RECENT DEVELOPMENT

Barajas-Romero v. Lynch: Political Opinion in Immigration Law—the Ninth Circuit's Standard of Review for Administrative Decisions on Appeal

I. OVERVIEW

Raul Barajas-Romero (Barajas-Romero) was found statutorily eligible for withholding of removal and Convention Against Torture (CAT) relief when he was convicted and imprisoned for illegal reentry to the United States.[1] Barajas-Romero, who first came to the United States legally as a young child and grew up in California, was originally deported to Mexico in 1998 due to drug and theft-related felony convictions.[2] After Barajas-Romero was deported, he obtained a house in Santa Clara del Cobre, Mexico, in the State of Michoacana.[3] Two years later, gang members of La Familia Michoacana assaulted and robbed him of his possessions, but they were unaware whether Barajas-Romero possessed a political opinion.[4] Several years later in 2006, four off-duty local police officers pushed Barajas-Romero inside his own home and tortured him for the purpose of extorting money from him.[5] Barajas-Romero begged them to stop and expressed his distaste for corrupt

1. Barajas-Romero v. Lynch, 846 F.3d 351, 355 (9th Cir. 2017).
2. *Id.* at 354.
3. *Id.*
4. *Id.*
5. *Id.*

police officers.[6] After this remark, the police officers drastically increased the amount of torture they inflicted on Barajas-Romero, permanently scarred his forehead, and told him they would put a bullet through his scar if he told anyone what had happened.[7] After Barajas-Romero was unsuccessful in reporting this incident to the police, he fled to the United States, where he was caught in 2010 and turned over to Immigration and Customs Enforcement (ICE).[8]

ICE had commenced proceedings to reinstate Barajas-Romero's original deportation order when he petitioned for withholding of removal and CAT relief.[9] The Immigration Judge found Barajas-Romero to be credible but rejected both of his claims because the police officers were "rogue officers" acting solely to extort money, because Mexico has laws that actively target police corruption, and because Barajas-Romero had the ability to safely relocate elsewhere within Mexico.[10] On appeal, the Board of Immigration Appeals (BIA) upheld the decisions of the Immigration Judge.[11] Barajas-Romero petitioned for review of the BIA's decision, giving rise to the noted case.[12] The U.S. Court of Appeals for the Ninth District Circuit *held* that (1) the BIA erroneously applied the "one central reason" nexus standard, used in asylum proceedings, to withholding of removal; (2) the BIA should have considered off-duty police officers "public officials" for the purposes of CAT relief; and (3) the BIA improperly placed the burden on Barajas-Romero to prove he could not safely relocate within Mexico for the purposes of CAT relief. *Barajas-Romero v. Lynch*, 846 F.3d 351, 360, 363-64 (9th Cir. 2017).

II. BACKGROUND

A. Judicial Review of Administrative Decisions

Generally speaking, an appellate court cannot "intrude upon the domain which Congress has exclusively entrusted to an administrative agency."[13] Typically, a court of appeals cannot conduct a *de novo* review

---

6. *Id.* at 354-55.
7. *Id.* at 355.
8. *Id.*
9. *Id.*
10. *Id.* at 356.
11. *Id.*
12. *Id.*
13. I.N.S. v. Orlando Ventura, 502 U.S. 12, 16 (2002) (citing SEC v. Chenery Corp., 318 U.S. 80, 88, 63 (1943)).

and reach its own conclusions on an administrative decision.[14] Administrative agencies have the expertise and resources to better make evaluations of evidence, particularly when creating potentially far-reaching legal precedent.[15] However, a court of appeals may often review a motion to reopen an administrative decision, which is considered an "important safeguard" that ensures proper and lawful processes of discretionary administrative matters.[16] When a court of appeals finds sufficient evidence to grant a motion to reopen an administrative decision, they are generally required to remand to the BIA for further explanation or investigation.[17]

Prior to 1992, in order to reverse a BIA denial of a motion to reopen, courts of appeals used a "substantial evidence" standard, which required that agency fact-finding supported what "a reasonable mind would accept as adequate to form a conclusion."[18] However, under *I.N.S. v. Elias-Zacarias*, the Supreme Court set forth a new standard known as the "compelling evidence" test, which requires a court of appeals seeking to overturn a BIA denial of a motion to reopen to find evidence that not only supports an opposite conclusion but also compels it.[19] This test was later codified under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) with the intent of narrowing the limitations on *de novo* review of asylum claims.[20] However, even when a court of appeals grants a reversal of a BIA's denial of a motion to reopen, it should only touch and concern on whether the alien's claims have been granted a reasonable hearing and not on any merits that grant substantive relief.[21]

The Ninth Circuit Court of Appeals has held for CAT relief, asylum relief, and withholding of removal that it assess the BIA's legal evidence *de novo* and its factual findings under the compelling evidence standard.[22] However, the Ninth Circuit has a reputation of relabeling

---

14. *Id.* (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)).

