

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ramirez-Lopez v. Garland

No. 19-534, United States Court of Appeals for the Second Circuit (May 4, 2021)

SUMMARY

The Second Circuit granted a petition for review of a BIA decision denying asylum, withholding of removal, and CAT relief, holding that the BIA erred in finding that the petitioner failed to preserve his proposed particular social group of "eyewitnesses to gang murder and torture who publicly reported the crime to the police." The court found that the petitioner's brief before the Immigration Judge sufficiently delineated this narrower group, and the IJ should have sought clarification if any ambiguity existed. The case was remanded for the agency to assess the legal viability of the proposed social group, which the court noted was non-frivolous. Key topics: asylum, particular social group, issue preservation, duty to clarify, witnesses reporting crime.

OPINION

PER CURIAM.

19-534 Ramirez-Lopez v. Garland BIA Nelson, IJ A205 919 640 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT=S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER").

A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL. 1 At a stated term of the United States Court of Appeals for the Second Circuit, 2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the 3 City of New York, on the 4th day of May, two thousand twenty-one. 4 5 PRESENT: 6 PIERRE N. LEVAL, 7 ROBERT A. KATZMANN, 8 GERARD E. LYNCH, 9 Circuit Judges.

10 _____ 11 12 ELMER OBENIEL RAMIREZ-LOPEZ, 13 Petitioner, 14 15 v. 19-534 16 NAC 17 MERRICK B. GARLAND, 18 UNITED STATES ATTORNEY GENERAL, 19 Respondent. 20 _____ 21 22 FOR PETITIONER: Kevin W. Jones, Esq., Kevin W. Jones & 23 Associates, P.C., New York, N.Y. 24 25 FOR RESPONDENT: Joseph H. Hunt, Assistant Attorney General; John 26 S. Hogan,

Assistant Director; Andrea N. Gevas, 27 Trial Attorney, Office of Immigration Litigation, 28 Department of Justice, Washington, DC.

1 UPON DUE CONSIDERATION of this petition for review of a Board of 2 Immigration Appeals (“BIA”) decision, it is hereby ORDERED, ADJUDGED, AND 3 DECREED that the petition for review is GRANTED, the order of the BIA is 4 VACATED, and this case is REMANDED for further proceedings. 5 Petitioner Elmer Obeniel Ramirez-Lopez, a native and citizen of Guatemala, seeks 6 review of a February 1, 2019, decision of the BIA affirming a December 11, 2017, 7 decision of an Immigration Judge (“IJ”) denying Ramirez-Lopez’s application for 8 asylum, withholding of removal, and relief under the Convention Against Torture 9 (“CAT”).

In re Elmer Obeniel Ramirez-Lopez, No. A 205 919 640 (B.I.A. Feb. 1, 2019), 10 aff’g No. A 205 919 640 (Immig. Ct. N.Y. City Dec. 11, 2017). We assume the parties’ 11 familiarity with the underlying facts and procedural history. 12 We have reviewed the IJ’s decision as supplemented by the BIA. See Yan Chen v. 13 Gonzales, 417 F.3d 268, 271 (2d Cir. 2005).

The applicable standards of review are well 14 established. See 8 U.S.C. § 1252(b)(4)(B); Paloka v. Holder, 762 F.3d 191, 195 (2d Cir. 15 2014) (reviewing factual findings for substantial evidence and questions of law, including 16 whether a proposed group is cognizable, de novo); Gjolak v. Bureau of Citizenship & 17 Immigration Servs., 468 F.3d 140, 143 (2d Cir.

2006) (reviewing nexus determination for 18 substantial evidence). 19 To qualify for asylum and withholding of removal, an applicant must establish 20 past persecution or a well-founded fear of future persecution and that “race, religion, 21 nationality, membership in a particular social group, or political opinion was or will be at 2 1 least one central reason for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i); see 2 also id. § 1231(b)(3)(A); Matter of C-T-L-, 25 I. & N. Dec.

341, 348 (BIA 2010). A 3 cognizable particular social group is one that has a “a common immutable characteristic,” 4 is “defined with particularity,” and is “socially distinct within the society in question.” 5 Paloka, 762 F.3d at 196 (quoting Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (BIA 6 2014)). A shared experience may constitute an immutable characteristic, but the group 7 must be sufficiently particular and perceived as a group by society.

See id. at 196; Matter 8 of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (citing as examples sex, color, kinship 9 ties, or shared past experiences, such as former military leadership or land ownership). 10 Ramirez-Lopez argued to the BIA that the IJ erred by failing to consider whether 11 he had a well-founded fear of being persecuted as a member of a social group consisting 12 of witnesses to gang murder and torture who were publicly involved in reporting the 13 matter to the police, rather than the broader group that the Immigration Judge considered, 14 of persons who merely witnessed gang murder and torture in Guatemala.

