

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Aviles-Tavera v. Garland

No. 20-60587, United States Court of Appeals for the Fifth Circuit (January 4, 2022)

SUMMARY

The Fifth Circuit denied a petition for review of a BIA decision holding that a noncitizen was statutorily ineligible for withholding of removal due to a particularly serious crime and not entitled to protection under the Convention Against Torture (CAT). The court held that issue preclusion did not bar the immigration judge from reexamining whether the petitioner's felony assault conviction was a "particularly serious crime" because the intervening decision in **United States v. Gracia-Cantu** (5th Cir. 2019) significantly changed the legal standard for analyzing whether the crime was a crime of violence under 18 U.S.C. § 16(a). The court also found that it had jurisdiction under **Kucana v. Holder** to review the particularly serious crime determination, and that substantial evidence supported the denial of CAT relief due to insufficient evidence of likely torture with government acquiescence.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Patrick E. Higginbotham; Carl E. Stewart; Cory T. Wilson
JURISDICTION	Federal
DECIDED	January 4, 2022
DOCKET	20-60587
DISPOSITION	other
PROCEDURAL POSTURE	Petition for review of a final order of the Board of Immigration Appeals denying withholding of removal and protection under the Convention Against Torture.
STANDARD OF REVIEW	Questions of law reviewed de novo, with deference to BIA's interpretation of immigration statutes and regulations. Factual findings reviewed for substantial evidence; reversal only if evidence compels a contrary conclusion.
PRECEDENTIAL VALUE	Published
PARTIES	Renferi Aviles-Tavera v. Merrick Garland, U.S. Attorney General

TOPICS

removal proceedings

deportation

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PRACTICE AREAS

Immigration Law

QUESTIONS PRESENTED

1. Whether the 2019 IJ was precluded by issue preclusion from reconsidering whether Aviles's felony assault conviction was a 'particularly serious crime' under the withholding of removal statute.
2. Whether the BIA erred in determining on the merits that Aviles's felony assault conviction was a particularly serious crime, making him statutorily ineligible for withholding of removal.
3. Whether the BIA erred in finding that Aviles did not meet his burden for protection under the Convention Against Torture.

HOLDINGS

1. Because Gracia-Cantu created a significant and demonstrable change to the legal standard for the 'nature of the conviction' factor, issue preclusion does not apply, and the 2019 IJ could reexamine the determination.
2. Aviles failed to show that any alleged errors in the BIA's determination compel reversal. The BIA's determination that the conviction is a particularly serious crime is affirmed.
3. The BIA did not err; Aviles failed to show that the evidence compels a finding that it is more likely than not he would be tortured with state action if returned to Mexico.

KEY QUOTATIONS

"We review de novo questions of law but give deference to the BIA's interpretation of immigration statutes and regulations. We review an immigration court's findings of fact for substantial evidence. Reversal is improper unless we determine that the evidence not only supports a contrary conclusion, but that it compels reversal." (at 4-5)

"A final decision by an immigration judge has a preclusive effect on future litigation and agency decisions. However, issue preclusion does not apply unless the facts and the legal standard used to assess them are the same in both proceedings." (at 5)

"An applicant is statutorily ineligible for withholding of removal if he has been convicted by a final judgment of a particularly serious crime." (at 5-6)

"Gracia-Cantu also significantly relaxed the standard for determining whether a crime is a crime of violence by removing the directness of force requirement under § 16(a)." (at 7)

"To receive a deferral of removal under CAT, a petitioner must show that it is more likely than not that he would be tortured if he returned to his home country. A petitioner must also show sufficient state action involved in that torture." (at 10-11)

FACTUAL BACKGROUND

Aviles, a Mexican citizen, has a criminal history including a 2004 Texas felony assault conviction for family violence against his sister. He has cognitive disabilities and mental health issues. He testified that he was attacked in Mexico by individuals, police, and the military due to his disabilities, and fears torture or institutionalization if returned. A counselor testified that Aviles showed signs of schizophrenia and autism, but could not provide a definitive diagnosis. Family members testified he is not aggressive.

PROCEDURAL HISTORY

Aviles, a native and citizen of Mexico, was ordered removed in 2000 and deported. He reentered and applied for relief. In 2015, an IJ denied asylum, withholding, and CAT protection, finding the felony assault conviction not a particularly serious crime. After reentry in 2017, a new IJ in 2019 reconsidered the crime and found it particularly serious, making Aviles statutorily ineligible for withholding. The BIA affirmed the determination. Aviles petitioned for review.

DISPOSITION

other

CASES CITED

- Singh v. Sessions, 880 F.3d 220 (5th Cir. 2018)
- Orellana-Monson v. Holder, 685 F.3d 511 (5th Cir. 2012)
- Amrollah v. Napolitano, 710 F.3d 568 (5th Cir. 2013)
- Medina v. INS, 993 F.2d 499 (5th Cir. 1993)
- Talcott v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir. 1971)
- United States v. Gracia-Cantu, 920 F.3d 252 (5th Cir. 2019)
- Vetcher v. Barr, 953 F.3d 361 (5th Cir. 2020)
- In re N-A-M-, 24 I. & N. Dec. 336 (BIA 2007)
- Samba v. Lynch, 641 F. App'x 376 (5th Cir. 2016)
- Borden v. United States, 141 S. Ct. 1817 (2021)
- Edwards v. Johnson, 209 F.3d 772 (5th Cir. 2000)
- Kucana v. Holder, 558 U.S. 233 (2010)
- Valerio-Ramirez v. Sessions, 882 F.3d 289 (1st Cir. 2018)
- Zhang v. Gonzales, 432 F.3d 339 (5th Cir. 2005)
- Efe v. Ashcroft, 293 F.3d 899 (5th Cir. 2002)
- Kwon v. INS, 646 F.2d 909 (5th Cir. 1981)
- Tamara-Gomez v. Gonzales, 447 F.3d 343 (5th Cir. 2006)
- Matter of Ombura, 2007 WL 1153996 (BIA Feb. 8, 2007)

CITED IN

- *Aviles-Tavera v. Garland*, *Aviles-Tavera v. Garland*, 22 F.4th 478, 486 (5th Cir. 2022)

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