No. 11-2706

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

N.L.A., H.O.P.M., and S.L.P.L.

Petitioners,

v.

Eric H. HOLDER, Jr., ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
Nos. A[redacted], A[redacted], A[redacted]

PETITIONERS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Respondent ignores this Court's recent decision defining persecution for purposes of asylum, Pet. Br., 11-12, and makes no effort to defend the Board's decision to discount the expert testimony submitted by Petitioners. Pet. Brief, 15-16. Instead, Respondent disregards Petitioners' expert testimony and mischaracterizes Petitioners' argument and the record.[1] Contrary to Respondent's suggestion that Petitioners have presented a derivative claim, Mrs. [redacted]'s claim of past persecution is based on the FARC's direct threat to her life. Moreover, although Respondent refuses to concede that Mrs. [redacted]'s sister lives in hiding, the record shows that she abandoned her home, moves often, and changed her name to avoid detection by the FARC. In the end, Respondent's brief fails to undermine the grounds for granting the petition for review in this case.

STANDARD OF REVIEW

Respondent suggests that standard of review is "paramount" in this case but mischaracterizes the standard applicable to review of the Board's decision. The Board's analysis of questions of law is not reviewed under the substantial evidence test, as Respondent implies. Instead, this Court reviews the Board's rulings on questions of law *de novo*. *Vahora v. Holder*, 626 F.3d 907, 912 (7th Cir. 2010). Only factual determinations are reviewed under the substantial evidence test. *Id*. And under that

[1] As one example of Respondent's distortion of the record, Respondent asserts that the delay in adjudicating the asylum application was the result of Petitioners changing attorneys and the retirement of the Immigration Judge (IJ) initially assigned to the case. Resp. Br. at 5. In fact, the delay was attributable to the government. Petitioners asked for an expedited hearing at the March 10, 2005, master calendar hearing. A.R. 115. At a July 31, 2006, hearing, the government sought a continuance. A.R. 127. Petitioners objected to the government's motion for continuance. AR 128. Counsel for Petitioners argued that his clients were entitled to a speedy hearing and noted that the case had already been continued for over a year. A.R. 127-28. The court reset the case over Petitioners' objection. A.R. 129. The case was reset to November 7, 2007. At that point, the government again asked the case to be reset. Thereafter, the IJ initially assigned to the case retired. The replacement IJ did not have a date available for a full year. Petitioners' counsel again asked for an expedited hearing, but the IJ refused the request. A.R. 147.

test, this Court need not respect conclusions "drawn from insufficient or incomplete evidence." *Georgis v. Ashcroft*, 328 F.3d 962, 968 (7th Cir. 2003). Otherwise stated, to the extent the Board's factual findings are unreasoned or contain logical gaps, they do not pass the substantial evidence test. *See Iao v. Gonzales*, 400 F.3d 530, 535 (7th Cir. 2005) ("[W]e are not authorized to affirm unreasoned decisions.").

ARGUMENT

I. The Board Erred in Concluding that Mrs. [redacted] Failed to Establish Past Persecution or a Well-Founded Fear of Future Persecution.

Respondent's assessment of Mrs. [redacted]'s claim of past persecution fails in three respects. First, it overlooks this Court's recent published decision defining persecution for purposes of asylum. Second, it misconstrues Mrs. [redacted]'s claim to be based on derivative persecution. Finally, it erroneously asserts that Mrs. [redacted] suggests the steps sister has taken to avoid persecution is persecution itself when, in fact, it is evidence of the threat of persecution.

A. Respondent incorrectly defines "persecution."

Respondent defines persecution as "punishment or the infliction of harm" as opposed to "mere harassment." Resp. Br. at 21. But Respondent ignores entirely the recent decision by this Court holding that harm, in order to be persecution, need not involve actual physical contact. *See Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011). A "credible threat to inflict grave physical harm" will suffice. *Id*. Because the record supports Petitioners' showing of a prior credible threat in addition to the well-founded expectation of future threats, the Board's decision denying asylum must be overturned.

