[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12544

Non-Argument Calendar

ANA DELMY MARTINEZ CHOTO,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A216-463-545

Before ROSENBAUM, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

Ana Delmy Martinez Choto seeks review of the Board of Immigration Appeals' ("BIA") order affirming the Immigration Judge's ("IJ") denial of her application for cancellation of removal under 8 U.S.C. § 1229b. After careful review, we deny the petition.

I.

Martinez Choto is a native and citizen of El Salvador who entered the United States in 2005 without admission or parole by an immigration officer. In August 2018, the Department of Homeland Security initiated removal proceedings against Martinez Choto, charging her as removable for being present in the United States without authorization. *See* 8 U.S.C. § 1182(a)(6)(A)(i). Through counsel, Martinez Choto admitted the allegations and conceded removability.

Martinez Choto applied for cancellation of removal for non-permanent residents. In her application, she indicated that her removal would result in exceptional and extremely unusual hardship to her son, J.A., a United States citizen born in 2012. In support of that contention, she submitted various documents, including (1) a 2019 psychological report finding that J.A. had Attention Deficit Hyperactivity Disorder ("ADHD"), as well as a developmental disorder of speech and language; (2) psychotherapy notes from a registered clinical social worker; (3) a biopsychosocial assessment from 2018 finding that J.A. had ADHD, combined type, and

recommending therapy; (4) information about ADHD from the National Institutes of Health; (5) a referral form for psychiatry; and (6) J.A.'s school records, which showed that he was below grade level in both language arts and mathematics and was also receiving accommodations in language arts. She also provided World Health Organization statistics regarding the availability of mental-health resources in El Salvador.

In February 2020, Martinez Choto appeared before an IJ and testified in support of her application. She stated that she had one child, J.A., who was seven years old at the time of her testimony. J.A. was diagnosed with ADHD in 2018, for symptoms including difficulty sleeping and following instructions, frustration when he does not see progress, and changing the subject "out of nowhere." For treatment, he had one-hour therapy sessions twice per month. He also took melatonin for difficulty sleeping and iron for an iron deficiency. He was in the second grade and was being evaluated for special-education placement because of his lagging progress. He could speak Spanish, which was the primary language spoken at home, but could not read or write it, and he received accommodations in school for his low English language proficiency.

Martinez Choto further testified that if she were removed to El Salvador, she would take J.A. with her and stay with her parents. She believed that, in El Salvador, she would not have enough money to continue his therapy treatment, and that he would not receive the benefits he currently received, like "education, health, [and] food."

After the parties presented argument on the issue of hardship to J.A., the IJ issued an oral decision denying Martinez Choto's application for cancellation relief and ordered her removal. The IJ said that cancellation of removal was appropriate only "where the facts demonstrate an exceptional and extremely unusual hardship to a qualifying family member," namely, her son. Citing *Matter of Monreal-Aguinaga*, 23 I. & N. Dec. 56 (BIA 2001), the IJ outlined the relevant analysis as follows:

> In determining whether [Martinez Choto] has satisfied the standard, the Court has considered all factors in the aggregate. Relevant factors include the ages, health, and circumstances of a qualifying relative. A strong applicant might have a qualifying child with very serious health issues or compelling special needs in school. A lower standard of living or adverse country conditions in the country of removal are relevant but are generally insufficient without more to constitute exceptional and extremely unusual hardship to a qualifying relative.

The IJ found that Martinez Choto, based on her testimony and documentary evidence, had not established that her son would experience hardship that rose to the level of exceptional and extremely unusual hardship as a result of her removal. The IJ found that J.A. had been diagnosed with ADHD, had sleep difficulties, an iron deficiency, and a developmental disorder of speech and language, and that he saw a clinical social worker twice per month for

therapy. But the IJ concluded that Martinez Choto had not shown that these conditions were not treatable, or that J.A.'s course of treatment was "not available in El Salvador." The IJ noted that, while there was evidence that "access to some therapy is more limited in El Salvador," the fact that medical facilities in El Salvador "may not be as good as they are in the United States [did] not itself establish exceptional and extremely unusual hardship to a qualifying relative."