15. *See id.* at 355-56 (holding that a court of appeals could not conduct final findings of fact that the BIA had not considered about Guatemalan conditions that should have been left to the BIA because they were potentially far-reaching as precedent).

16. Kucana v. Holder, 558 U.S. 233, 242 (2010) (citing Dada v. Mukasey, 128 S. Ct. 2307, 2317-19 (2008)).

17. *Orlando Ventura*, 502 U.S. at 16.

18. Eric M. Fink, *Liars and Terrorists and Judges, Oh My*, 83 NOTRE DAME L. REV. 2019, 2025 (2008).

19. I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481 (1992).

20. Fink, *supra* note 18, at 2025.

21. *Kucana*, 558 U.S. at 235.

22. Wakkary v. Holder, 558 F.3d 1049, 1056 (9th Cir. 2009).

factual findings as legal evidence so that it may assess questions of fact *de novo*.[23] The Ninth Circuit's ability to circumvent the Supreme Court's restrictions set forth in *Elias-Zacarias* was considered a key motivator for Congress to statutorily incorporate the restrictions in the IIRIRA.[24] Whether the statutory interpretations have made a difference in the Ninth Circuit's implementation of review remains to be seen.

B. Asylum and Withholding of Removal

Under the Immigration and Nationality Act of 2005 (INA), eligibility for asylum and withholding of removal are statutorily similar in many aspects. Both require some degree of persecution based on account of race, religion, nationality, membership in a particular social group, or political opinion.[25] The key difference between the two is that asylum is a discretionary grant from the Attorney General, whereas withholding of removal is a mandatory form of relief.[26] As such, it follows that the two eligibilities require different standards of objective reasonableness.[27] Asylum requires a "well-founded fear" of future persecution, which is satisfied by as low as a 10% chance of future persecution.[28] Because withholding of removal is a mandatory grant, it requires a higher standard of objective reasonableness by demanding that future persecution be "more likely than not."[29]

However, in the case of past persecution, neither forms of relief actually require this standard to be met.[30] For example, in *Madrigal v. Holder*, the court established that Asylum eligibility is established either by "past persecution *or* a well-founded fear of future persecution," and that when past persecution has occurred, the applicant only bears the burden of proving that (1) his past treatment constitutes persecution; (2) the persecution was due to a common nexus of one or more protected grounds; and (3) the persecution was instigated by the government or forces not within the government's control.[31] Similarly, the Code of Federal Regulations states that when an applicant for withholding of removal has experienced past persecution on account of some protected

---

23. Fink, *supra* note 18, at 2025-26.
24. *Id.* at 2025.
25. 8 U.S.C. § 1158(b)(1) (2012); 8 U.S.C. § 1231(b)(3)(A) (2006).
26. 8 U.S.C. § 1158(b)(1); 8 U.S.C. § 1231(b)(3)(A).
27. *Wakkary*, 558 F.3d at 1052-53.
28. *Id.*
29. *Id.*
30. Madrigal v. Holder, 716 F.3d 499, 503 (9th Cir. 2013).
31. *Id.*

ground, future persecution is assumed, unless there has been some fundamental change in circumstances in the applicant's home country, or the applicant could avoid future persecution by relocating to another part of his or her home country.[32] Subsequently, the Ninth Circuit held in *Garcia-Milian v. Holder* that when an applicant who experiences past persecution and, thus, bears the burden of proof to establish that the persecution occurred on account of some protected ground, she similarly bears the same burden of proof for withholding of removal.[33] Thus, both eligibilities share the key component that the burden of proof to establish past persecution occurred on account of some protected ground lies with the applicant.[34]

C. Central Nexus and Political Opinion

The Supreme Court has held that when an applicant for asylum has been persecuted on account of a political opinion, the persecution must have occurred due to the applicant's political opinion, and not because of some other tangential reason.[35] Prior to the REAL ID Act, the Ninth Circuit satisfied this nexus under the "at least in part" standard.[36] For example, in *Borja v. I.N.S.*, the court ruled that in "mixed motive" cases, a petitioner persecuted primarily for economic purposes still satisfied asylum's nexus requirement when the persecutor had some minimal political-opinion motive.[37]

