[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10014
Non-Argument Calendar

Agency No. A075-049-918

ARMIN KAHRIC,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(June 23, 2021)

Before JORDAN, GRANT, and ED CARNES, Circuit Judges.

PER CURIAM:

Armin Kahric, proceeding pro se, seeks review of the denial of his application for withholding of removal and deferral of removal under the United Nations Convention Against Torture (CAT).[1] He contends that the immigration judge denied him due process by denying a second continuance before Kahric admitted the allegations in the notice charging him with removability. Kahric challenges the agency's finding that his conviction for assault with a deadly weapon was a "particularly serious crime," barring his entitlement to withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii).

He also contends that the record compels reversal of the agency's denial of his application for deferral of removal under CAT. Kahric argues that, as the son of a Muslim Bosnian soldier who fought in that country's civil war more than two decades ago, if he returns to Bosnia now, it is likely that he will be tortured by or with the consent or acquiescence of the government.

I.

Kahric is a twenty-nine-year-old citizen of Bosnia and Herzegovina who came to the United States in 1999 as a refugee. Two years later he became a legal permanent resident.

[1] Kahric concedes that he is not entitled to asylum, stating in his brief to this Court that "the IJ correctly concluded that Petitioner was barred from asylum due to his Florida conviction of aggravated assault with a deadly weapon, which is an aggravated felony." Br. of Petitioner at 15.

In 2019 the Department of Homeland Security served him with a notice to appear. The notice alleged, among other things, that in 2013 Kahric was convicted of possessing cocaine in violation of Fla. Stat. § 893.13(6)(a). It alleged that Kahric had more convictions in 2016: aggravated assault with a deadly weapon, in violation of Fla. Stat. § 784.021(1)(a), and being a felon in possession of a firearm, in violation of Fla. Stat. § 790.23(1)(a).

The notice charged him with removability both under INA § 237(a)(2)(B)(i) because he had been convicted of an offense relating to a controlled substance and under INA § 237(a)(2)(A)(iii) because he had been convicted of an aggravated felony. At a telephonic hearing on March 4, 2019, Kahric was proceeding pro se while he was incarcerated, and he asked the immigration judge for a 60-day extension. The IJ would not agree to 60 days but gave Kahric nearly a month, until April 2, to find an attorney. The IJ emphasized that at the April 2 hearing they would discuss the notice to appear, even if Kahric could not find an attorney by that date.

At the next telephonic hearing on April 2, 2019, Kahric said he had an attorney but did not know his name. The IJ said that they would discuss the notice to appear, and then the case would be scheduled for another hearing when Kahric's attorney could appear. The IJ described each of the factual allegations in the notice, and Kahric admitted them, including the facts of his Florida convictions.

After that, Kahric, who was represented by counsel, filed an application for asylum and withholding of removal based on religion, nationality, and political opinion. He also sought deferral of removal under CAT. His application stated he and his family had come to the United States in 1999 as refugees of the Bosnian/Croatian war and, if removed to Bosnia, he would be sent to a place where ethnic tensions were high and would always fear for his safety. Kahric said that the United States had been his home for most of his life and that he didn't want to be separated from his parents and his young son.

In support of his application, he submitted materials including the 2018 country report for Bosnia; a Wikipedia article about the Bosnian genocide and the crimes against humanity committed during the Bosnian war; and various news articles about Croatian-Bosnian political relations.

At his merits hearing, Kahric was represented by the same attorney who had prepared his asylum and withholding of removal application. At that hearing, he did not challenge the facts about his prior convictions or any of the findings of removability. In addition to his own testimony, Kahric presented testimony from two witnesses: his mother and his son's mother.

The IJ denied Kahric's claims for asylum, withholding of removal, and deferral of removal under CAT. The IJ determined that Kahric's 2013 cocaine offense qualified as a conviction related to a controlled substance and that his 2016

conviction for aggravated assault with a deadly weapon was a crime of violence. He found Kahric credible and specifically credited his account of the mistreatment that he and his family suffered during the Bosnian war before they left the country in 1999. The IJ also credited the testimony of Kahric's other two witnesses.

The IJ evaluated the evidence presented about Kahric's crime of aggravated assault with a deadly weapon. First, the IJ found that because the offense was an aggravated felony, the conviction automatically barred asylum relief. Because Kahric's sentence was less than five years of imprisonment, however, the IJ assessed the details of the crime to determine whether it was a "particularly serious crime," which would bar withholding of removal. See 8 U.S.C. § 1231(b)(3)(B) (providing that "an alien who has been convicted of an aggravated felony . . . for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime" but granting the Attorney General discretion to determine that "notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime").