B. Mrs. [redacted]'s claim of past persecution is not a derivative claim.

It is undisputed that the FARC threatened to kill Mrs. [redacted]. That direct threat to her life is the basis for her claim of past persecution. Respondent mischaracterizes Mrs. [redacted]'s claim as a derivative claim based on the murder of her uncle and the kidnapping of her father. Resp. Br. at 21. In so doing, Respondent fails to recognize the gravity of the death threats issued specifically against Mrs. [redacted]. The FARC's threats to Mrs. [redacted]'s life were credible in part because the FARC had carried out its threats against members of her own family. Pet. Br. at 12. These are not incidents supporting a claim of "derivative" persecution; they are incidents supporting the credibility of the direct threat to Mrs. [redacted]'s life.

Respondent claims the credible threat to Petitioners was not "immediate" or "menacing" enough. Resp. Br. at 24. The assassination of Mrs. [redacted]'s uncle and the kidnapping of her father show that these threats were in fact immediate and menacing. Moreover, Respondent acknowledges that, subsequent to these incidents, individuals thought to be FARC members were seen lurking around the farm inquiring about Petitioners. Resp. Br. at 31; *cf. Escobar v. Holder*, 657 F.3d 537, 544 ("Threats can constitute persecution, if . . . the perpetrators attempt to follow up on them."). Respondent gives this fact short shrift, asserting that it takes "numerous imaginative leaps" to conclude that the individuals were in fact FARC members. *Id*. In fact, all it takes is the understanding that after forty years of civil war, Petitioners' former

neighbors would be capable of recognizing members of the largest guerrilla group in Colombia.

C. The steps Mrs. [redacted]'s sister has taken in avoiding detection by the FARC are indicative of Mrs. [redacted]'s well-founded fear of future persecution.

Though the Board recognized Mrs. [redacted]'s sister and her family "move often, change their phone number frequently, and have registered their business under a third party's name," App. 3, Respondent maintains she is not actually living in hiding. Resp. Br. at 29-30. As a factual matter, contrary to Respondent's assertion, Mrs. [redacted]'s sister *has* transferred to a different pharmacy to keep her whereabouts unknown. A.R. 196-97. Moreover, she has gone so far as to change her name to remain hidden. Respondent argues that a name change does not constitute persecution, Resp. Br. at 29, but that misses the point: Mrs. [redacted]'s sister's circumstances – including her name change – are indicative of a fear of persecution shared by Petitioners. Respondent suggests that Petitioners could safely relocate within Colombia, "as the other members of their family did[.]" Resp. Br. at 30. But as this Court has held, "[i]t is an error of law to assume that an applicant cannot be entitled to asylum if she has demonstrated the ability to escape persecution by chance or by trying to remain undetected." *Giday v. Gonzales*, 434 F.3d 543, 555 (7th Cir. 2006).

D. Respondent unjustifiably disregards the testimony of Mrs. [redacted]'s expert.

Dr. Green, Senior Research Fellow, Council of Hemispheric Affairs (COHA), Washington, D.C., and Colombia Country Specialist for Amnesty

International USA, concluded that Mrs. [redacted] would be in "mortal danger" if forced to return to Colombia because the FARC "would eventually find her." App. 11. This testimony is particularly relevant given the facts surrounding Mrs. [redacted]'s situation. Yet Respondent's brief fails to address it.

II. The Board Erred in Concluding that Mrs. [redacted] Failed to Establish Persecution on Account of Membership in a Particular Social Group or Political Opinion.

A. Respondent fails to justify the Board's *sua sponte* determination that Mrs. [redacted] failed to establish persecution of account of membership in a particular social group.

