NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-14299
Non-Argument Calendar

FIDEL ERNESTO ARMAS RIVERON,
VIENA MARTINEZ BERNAL,
MAURO DORTA MARTINEZ,
DEBORAH ARMAS MARTINEZ,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A220-647-623

Before JORDAN, LUCK, and KIDD, Circuit Judges.

PER CURIAM:

Fidel Ernesto Armas Riveron and his wife and minor children petition for review of the denial of their application for asylum; withholding of removal; and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The immigration judge denied relief because he found that the petitioners failed to show past persecution or a well-founded fear of future persecution, and the Board of Immigration Appeals affirmed. After careful review, we deny in part and dismiss in part the petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Armas Riveron, his wife Viena Martinez Bernal, and their two minor children are Cuban natives and citizens. They entered the United States without inspection in 2021. The Department of Homeland Security charged them with removability for being present in the United States without being admitted or paroled and for being present without proper entry documents. *See* 8 U.S.C. § 1182(a)(6)(A)(i), (a)(7)(A)(i)(I). They conceded removability.

Armas Riveron applied for asylum, withholding of removal, and relief under the Convention, asserting persecution on account of his political opinion. He included Martinez Bernal and their children as derivative applicants. Armas Riveron argued in his application that he and his family had been persecuted in Cuba and had a well-founded fear of future persecution because they participated in the Ladies in White opposition movement.

Before the merits hearing, Armas Riveron submitted evidence supporting his application, including statements from himself and Martinez Bernal about their political activities and treatment in Cuba; a police summons and warning he was sent regarding his participation in protests; a police citation Martinez Bernal received regarding her participation in protests; a Human Rights Watch report on the country conditions in Cuba; an Amnesty International article about the imprisonment of Cuban activists; and online articles describing the Ladies in White movement.

After hearing testimony from Armas Riveron and Martinez Bernal at the merits hearing, the immigration judge denied asylum because he found that they did not demonstrate past persecution, and they did not show a well-founded fear of future persecution. The immigration judge made an explicit adverse credibility finding against Armas Riveron and disregarded his testimony because he wrote notes on his palm and tried to erase them when caught and his testimony was ambiguous and unresponsive.

As for Martinez Bernal, the immigration judge found her credible and considered her testimony that the family had been surveilled, verbally harassed, and insulted by police and members of the Committees for the Defense of the Revolution (neighborhood-based networks that report on "counter-revolutionary activity"). The mistreatment started in 2019 after Armas Riveron and Martinez Bernal publicly voiced their opposition to the new constitution and voted "no" for it. Later that year, Martinez Bernal was

fired from her job at a government-run university, which she suspected was due to her vote, though she was never told why. Then, in 2021, the family participated in a march that deteriorated into violence—police shot "at the air" and hit people with clubs while protesters "flipped . . . police cars." The family left unharmed. Police sent them summonses and Committee members came to their door and chanted "nation or death." And a Cuban police captain threatened to send one of the family's children to a disciplinary school if the family did not stop their activities.

The family continued to protest despite the harassment, hanging white sheets from their balcony to signal their beliefs and intent to participate in another march. Eventually, however, fearing retaliation, they renewed their passports, obtained birth certificates for their children, and left Cuba. The police did not attempt to contact the family through their remaining family members in Cuba after their departure. And Armas Riveron's brother, who remained in Cuba, was able to obtain Armas Riveron's birth certificate after the family had fled to United States. Martinez Bernal also testified that she was never physically harmed in Cuba. She initially testified that a police captain had physically harmed her, but she later recanted.

Based on the totality of the circumstances, the immigration judge denied asylum and ruled that the record showed no "more than a few isolated incidents of verbal harassment and intimidation"—not past persecution. Nor did the family demonstrate an

objectively reasonable fear of future persecution—while "[i]ndependent media" and the Department of State 2023 Country Report on Human Rights Practices for Cuba described the government preventing political activists from leaving, the family was able to secure official travel and identification documents and left without issue. The family was not entitled to withholding of removal, which required a higher burden of proof, because they did not establish eligibility for asylum. And they weren't eligible for Convention relief because they established neither a likelihood of torture upon return to Cuba nor the Cuban government's consent or acquiescence to torture.

The family appealed the decision to the board, arguing that the "series of escalating events, occurring in close temporal proximity," established past persecution and a well-founded fear of future persecution. They also argued that the immigration judge "failed to provide a comprehensive and reasoned explanation for the denial of withholding of removal" because he did not "adequately address[] the corroborating evidence" and failed to consider the "cumulative effect" of the persecution. They did not make any arguments on entitlement to relief under the Convention.

The board dismissed the appeal and affirmed the immigration judge's decision. The board agreed that based on the "totality of the circumstances . . . the harm suffered . . . did not amount to the type of extreme conduct required to amount to persecution" and concluded that the adverse credibility finding was not clearly

erroneous. Nor did the family show a well-founded fear of future persecution. "In light of these dispositive findings," the board did not reach the family's remaining asylum-eligibility arguments. Because Armas Riveron had not met the lower standard for asylum eligibility, he necessarily did not meet the higher standard required for withholding of removal. And the family had waived their Convention-relief claim, having made no "meaningful arguments on appeal challenging the [i]mmigration [j]udge's denial of [their] application for [Convention] protection."