The IJ noted these details: a three-year sentence of imprisonment reflected the seriousness of the crime; the nature of the crime itself was assault with a deadly weapon; and Kahric had confronted his neighbor with a firearm. The IJ considered the fact that the gun was not loaded but emphasized that Kahric had committed the

offense after he had already been convicted of another felony and while "under some level of intoxication." Considering all the circumstances, the IJ found that the offense qualified as a particularly serious crime, which barred Kahric from withholding of removal.

The IJ also determined that Kahric was not entitled to deferral of removal under CAT because he had failed to show that it was more likely than not that he would be tortured in Bosnia. The IJ found that Kahric had been tortured during the Bosnian civil war when he was child by having his hands burned. The IJ considered that "highly relevant" but also noted that it happened during the war, which had been over for nearly a quarter century.

The IJ relied heavily on the 2018 country report, which indicated that elections in Bosnia "were held in a competitive environment," Bosnian authorities controlled the law enforcement agencies, there were no reports that the government or its agents committed arbitrary or unlawful killings or used tactics such as torture, and there was adequate representation for Serbs, Croats, and Bosniaks, like Kahric. The IJ noted that the evidence showed that Bosnia was a "Muslim majority nation," and although the country report indicated discrimination against Jews and Roma, Kahric was Muslim.

The IJ found it "speculative" to think that current government officials would target Kahric just because of his last name, which connected him to his

father, who had fought in the Bosnian civil war. The IJ observed that Kahric's grandmother still lives in Bosnia, and there was no evidence showing that she was targeted for being Bosniak or for having a family connection to Kahric's father.

In rejecting Kahric's and his mother's accounts of the current conditions in Bosnia, the IJ considered the fact that neither of them had recently travelled to the country. The IJ expressed understanding of their "subjective views" of the country conditions in light of their personal history with the Bosnian war. The IJ found, however, that their testimony did not "match up" with the country report, which showed, among other things, that Bosnian law requires that "the three constituent people of Bosnia, including the Bosniaks, must be adequately represented at all levels of the government." After weighing all the evidence, the IJ concluded that Kahric had failed to establish that it was more likely than not that he would be tortured by government officials in Bosnia or with their consent or acquiescence.

The BIA dismissed Kahric's appeal. It affirmed the IJ's decision that Kahric was ineligible for asylum and was ineligible for withholding of removal because his assault with a deadly weapon conviction was a particularly serious crime. It agreed with the IJ that the elements and the underlying facts of that crime made it a particularly serious offense. The BIA considered the fact that Kahric had confronted a neighbor with a firearm and had threatened to harm him and then later had resisted arrest and tried to discard the firearm. The BIA noted that Kahric had

also been convicted of being a felon in possession of a firearm and of resisting an officer without violence.

The BIA considered Kahric's arguments that he had received "only" a three-year sentence and that he did not intend to shoot the victim, but it found that the sentence was lengthy and removal proceedings were not the proper forum for "redetermin[ing]" Kahric's criminal guilt or innocence. As a result, it concluded that Kahric was ineligible for withholding of removal.

The BIA rejected Kahric's argument that the IJ had denied him due process, finding that he "was not 'forced' to proceed pro se" at his April 2 hearing. Instead, he was given a continuance and "a meaningful opportunity to obtain counsel," and he understood that he would have to respond to the notice to appear at the next hearing, even if he had not yet retained counsel. Additionally, the BIA pointed out that Kahric admitted that his cocaine conviction made him ineligible for a 212-H waiver and his conviction for assault with a deadly weapon was an aggravated felony that made him ineligible for cancellation of removal, facts his retained counsel continued to acknowledge. In light of his concessions, the BIA concluded that there could be no prejudice to the outcome of the proceedings based on his admissions to the IJ about the charges of removability.

The BIA also affirmed the IJ's denial of deferral of removal under CAT. It rejected Kahric's argument that his mother, who testified on his behalf before the

IJ, should have been qualified as an expert on Bosnian country conditions when there was no evidence that she was an expert. The BIA found no error in the IJ's findings that Kahric's claims about torture were speculative, and it rejected Kahric's attempt to present new evidence on appeal about country conditions.

II.

We usually review the BIA's decision as the final judgment. Perez-Zenteno v. U.S. Att'y Gen., 913 F.3d 1301, 1306 (11th Cir. 2019). But when "the BIA agree[s] with the findings of the IJ and add[s] its own observations, we review both." Id. We review de novo constitutional challenges, including alleged due process violations. Lapaix v. U.S. Att'y Gen., 605 F.3d 1138, 1143 (11th Cir. 2010). We also review de novo our subject matter jurisdiction. Amaya-Artunduaga v. U.S. Att'y Gen., 463 F.3d 1247, 1250 (11th Cir. 2006).