Congress viewed this standard as problematic and therefore statutorily added the "one central reason" standard to asylum eligibility as part of the REAL ID Act.[38] Under this standard, the protected ground must be at least "one central reason" for persecution and not just "a" reason.[39] In *Matter of C-T-L-*, the BIA held that the new "one central reason" standard in asylum applied to withholding of removal because before the Act, the Immigration and Naturalization Service (INS) applied the same standard to both asylum and withholding of removal.[40] The Ninth Circuit similarly applied the same "central nexus" standard to

---

32. 8 C.F.R. § 208.16(b)(1)(A)-(B) (2009).
33. Garcia-Milian v. Holder, 755 F.3d 1026, 1033 (9th Cir. 2014).
34. *Id.*
35. I.N.S. v. Elias-Zacarias, 502 U.S. 478, 482 (1992).
36. Borja v. I.N.S. 175 F.3d 732, 736 (9th Cir. 1999).
37. *Id.*
38. 8 U.S.C. § 1158(b)(1)(B)(i) (2009).
39. *Id.*
40. Barajas-Romero v. Lynch, 846 F.3d 351, 359 (9th Cir. 2017) (citing Matter of C-T-L-, 25 I. & N. Dec. 341 (2010)).

asylum and withholding of removal in *Zetino v. Holder* but was unable to distinguish the two because a nexus did not exist whatsoever.[41]

D. The Convention Against Torture

An alternative form of relief for an alien facing removal is CAT relief.[42] Under CAT, the applicant bears the burden to establish that it is "more likely than not" that he or she would be tortured if removed to their home country.[43] Torture is a higher form of infliction of suffering than persecution and, therefore, requires no protected ground and, thus, applies to all persons.[44] The Ninth Circuit has held that under CAT relief, all the applicant must establish is a greater than 50% chance of future torture under which *all* relevant evidence shall be considered.[45] Evidence of past torture is considered when weighing the probability of future torture but, alone, does not establish a probability of future torture.[46] Other evidence is considered, such as country conditions, gross violations of human rights, or evidence that an applicant could relocate to another part of their home country.[47] However, the Ninth Circuit held in *Maldonado v. Lynch* that an applicant seeking CAT relief did not need to prove that relocation in his native country was impossible when he was targeted by corrupt police officers because the BIA had ignored documentary evidence of nationwide police corruption.[48]

To demonstrate eligibility for CAT relief, an applicant must show "that it is 'more likely than not' that a government official or person acting in an official capacity would torture him or aid or acquiesce in his torture by others."[49] Acquiescence of a public official occurs when a public official is aware of the activity and is unable or unwilling to solve it.[50] However, the Ninth Circuit held in *Garcia-Milian* that absent

---

41. Zetino v. Holder, 622 F.3d 1007, 1015-16 (9th Cir. 2010); *see also* Garcia-Milian v. Holder, 755 F.3d 1026, 1032 (9th Cir. 2014) (holding that an asylum applicant had not been persecuted because of her political opinion when her persecutors had targeted her for her husband's affiliation with a guerilla organization, but made no statements about their beliefs on the applicant's actual opinion).

42. 8 C.F.R. § 208.16(c)(2) (2009).

43. *Id.*

44. Cole v. Holder, 659 F.3d 762, 770 (9th Cir. 2011); *see also* Wakkary v. Holder, 558 F.3d 1049, 1068 (9th Cir. 2009) (holding that discrimination and harassment could be persecution but not torture).

45. *Cole*, 659 F.3d at 770-71.

46. 8 C.F.R. § 208.16(c)(3)(i-iv).

47. *Id.*

48. Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015).

49. *Wakkary*, 558 F.3d at 1067-68.

50. Garcia-Milian v. Holder, 755 F.3d 1026, 1034 (9th Cir. 2014).

widespread corruption or some other similar inability to solve a crime, a government official does not acquiesce in torture simply because he or she is powerless to stop it.[51] Comparatively, in *Madrigal*, the Ninth Circuit assessed the Mexican Government's efficacy of ending drug cartel violence when establishing the likelihood of corrupt police officers acquiescing in future torture.[52] The Ninth Circuit further expanded the "public official" scope in *Madrigal* by stating that local officers satisfy CAT's public official requirement.[53] Thus, an alien facing removal may establish CAT relief as an alternative to asylum or withholding of removal.[54]

