3-14-2008

Torres v. Atty Gen USA

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 07-1153
No. 07-1154

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RODRIGO TORRES - 07-1153
REINALDO MOTTA - 07-1154

Petitioners,

v.

Attorney General of the United States,

Respondent.

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On Petition for Review from an
Order of the Board of Immigration Appeals
(Board Nos. A98-493-260, A98-493-261)
Immigration Judge: Mirlande Tadal

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Submitted Under Third Circuit LAR 34.1(a)
March 7, 2008

Before: BARRY, JORDAN and HARDIMAN, *Circuit Judges*.

(Filed: March 14, 2008)

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OPINION OF THE COURT

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HARDIMAN, *Circuit Judge*.

In this consolidated appeal, Rodrigo Torres and Reinaldo Motta challenge the Board of Immigration Appeals' denial of their petitions for withholding of removal. Appellants argue that the Immigration Judge (IJ) erred by refusing to consolidate their petitions and by determining that they did not meet the standard for withholding. We will deny the petitions for review.

I.

Torres and Motta are Colombian natives. They are HIV-positive gay men who entered the United States on I-94 visas in 1999. Although they registered as partners under the New Jersey Domestic Partnership Act of 2003, neither man applied for asylum. In separate oral opinions dated August 8, 2005, the IJ denied their petitions for withholding of removal and Convention Against Torture protection. The BIA adopted and affirmed the IJ's decisions in identical per curiam opinions.

II.

We have jurisdiction pursuant to 8 U.S.C. § 1252(a). Because the BIA not only adopted the IJ's decisions but also expanded upon them, our review encompasses both decisions. *Chen v. Ashcroft*, 376 F.3d 215, 222 (3d Cir. 2004).

Appellants first argue that, because they are a "family unit," the IJ erred in refusing to consolidate their petitions. An IJ may consolidate the cases of different petitioners to promote administrative efficiency as long as hearing the cases together does not deny the

petitioners the right to fully litigate their claims. 8 C.F.R. § 1240.1(a)(iv); *Matter of Taerghodsi*, 16 I&N Dec. 260, 262-63 (BIA 1977). Typically, consolidation is used where a family member claims derivative asylum status through another family member, or where two petitions rely on the same events. *See, e.g.*, *Segura v. Att'y Gen.*, 240 Fed. Appx. 347, 348-49 (11th Cir. 2007); *Jabba v. Att'y Gen.*, 195 Fed. Appx. 883, 884 n.1 (11th Cir. 2006). Consolidation is not required, however, and is generally disfavored because of its potential to deprive petitioners of procedural due process rights. *See United States v. Barraza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978); *Taerghodsi*, 16 I&N Dec. at 263.

In the case at bar, the IJ did not abuse her discretion when she decided to hear Appellants' petitions separately. First, even if Appellants constitute a "family unit," there is no derivative status for family members under the withholding of removal statute. *See* 8 U.S.C. § 1231(b)(3); *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005). Second, Appellants' petitions do not rely exclusively on the same incidents of alleged persecution. Finally, Appellants were not prejudiced by the IJ's refusal to consolidate because that did not prevent Torres or Motta from testifying at each other's hearings.

III.

Appellants next argue that the agency's denials of their petitions were not supported by substantial evidence as required by *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002). Appellants were obligated to show that it was more likely than not that their

"life or freedom would be threatened" upon their return to Colombia "because of their race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b); *Amanfi v. Ashcroft*, 328 F.3d 719, 725 (3d Cir. 2003). The threat of persecution must be "severe" and "does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

We assume without deciding that Appellants are members of a particular social group. *See Amanfi*, 328 F.3d at 730; *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990). Nevertheless, substantial evidence supports the BIA's conclusion that Appellants failed to carry their burden of demonstrating a clear probability that they would be persecuted in Colombia. *INS v. Stevic*, 467 U.S. 407, 424 (1984). Torres testified that he was fired from a job because a secretary discovered his relationship with Motta. Motta testified that he was arrested and briefly detained during a police raid on a discotheque. Although these incidents are evidence that Torres and Motta were harassed and discriminated against, they do not rise to the level of persecution. *See Fatin*, 12 F.3d at 1240; *Ahmed v. Ashcroft*, 341 F.3d 214, 218 (3d Cir. 2003); *Kibinda v. Att'y Gen.*, 477 F.3d 113, 119 (3d Cir. 2007).

Nor does the documentary evidence in the record compel the conclusion that Appellants face a clear probability of future persecution, *see* 8 C.F.R. § 1208.16(b)(2),

because it shows increasing tolerance of homosexuals in Colombia.[1] Accordingly, we find that substantial evidence supports the agency's determination that Appellants are not entitled to withholding of removal. For the foregoing reasons, Appellants' petitions for review will be denied.

[1] For example, the Colombian military permits openly gay men to serve in its forces, and the Colombian Constitutional Court ruled that teachers cannot be dismissed because of their sexual orientation.