Under the Immigration and Nationality Act's criminal alien bar, we generally lack jurisdiction to review a final order of removal against an alien who is removable because he has committed an aggravated felony. See 8 U.S.C. §§ 1252(a)(2)(C), 1227(a)(2)(A)(iii). There is an exception to that jurisdictional bar for constitutional claims and questions of law. See 8 U.S.C. § 1252(a)(2)(D) (providing that the statutory jurisdictional bar does not "preclud[e] review of constitutional claims or questions of law"); Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1067 (2020) (concluding that the phrase "questions of law" that limits

judicial review in 8 U.S.C. § 1252(a)(2)(D) "includes the application of a legal standard to undisputed or established facts"). The statutory limitation on judicial review in 8 U.S.C. § 1252(a)(2)(D) does "not preclude judicial review of a noncitizen's factual challenges to a CAT order." Nasrallah v. Barr, 140 S. Ct. 1683, 1694 (2020).

A.

Kahric conceded before the BIA that his conviction for assault with a deadly weapon is an aggravated felony, and he repeats that concession in his brief to this Court. He has not challenged the legal standards that the agency applied in determining that his aggravated felony conviction barred his entitlement to withholding of removal. Instead, Kahric raises various factual challenges to the denial of withholding of removal, arguing that his aggravated assault conviction is not a particularly serious crime and that, as a Muslim and the son of a soldier who fought in the Bosnian civil war, he will be persecuted if he returns to Bosnia. See 8 U.S.C. § 1231(b)(3)(B)(ii) (providing that an alien convicted of a "particularly serious crime" is ineligible for withholding of removal); Lapaix, 605 F.3d at 1141 n.2 ("Particularly serious crimes render aliens ineligible for asylum and withholding of removal.").

When a conviction "is not a per se particularly serious crime," the Attorney General has the "discretion to determine on a case-by-case basis whether the

offense constituted a particularly serious crime" and may delegate that discretion "to other administrative bodies," including immigration judges. Lapaix, 605 F.3d at 1143.[2] In making that determination, the IJ can "rely solely on the elements of the offense" or can choose to consider additional factors such as "the nature of the conviction, the circumstances of the underlying facts of the conviction, and the type of sentence imposed." Id. (alteration adopted and quotation marks omitted). The IJ and the BIA did that here, evaluating the facts and circumstances of Kahric's crime of assault with a deadly weapon.

Kahric takes issue with the weight given to evidence that he presented. He argues that his crime was not particularly serious because the gun he pointed at his neighbor was not loaded and he did not intend to shoot him. He does not point to any error in the legal standards that the IJ and BIA applied.

We lack jurisdiction to consider Kahric's challenges to the agency's factfindings and dismiss that part of his petition for review. See Fynn v. U.S. Att'y Gen., 752 F.3d 1250, 1253 (11th Cir. 2014); Jimenez-Galicia v. U.S. Att'y Gen., 690 F.3d 1207, 1210–11 (11th Cir. 2012) (concluding that "'garden-variety abuse

[2] Kahric's conviction for assault with a deadly weapon is not "per se" a particularly serious crime because he was sentenced to three years imprisonment, two years less than the five-year per se statutory threshold. See 8 U.S.C. § 1231(b)(3)(B) ("[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime."). As a result, the IJ analyzed the particular crime that Kahric had committed to determine whether it was particularly serious. See Lapaix, 605 F.3d at 1143.

of discretion' arguments about how the BIA weighed the facts in the record" do not present "colorable" questions of law or constitutional claims).

B.

Kahric also raises a due process claim, which is a question of law that we have jurisdiction to consider. See 8 U.S.C. § 1252(a)(2)(D). He contends that the telephonic hearing the IJ conducted on April 2, 2019 deprived him of his due process rights under the Fifth Amendment because he had no counsel present when he admitted the charges of removal in the notice to appear. Procedural due process requires that a petitioner be given notice of the charges of removal and an opportunity to be heard. Resendiz-Alcaraz v. U.S. Att'y Gen., 383 F.3d 1262, 1272 (11th Cir. 2004). To prevail on his claim, Kahric must show that he was deprived of liberty without due process and that he was substantially prejudiced by the deprivation. See Lapaix, 605 F.3d at 1143. To show substantial prejudice, he must demonstrate that, absent the alleged violations, the outcome of the proceeding would have been different. Id.