III. THE COURT'S DECISION

In the noted case, the U.S. Court of Appeals for the Ninth Circuit relied exclusively on the relevant congressional statutes and administrative regulations alongside *Kucana v. Holder* for the withholding of removal petition, and on *Madrigal* and *Maldonado* for the CAT petition, where the court expanded CAT claims to include lower public officials and evidence of a country's efficacy in pursuing torture.[55] The Ninth Circuit first held that the BIA erred in using the "central reason" standard, applicable in asylum, for withholding of removal, as opposed to the "a reason" standard.[56] The court next held that lower state police officers constituted "public officials" for the purposes of CAT relief.[57] Lastly, the court held that the BIA improperly placed the burden on the applicant to establish that internal relocation within his home country was impossible.[58]

The court established "a reason" standard for withholding of removal by synthesizing the rule established in *Kucana* and decided that Congress must have *intentionally* omitted the "central nexus" element from withholding of removal as part of the REAL ID ACT.[59] Further, the court reasoned that because withholding requires applicants to prove that

---

51. *Id.* at 1034-35.
52. Madrigal v. Holder, 716 F.3d 499, 510 (9th Cir. 2013).
53. *Id.*
54. 8 C.F.R. § 208.16(c)(2) (2009).
55. Barajas-Romero v. Lynch, 846 F.3d 351, 360, 363-65 (9th Cir. 2017).
56. *Id.* at 360.
57. *Id.* at 363.
58. *Id.* at 364-65.
59. *Id.* at 359; *see* Kucana v. Holder, 558 U.S. 233, 249 (2010) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

it is more likely than not that they will be persecuted, while the asylum statute only requires a "well-founded fear," Congress created a lighter nexus standard for withholding of removal to offset the greater burden of probability.[60] Because the court found that the statutory language was so "unambiguously different," it did not need to review BIA's contrary holding with deference.[61] It remanded to the BIA to review the withholding claim under the "corrected" standard.[62]

For purposes of CAT relief, the court solely relied on *Madrigal* to establish that police officers counted as government officials and that the BIA failed to assess Mexico's efficacy in stopping drug cartel violence when considering government acquiescence.[63] The Ninth Circuit reasoned that there existed no "rogue official" exception to a government official because the Code of Federal Regulations establishes that torture is at the hands of or acquiesced by a government official *or* a person acting in an official capacity.[64]

Lastly, the Ninth Circuit held under the *Maldonado* standard that an applicant for CAT does not need to bear the burden to prove that internal relocation within their native country is impossible.[65] The court assumed that the BIA demanded this burden under the prior circuit law before *Maldonado* was established.[66] It reasoned that Barajas-Romero was threatened with death if he returned to Mexico, and, therefore, evidence of safe internal relocation was likely scarce.[67] It remanded both of the CAT issues of law to be reconsidered under their new standards to the BIA.[68]

IV. ANALYSIS

In the noted case, the Ninth Circuit's *de novo* findings of law for Barajas-Romero's eligibility for withholding of removal and CAT are classic examples of the Ninth Circuit's willingness to consider findings of fact mislabeled as findings of law. However, its main errors are mostly in regards to its interpretations of immigration law, which should be under the sole authority of the BIA. The court makes its first mistake

60. *Barajas-Romero*, 846 F.3d at 360.
61. *Id.*
62. *Id.*
63. *Id.* at 363.
64. *Id.* at 362; 8 C.F.R. § 208.18(a)(7) (2009).
65. *Barajas-Romero*, 846 F.3d at 364.
66. *Id.*
67. *Id.*
68. *Id.* at 365.

when it applies *Kucana* to all statutory and regulatory omissions by Congress.[69] In *Kucana*, the Supreme Court found it paramount when deciding whether Congress conscientiously omitted a clause that the omission was corroborated by the historical purpose and implementation of the relevant law.[70] Comparatively, in the noted case, the court hypothesizes that Congress intentionally omitted the asylum statute's "central nexus" standard from withholding of removal with the intent to counterbalance withholding of removal's higher standard of proof.[71] However, in application, this would eliminate the purpose of the historical differences between asylum eligibility and withholding of removal.

Historically, asylum requires a "well-founded fear" while withholding of removal requires a "probability" of future persecution because of the different types of relief available.[72] However, in the case of past persecution, neither withholding of removal nor asylum eligibility requires *any* standard of proof for future persecution.[73] Thus, in the cases of past persecution, such as in the noted case, if withholding of removal required a lower nexus standard, it would have no counterbalance and, thus, be a much easier burden to prove than asylum. This would directly contradict the long-lasting historical policy that withholding of removal *should* require a more difficult burden than asylum because it provides a mandatory, not discretionary, form of relief.[74] The court's inability to properly interpret the primary purpose of immigration laws, as demonstrated here, is precisely the reason why it should have deferred to the BIA's contrary judgment in *Matter of C-T-L-*.[75]