The BIA 15 rejected that argument, not because it concluded that Ramirez-Lopez's proposed social 16 group was not cognizable, but because it concluded that he had failed to preserve this 17 contention before the IJ. Ramirez-Lopez argues that he fairly presented the narrower 18 proposed group to the IJ.

We agree. 19 The preliminary statement in Ramirez-Lopez's brief before the IJ identifies 20 Ramirez-Lopez's proposed social group as "eyewitnesses to gang murder and torture in 21 Guatemala." Cert. Admin. Rec. at 260.

Although the IJ and the BIA treated this as 3 1 referring to people who had simply observed gang violence, the brief in fact framed the 2 proposed group with reference to his participation in publicly reporting of the crime that 3 he witnessed. 1 First, both in the preliminary statement and throughout the brief, 4 Ramirez-Lopez uses the term "eyewitness," which often connotes someone who has not 5 only seen something, but who also reports what she has seen.

2 Second, his articulation of 6 the narrower group is even more explicit elsewhere in the brief. Most notably, at the 7 beginning of the argument section of the brief, he writes: 8 Mr. Ramirez is a member of a "particular social group". [sic] 9 Mr. Ramirez has the immutable characteristic of having 10 witnessed torture and murder perpetrated by a gang and he 11 helped his friend report the crime to the police.

This 12 characteristic cannot be changed because it happened in the 13 past. Mr. Ramirez brought his friend to the police station and 14 the gang killed Mr. Ramirez's friend the next day and sent 15 Mr. Ramirez a threatening note. 16 17 Id. at 265 (emphasis added). This language was unquestionably sufficient to present the 18 narrower group of witnesses to crime who are involved in publicly reporting what they 19 had seen.

Third, when discussing the facts giving rise to his asylum, claim, Ramirez- 1 There was no oral argument on the merits of Ramirez-Lopez's application nor any oral articulation of his proposed social group. Thus, the contours of that group must be discerned by reference to Ramirez-Lopez's brief.

We note, however, that Ramirez- Lopez's testimony, which the Immigration Judge specifically deemed credible, included all of the facts regarding his participation in reporting the incident and the retaliation that followed. See Cert. Admin. Rec. at 72-75, 80-90. 2 See, e.g., Eyewitness, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/eyewitness> ("[O]ne who sees an occurrence or an object, especially: one who gives a report on what he or she has seen."); Eyewitness, Oxford English Dictionary (3d ed.

2014) ("A person who has seen or observed something... a person who testifies to something that he or she has seen."). 4 1 Lopez consistently describes both the crime that he witnessed and his

involvement in 2 reporting that crime. See, e.g., *id.* at 260 (“Respondent brought his friend to the local 3 police department the next day to report the crime that they had witnessed.”).

Finally, to 4 the extent that there was any ambiguity in Ramirez-Lopez’s delineation of that group, the 5 IJ should have sought clarification prior to adjudicating his petition. See *Matter of W-Y- 6 C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018) (“If an applicant is not clear as to the 7 exact delineation of the proposed social group, the Immigration Judge should seek 8 clarification.”).

9 Moreover, while we express no view on whether Ramirez-Lopez’s proposed social 10 group is indeed cognizable for purposes of an asylum claim, or whether his actions were 11 sufficient to place him within that group – questions that are for the agency to resolve in 12 the first instance – the claim is non-frivolous. See *Gashi v. Holder*, 702 F.3d 130, 136-37 13 (2d Cir.

2012) (social group of “cooperating witnesses” in Kosovar society was 14 cognizable); cf. *Yucra-Santi v. Lynch*, 660 F. App’x 78, 81 (2d Cir. 2016) (proposed 15 social group of witnesses to specific terrorist attack was not socially distinct where 16 petitioner had not presented evidence that anyone in village or society was aware that he 17 had witnessed that attack).

18 Because Ramirez-Lopez met his burden to delineate his proposed social group, the 19 IJ was obligated to assess its legal viability, and the BIA’s refusal to consider it on the 20 ground that the proposed group had not been properly presented to the IJ was error. 21 Accordingly, the petition for review is GRANTED, the BIA’s decision is VACATED, 5 1 and the case is REMANDED to the agency for further proceedings consistent with this 2 order.

3 FOR THE COURT: 4 Catherine O’Hagan Wolfe, 5 Clerk of Court 6