irrational. There is ample record support for the BIA’s conclusion that threats against human rights activists have been ongoing for some time and this evidence can support the BIA’s conclusion that there has been no *material* change in circumstances for a person in Chavez’s position. It is also not entirely irrational for the BIA to conclude that a person whose family is engaged in extensive activism is at no more risk after he himself engages in that same activism.

CONCLUSION

For the foregoing reasons, we DENY Chavez’s petition for review.