The court's next mistake was assuming that the BIA had established a "rogue official" exception to CAT claims when it clearly did not.[76] It assumes, based on the merits of the case, that the BIA erroneously overlooked that the applicant had been tortured by a public official and hyper-focuses on the statute's relevant language of "public official *or* person acting in an official capacity."[77] In doing so, it ignores the overall

---

69. *Id.* at 359.
70. Kucana v. Holder, 558 U.S. 233, 252 (2010).
71. *Barajas-Romero*, 846 F.3d at 360.
72. Wakkary v. Holder, 558 F.3d 1049, 1052-53 (9th Cir. 2009).
73. 8 C.F.R. § 208.16(b)(1)(A)-(B) (2009); Madrigal v. Holder, 716 F.3d 499, 503 (9th Cir. 2013).
74. 8 U.S.C. § 1158(b)(1) (2009); 8 U.S.C. § 1231(b)(3)(A) (2012).
75. *Barajas-Romero*, 846 F.3d at 362.
76. *Id.* at 362-63.
77. *See* Cole v. Holder, 659 F.3d 762, 771 (9th Cir. 2011) (citing 8 C.F.R. § 1208.18(a)(1) (2009)).

demands of CAT relief, which require a more than 50% chance that the respondent *will* suffer torture at the hands of or because of acquiescence by a public official *in the future*.[78] Under the *Madrigal* standard, efficacy of laws targeting actors may be used to assess how widespread police corruption may decide future probability of torture, but absent corruption or some similar inability, a failure by government officials to catch torturers is not "acquiescence" for CAT purposes.[79] Thus, the court improperly assessed "rogue officials" to mean "on or off duty" when they should have assessed whether the police officers were independent actors or working on behalf of some criminal organization.[80] In the noted case, it seems the BIA determined that although the petitioner was attacked by La Familia, a several-year gap and no indication that the officers were working on behalf of the gang, did not indicate the kind of police corruption necessary to make *future* persecution by corrupt officers more likely than not.[81]

The court's last error was in applying the *Maldonado* standard saying that a CAT applicant did not bear the burden of establishing inability to relocate.[82] This is an understandable standard in cases such as *Maldonado*, where the police corruption at hand seems to be widespread and it would be difficult for an applicant to prove that *nowhere* within the entire country offers safe relocation.[83] However, in cases, such as the noted one, where only a handful of private actors are at issue, internal relocation is an understandably inherent question. If a petitioner *never* had to argue that internal relocation was impossible, then section 208.16(c)(3) of the Code of Federal Regulations would be rendered entirely useless.[84] It seems more likely that the court improperly determined, based on the merits, that the BIA had not weighed all the available evidence because it should have resulted in an opposite decision. This assessment is one of facts and not one of law and, thus, should not have been considered *de novo*.

---

78. Wakkary v. Holder, 558 F.3d 1049, 1068 (9th Cir. 2009).
79. Garcia-Milian v. Holder, 755 F.3d 1026, 1034-35 (9th Cir. 2014); Madrigal v. Holder, 716 F.3d 499, 510 (9th Cir. 2013).
80. *Barajas-Romero*, 846 F.3d at 362-63.
81. *Id.*
82. *Id.* at 364.
83. Maldonado v. Lynch, 786 F.3d 1155, 1167 (9th Cir. 2015).
84. 8 C.F.R. § 208.16(c)(3) (2009).

V. CONCLUSION

The Ninth Circuit's desire to lower review standards is better understood in light of the facts of the noted case. Barajas-Romero did, after all, grow up in the United States with nearly his entire nuclear family.[85] He also experienced real past persecution that amounted to torture.[86] The fact that his past torture was neither on account of a political opinion nor created a likelihood of future torture does not make his experience or trauma any less real or sad. Nor does this lower his subjective perception of fear. While members of the Ninth Circuit Court of Appeals may possess a political opinion that any person fleeing real actors should be granted deferrals of removal, Congress places real, objective power with administrative agencies, such as the BIA.[87] Political opinions of judges, no matter how noble, do not and cannot constitute real and enforceable law.

Cora Hill*

85. *Barajas-Romero*, 846 F.3d at 354.
86. *Id.*
87. 8 C.F.R. § 208.16(b)(1)(A)-(B).

* © 2017 Cora Hill. J.D. candidate 2019, Tulane University Law School; B.A. 2016, University of Georgia. She decided to attend law school because of her interest in immigration law. She credits the support she has received from her friends and family for the opportunity to work hard at work worth doing.