Kahric's due process claim fails. He does not deny that he received notice of the charges against him and an opportunity to be heard. See Resendiz-Alcaraz, 383 F.3d at 1272. Nor can he show that, absent the alleged violations, the outcome of the proceeding would have been different. See Lapaix, 605 F.3d at 1143. At his first telephonic hearing, the IJ gave Kahric a continuance of nearly a month so that

he could retain counsel and clearly told him that at the next hearing they would discuss the notice to appear, even if he had not retained counsel by that time.

At that next hearing, Kahric said he had counsel but did not know his name. The IJ did not grant another continuance but instead went through the notice to appear, as he had told Kahric they would do. Kahric admitted the facts supporting the charges. Even after counsel appeared on his behalf, Kahric never challenged the factual basis for the charges, including his prior convictions. Nor does he challenge the fact of those convictions before this Court. The IJ did not deny Kahric due process; he received notice and an opportunity to be heard. See Resendiz-Alcaraz, 383 F.3d at 1272. Nor did he suffer any prejudice. He has not shown the outcome of the proceedings would have been any different without the alleged violation. See Lapaix, 605 F.3d at 1143. On his due process claim, we deny his petition.

C.

Kahric also contends that, even if he is not entitled to withholding of removal, he is entitled to deferral of removal based on CAT. The Supreme Court has recently determined that an order denying CAT protection is distinct from an order of removal. Nasrallah, 140 S. Ct. at 1692. The Court held that the criminal alien review bar in 8 U.S.C. § 1252(a)(2)(C), which applies to the review of final orders of removal, does not preclude judicial review of a noncitizen's factual

challenges to an order denying CAT protection. Id. at 1694. As a result, we have jurisdiction to consider Kahric's contentions about his entitlement to CAT protection, which are fact-based.

The substantial evidence standard of review applies to the decision that Kahric challenges, and under that standard the "agency's findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." Id. at 1692 (quotation marks omitted). To be eligible for CAT protection, an applicant must show "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). For an act to constitute torture, it must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity." Id. § 208.18(a)(1). "Acquiescence" requires showing that public officials are aware of torture and breach their legal responsibility to intervene to prevent it. See Lingeswaran v. U.S. Att'y Gen., 969 F.3d 1278, 1293 (11th Cir. 2020).

In assessing a CAT claim, the IJ or BIA may consider episodes of past torture, widespread human rights abuses within the proposed country of removal, and other relevant country conditions evidence. 8 C.F.R. § 208.16(c)(3). We have recognized that an IJ may "rely heavily on" country reports produced by the U.S. State Department. Gaksakuman v. U.S. Att'y Gen., 767 F.3d 1164, 1171 (11th

Cir. 2014) (quotation marks omitted); see also Rojas v. I.N.S., 937 F.2d 186, 190 n.1 (5th Cir. 1991) (noting that U.S. State Department reports are "the most appropriate and perhaps the best resource the Board could look to in order to obtain information on political situations in foreign nations"). Substantial evidence supports the finding that Kahric was ineligible for CAT protection because he failed to show that it was more likely than not that he would be tortured if removed to Bosnia. The IJ found that Kahric had been tortured in Bosnia more than twenty years ago during the Bosnian civil war when his hands were burned but also noted that the war had ended long ago and the country conditions had changed.

The IJ relied heavily on the 2018 country report, as he was entitled to do. See Gaksakuman, 767 F.3d at 1171. The IJ noted that the country report indicated that there were no recent reports that government officials had engaged in "tactics such as torture." The IJ also noted that Kahric's grandmother remained in Bosnia and that there was no evidence she was targeted for being Bosniak or for her family connection to Kahric's father. The IJ found that it was "speculative" to think that current government officials would torture, or consent or acquiesce to the torture of, Kahric "simply because of his last name." The IJ gave more weight to the country report than to Kahric's mother's testimony because she had not been to Bosnia recently and was not an expert on country conditions. The IJ found that

Kahric's mother's testimony "did not match up with" the current country report about the state of affairs in Bosnia.

The BIA found no clear error in those factfindings. It agreed with the IJ's finding that Kahric's mother was not qualified as an expert on Bosnian country conditions, pointing out that Kahric had presented no evidence of her qualifications. The BIA found that Kahric's contentions about anti-Muslim discrimination in Bosnia did not establish that it was more likely than not that he would be tortured if he returned there, and it noted the IJ's finding that Bosnia is a majority Muslim nation. The BIA agreed with the IJ's conclusion that the possibility of torture was "speculative."

Because the record does not compel the conclusion that the Bosnian government would consent or acquiesce to torturing Kahric, we deny his petition for review of the agency's denial of CAT protection.

PETITION DISMISSED IN PART, DENIED IN PART.