Apart from the availability of treatment, the IJ considered the severity of J.A.'s condition. In the IJ's view, Martinez Choto had not established that J.A.'s condition "constitute[d] very serious health issues, or that his attention and behavioral disorders and apparent language issues have resulted in compelling special needs in [J.A.'s] education." The IJ noted that the "only special accommodation received by [J.A.] is related to English as a second language."

The IJ also evaluated J.A.'s adjustment to El Salvador more generally. She reasoned that, because J.A. spoke Spanish at home, there would be no extreme or unusual hardship in his readjustment to another language other than English, particularly in light of his young age. While the IJ acknowledged that J.A. would face difficulties adjusting to life in El Salvador, she concluded that they did not "substantially differ from those encountered [by] other children who relocate as a consequence of their parents' deportation." Finally, the IJ determined that Martinez Choto had failed to prove that she would face difficulties working and supporting her son in El Salvador beyond the typical "economic detriment due to

adverse country conditions in [El Salvador]." The "bottom line" for the IJ was that Martinez Choto had not established the "type of hardship that rises to the level of exceptional and extremely unusual or that . . . goes substantially beyond that which is to be expected.

Martinez Choto appealed the IJ's decision to the BIA. In her brief to the BIA, she argued that her case should be remanded for further consideration in light of *Matter of J-J-G-*, 27 I. & N. Dec. 808 (BIA 2020), which was issued shortly after the IJ's decision and which, in her view, clarified the appropriate standard for evaluating a claim of exceptional and extremely unusual hardship based on the medical condition of a qualifying relative. She otherwise argued that the IJ made factual and legal errors in evaluating her evidence.

In July 2023, the BIA dismissed the appeal and affirmed the order of removal. The BIA determined that Martinez Choto had not established clear error in the IJ's factual findings regarding the hardship her son would experience upon her removal, and that the IJ properly considered both the availability and quality of care in analyzing whether J.A. would experience the requisite level of hardship. Regarding *Matter of J-J-G-*, the BIA determined that the case did not articulate a new standard and that the IJ considered the seriousness of J.A.'s medical condition consistent with *Matter of J-J-G-*. The BIA determined that the totality of the evidence did not reflect that the hardship to J.A. would be "substantially beyond" the ordinary hardship that would be expected when a close family member leaves this country. Finally, the BIA found that remand

to consider *Matter of J-J-G-* was not warranted because the IJ considered evidence of the seriousness of J.A.'s medical conditions and the availability of care, and because Martinez Choto did not provide an explanation as to what additional evidence she would present on remand.

Martinez Choto timely petitioned this Court for review.

II.

We review the decision of the BIA only, except to the extent that the BIA expressly adopts or agrees with the IJ's opinion or reasoning. *Seck v. U.S. Att'y Gen.*, 663 F.3d 1356, 1364 (11th Cir. 2011). "We therefore review the IJ's opinion, to the extent that the BIA found that the IJ's reasons were supported by the record, and we review the BIA's decision, with regard to those matters on which it rendered its own opinion and reasoning." *Id.* (quotation marks omitted).

Section 1229b allows the Attorney General to cancel the removal of a noncitizen who demonstrates these four things: (1) continuous physical presence in the United States for at least ten years; (2) good moral character during that period; (3) a lack of certain criminal convictions; and (4) "exceptional and extremely unusual hardship" to a "spouse, parent, or child" who is a U.S. citizen or permanent resident. 8 U.S.C. § 1229b(b)(1).

Section 1252(a)(2)(B) states that we are barred from reviewing "any judgment regarding" certain forms of relief, including cancellation of removal under § 1229b. 8 U.S.C. § 1252(a)(2)(B)(i). But we retain jurisdiction to review "constitutional claims or questions

of law" raised in a petition for review. *Id.* § 1252(a)(2)(D). "[T]he statutory phrase 'questions of law' includes the application of a legal standard to undisputed or established facts," also referred to as mixed questions of law and fact." *Wilkinson v. Garland*, 601 U.S. 209, 217 (2024).