The Board found *sua sponte* that Mrs. [redacted] failed to enunciate a cognizable particular social group, without giving the parties opportunity to address that issue. Pet. Br. at 18-19. Respondent argues that Petitioners put the issue before the Board by noting in their briefing to the Board that the Immigration Judge had "articulated" the social group differently than they would have. Resp. Br. at 41. But the Immigration Judge had denied asylum based on his conclusion that Petitioners had failed to demonstrate past persecution or future persecution. A.R. 74-76. Petitioners' cursory briefing to the Board on this point at no point argued that the Immigration Judge erred. A.R. 42. The briefing was designed to set forth the claim to assist the Board in adequately reviewing the Immigration Judge's decision, which denied asylum on other grounds. The fact that Petitioners suggested a different articulation of the social group -- "landowners of means who refuse to support the FARC" -- did not put the cognizability of either proposed particular social group before the Board. In short,

Petitioners did not defend the cognizability of the particular social group, because they had no notice that it was at issue. *See* A.R. 41-42.

The Government argues that "Petitioners have not asserted what arguments they would have made had the Board asked for further briefing." Resp. Br. At 42. But the arguments made by Petitioners at pages 19-21 of their brief, regarding cognizability, were not raised to the Board, precisely because Petitioners had no notice that the cognizability of the group was at issue. The administrative agency ought to be given the chance to address these arguments in the first instance; indeed, the agency might well have agreed with the Petitioners on this point, which would have at least narrowed the scope of this appeal. Moreover, the Court reviews the Board's legal analysis with some degree of deference, *Arobelidze v. Holder*, 653 F.3d 513 (7th Cir. 2011); the Court ought not be in the position of deferring to an analysis until the agency has undertaken an adequate consideration of the legal arguments in the first instance. *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (*per curiam*); *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (*per curiam*).

Thus, the Court should remand to permit the agency to consider the cognizability question free from procedural error.

B. Respondent's interpretation of the particular social group requirement is inconsistent with this Court's precedent.

The Board's procedural error notwithstanding, Respondent's arguments that the particular social group at issue here is invalid are unavailing. Respondent contends that the particular social group Petitioners proposed to the Board is not

"particular or specific" enough because it includes the term "of means." Resp. Br. at 35. Yet this says nothing about the particular social group actually at issue: "child[ren] or daughter[s] of a land owner who has been kidnapped by the FARC[.]" A.R. 75. That group, Respondent argues, fails because it is "defined by the harm" to the group's members. Resp. Br. at 34. But there is no principle forbidding a group defined in part by some event affecting group members. *Cf. Sepulveda v. Gonzales*, 464 F.3d 770, 771-72 (7th Cir. 2006) (listing among qualifying groups "children who escaped after being enslaved from Ugandan guerillas who had enslaved them"). Indeed, as this Court has held, "a social group may be defined merely by the fact that its members share a certain characteristic and are systematically persecuted solely because they share that characteristic."*Martinez-Buendia v. Holder*, 616 F.3d 711, 721 (7th Cir. 2010). That is precisely the case here, where the social group at issue is defined by the fact that its members are children of formerly kidnapped landowners who are persecuted by the FARC because they are children of formerly kidnapped landowners.

C. Respondent fails to address Dr. Green's expert testimony showing persecution on account of a political opinion.

As stated in Petitioners' opening brief, Mrs. [redacted]'s testimony establishes that both her uncle and father refused to pay the FARC because of their opinion of the FARC. Pet. Br. at 22. And Dr. Green testified that "by refusing to pay their 'war taxes', Mrs. [redacted]'s family has marked themselves as enemies." App. 11. Respondent's claim that Petitioners "offered no testimony below" establishing

any persecution on account of a political opinion, Resp. Br. at 32, is accordingly inaccurate. For this reason as well, the Board's decision should be reversed.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, this Court should grant the petition for review and remand this matter to the Board with instructions to either grant Mrs. [redacted]'s request for immigration relief or offer a reasoned basis in light of the law and the record for its denial.

Dated: January 11, 2012

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,077 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: January 11, 2012

/s Jason M. Adler
Jason M. Adler

CERTIFICATE OF SERVICE

I, Jason M. Adler, hereby certify that on January 11, 2012, I filed the foregoing Petitioners' Reply Brief via the Electronic Case Filing system, which will send notification of such filing to all counsel of record using the Electronic Case Filing system.

Date: January 11, 2012

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