While this appeal was pending, the Supreme Court clarified in *Wilkinson* that "the application of the statutory 'exceptional and extremely unusual hardship' standard to a given set of facts presents a mixed question of law and fact" that is reviewable under § 1252(a)(2)(D).[1] *Id.* at 221. That remains true even if the case "requires a close examination of the facts." *Id.* at 222. Thus, our contrary precedent on this question has been overruled. *See Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219, 1222–23 (11th Cir. 2006) ("Notwithstanding Congress's enactment of § 1252(a)(2)(D), we continue to lack jurisdiction over the BIA's purely discretionary decision that a petitioner did not meet § 1229b(b)(1)(D)'s 'exceptional and extremely unusual hardship' standard.").

Nonetheless, "a court is still without jurisdiction to review a factual question raised in an application for discretionary relief." *Wilkinson*, 601 U.S. at 222. Thus, "an IJ's factfinding on credibility, the seriousness of a family member's medical condition, or the level of financial support a noncitizen currently provides remain unreviewable." *Id.* at 225. But "[w]hen an IJ weighs those found facts and applies the 'exceptional and extremely unusual hardship'

[1] At our request, the parties have submitted supplemental briefs addressing the effect of *Wilkinson* on this appeal.

standard, . . . the result is a mixed question of law and fact that is reviewable under § 1252(a)(2)(D)." *Id.* at 222. "Because this mixed question is primarily factual, that review is deferential." *Id.* at 225.

III.

"[T]he exceptional and extremely unusual hardship requirement is governed by BIA precedent." *Flores-Alonso v. U.S. Att'y Gen.*, 36 F.4th 1095 (11th Cir. 2022), *abrogated on other grounds by Wilkinson v. Garland*, 601 U.S. 209 (2024); *see Matter of J-J-G-*, 27 I. & N. Dec. 808 (BIA 2020); *Matter of Monreal-Aguinaga*, 23 I. & N. Dec. 56 (BIA 2001); *Matter of Andazola-Rivas*, 23 I. & N. Dec. 319 (BIA 2002); *Matter of Gonzalez Recinas*, 23 I. & N. Dec. 467 (BIA 2002). According to the BIA, the hardship to the applicant's qualifying relatives, if the applicant is forced to leave the United States, "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal*, 23 I. & N. Dec. at 62.

In assessing hardship, the BIA considers several factors, including the "ages, health, and circumstances" of qualifying relatives. *Id.* at 63. There is no "fixed definition of what constitutes exceptional and extremely unusual hardship," but the BIA has offered a few examples for guidance. *Flores-Alonso*, 36 F.4th at 1097. For instance, "an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case." *Matter of Monreal*, 23 I. & N. Dec. at 63. So too might an applicant who has a "qualifying child with very serious health issues, or compelling special needs in school." *Id.* But a "lower

standard of living or adverse country conditions in the country of return," while relevant to the inquiry, "generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship." *Id.* at 63–64. Nonetheless, "all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship." *Id.* at 64.

In *Matter of J-J-G-*, issued after the IJ's decision in this case, the BIA clarified the showing required for cancellation applications based on the health of a qualifying relative. *See* 27 I. & N. Dec. at 811–12. The BIA explained that an applicant basing a claim on the health of a qualifying relative "needs to establish that the relative has a serious medical condition and, if he or she is accompanying the applicant to the country of removal, that adequate medical care for the claimed condition is not reasonably available in that country." *Id.* at 811. Thus, the IJ must evaluate the "seriousness of a qualifying relative's medical condition and the reasonable availability of medical care in the country of removal." *Id.* Nonetheless, *Matter of J-J-G-* reiterated that the hardship determination is "based on a cumulative consideration of all hardship factors." *Id.*

Martinez-Choto alleges several interrelated errors based on *Matter of J-J-G-*. First, she says that the IJ and BIA applied a higher standard of proof than what *J-J-G-* demands, requiring her to show that J.A. had a "*very* serious medical condition," and that treatment was "not available," instead of a "serious medical condition" for which adequate treatment was "not reasonably available." Second, she claims that the BIA improperly reviewed for "clear error" the

legal determination of whether the IJ used an incorrect legal standard regarding the availability of treatment. Third, the BIA, in her view, made improper fact findings when it failed to remand for the IJ to apply the lower, revised legal standard. And fourth, she contends that the BIA abused its discretion by failing to follow its precedent in *Matter of J-J-G-*. All of these arguments are questions of law or mixed questions of law and fact that we have jurisdiction to review under § 1252(a)(2)(D). *See Wilkinson*, 601 U.S. at 221–22.

Nonetheless, Martinez Choto's overarching premise, that *Matter of J-J-G-* set forth a lower standard for cancellation applications based on the health of a qualifying relative, is misguided. *Matter of J-J-G-* did not state a new legal standard because it neither overruled nor conflicted with existing BIA precedent on the standard for exceptional and extremely unusual hardship. The discussion of the hardship standard in *Matter of J-J-G-* was the same as that in *Matter of Monreal*, which is evident because *Matter of Monreal* is quoted multiple times and the discussions of the relevant hardship standard were almost identical in both cases. *See Matter of J-J-G-*, 27 I. & N. Dec. at 811–14; *Matter of Monreal*, 23 I. & N. Dec. at 63–64. And *Matter of J-J-G-* reiterated that "[t]he exceptional and extremely unusual hardship for cancellation of removal is based on a cumulative consideration of all hardship factors." 27 I. & N. Dec. at 811–12. So while *Matter of J-J-G-* clarified aspects of a cancellation applicant's evidentiary burden, it did not change the "cumulative" analysis immigration judges apply in hardship cases or the ultimate standard applicants must meet. *See id.* at 814.

In short, we agree with the BIA that *Matter of J-J-G-* "did not articulate a new standard" for which remand to the IJ would be required on this record. As the BIA explained, the record shows that, consistent with *Matter of J-J-G-* and *Matter of Monreal*, the IJ considered and made findings about both the seriousness of J.A.'s medical condition and the availability of treatment in El Salvador as part of its cumulative hardship analysis. *See Matter of J-J-G-*, 27 I. & N. Dec. at 811, 814; *Matter of Monreal*, 23 I. & N. Dec. at 63. In particular, the IJ found that J.A. suffered from ADHD, for which he was receiving therapy from a clinical social worker twice per month, and that the only accommodation he received for this condition "was related to English as a second language," which would not be a problem in El Salvador since he spoke Spanish. And the IJ reasoned that the evidence did not show that J.A. would be unable to continue his treatment in El Salvador, even if "access to some therapy is more limited there." *See Matter of J-J-G-*, 27 I. & N. Dec. at 812 (finding "no indication that [the qualifying relative] will be unable to continue treatment if the respondent is removed"). Those factual matters are not within the scope of our review. *See Wilkinson*, 601 U.S. at 222.

Based on these and other findings, the IJ concluded that Martinez Choto had not established that her removal would result in hardship "substantially beyond that which is to be expected," the same standard applied in *Matter of J-J-G-*. *See* 27 I. & N. Dec. at 814 ("The hardship must be substantially different from, or beyond, that which would normally be expected from the deportation of [a noncitizen] with close family members here.") (quotation marks

omitted). Martinez Choto does not claim "that the facts of her case meet" the exceptional-and-extremely-unusual standard, and the IJ's determination strikes us as reasonable on its face. And we have otherwise rejected her argument that *Matter of J-J-G-* articulated a new standard warranting remand in this case. It follows that the BIA, in affirming the IJ's hardship determination, did not apply the wrong hardship standard, apply the wrong standard of review, make improper factual findings, or fail to follow its own precedent.

For these reasons, the BIA did not commit any legal error by adopting and affirming the IJ's denial of Martinez Choto's application for cancellation of removal without remanding for the IJ to consider *Matter of J-J-G-*.

PETITION DENIED.