STANDARD OF REVIEW

We review the decision of the board and only review the decision of the immigration judge to the extent that the board expressly adopted or agreed with that decision. *Hasan-Nayem v. U.S. Att'y Gen.*, 55 F.4th 831, 842 (11th Cir. 2022). We review legal conclusions de novo and factual findings, including credibility determinations, for substantial evidence. *Id.* "As to credibility determinations, the trier of fact must determine credibility, and this court may not substitute its judgment for that of the [board] and immigration judge." *Id.* at 843 (citation modified). Under the substantial evidence standard, we will not disturb factual findings "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Id.* at 842 (citation modified). We "view the record evidence in the light most favorable to the [board]'s decision and draw all reasonable inferences in favor of that decision." *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc). We may grant relief "only if the record compels reversal, and the

mere fact that the record may support a contrary conclusion is insufficient to justify reversal." *Hasan-Nayem*, 55 F.4th at 842 (citation modified).

DISCUSSION

The family challenges the denial of their asylum and Convention-relief claims.[1] We address each of them in turn.

Asylum Claim

The family first argues that the board's decision to deny their asylum application isn't supported by substantial evidence. In addition to reiterating the record evidence, they insist that Martinez Bernal was physically injured.

To establish eligibility for asylum, an applicant must establish, with specific and credible evidence, past persecution or a well-founded fear of future persecution on account of a statutorily protected ground including, as relevant here, one's political opinion. *See Diallo v. U.S. Att'y Gen.*, 596 F.3d 1329, 1332 (11th Cir. 2010). Persecution is an "extreme concept" that requires "more than a few isolated incidents of verbal harassment or intimidation." *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1229, 1231 (11th Cir. 2005) (citation modified) (holding that menacing phone calls and death threats to an applicant, her brother, and other members of a student group did not compel a finding of persecution where the applicant's

[1] The petition also mentions the denial of withholding of removal, but there is no argument. So, the withholding issue is forfeited. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014).

workplace was bombed); *see, e.g.*, *Silva v. U.S. Att'y Gen.*, 448 F.3d 1229, 1233–34, 1237 (11th Cir. 2006) (holding a death threat and threatening anonymous phone calls, without more, were merely harassment); *Djonda v. U.S. Att'y Gen.*, 514 F.3d 1168, 1171, 1174 (11th Cir. 2008) (holding a minor beating and 36-hour detention, with threat of future imprisonment, did not compel finding of past persecution). In determining whether an applicant has suffered past persecution, we must consider the cumulative mistreatment the petitioner suffered. *De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999, 1008 (11th Cir. 2008).

A well-founded fear of future persecution may be established by showing: (1) past persecution, which creates a rebuttable presumption of a well-founded fear of future persecution; (2) a reasonable possibility of being singled out for persecution on account of a protected ground that cannot be avoided by relocating within one's home country; or (3) a pattern or practice in that country of persecuting people that share the same protected ground, such that the applicant faces a reasonable possibility of being persecuted. 8 C.F.R. § 1208.13(b)(1), (2); *see I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). The fear must be subjectively genuine and objectively reasonable. *Mehmeti v. U.S. Att'y Gen.*, 572 F.3d 1196, 1200 (11th Cir. 2009). "[O]nly in a rare case does the record compel the conclusion that an applicant for asylum suffered past persecution or has a well-founded fear of future persecution." *Silva*, 448 F.3d at 1239.

Substantial evidence supported the board's past-persecution and well-founded-fear-of-future-persecution findings. As to past persecution, no one in the family suffered any physical harm and the only mistreatment reported consisted of insults; verbal threats that were never followed up on; and a handful of official summonses and warnings. Martinez Bernal admitted she did not know why she was fired. And her claim of physical injury is belied by the record—she recanted that testimony upon further questioning by the immigration judge. Together, these instances of threats and intimidation are insufficient to compel a finding of past persecution. *See Sepulveda*, 401 F.3d at 1230–31; *Adefemi*, 386 F.3d at 1027.

Substantial evidence also supports the finding that the family failed to establish a well-founded fear of future persecution. While their fear may have been subjectively genuine, it was not objectively reasonable. *See Mehmeti*, 572 F.3d at 1200. Armas Riveron and his family remained in Cuba for multiple years through the harassment and continued engaging in political activism; were able to secure passports and birth certificates; and were allowed to leave without incident. After the family's departure, the police did not harm the family members who remained in Cuba. *See Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1259 (11th Cir. 2006) (explaining that the fear of persecution is undercut where the applicant's family continued to live "unharmed" in the home country). And the board reasonably concluded that, though "the Cuban government restricts the departure from the country of activists, . . . its choice not to do so in this case indicated a lack of interest in the [family]." The record does not compel a different conclusion.

Convention-Against-Torture Claim

The family next contends the board erred in denying them relief under the Convention, referring to record evidence that they say supports the risk of torture and government acquiescence. But the Convention-relief claim was not exhausted.

To be eligible for Convention relief, an applicant "must meet a higher burden than for asylum eligibility, and show that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." *Lingeswaran v. U.S. Att'y Gen.*, 969 F.3d 1278, 1293 (11th Cir. 2020) (citation modified). The Convention protects against torture inflicted by, instigated by, or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 1208.18(a)(1) (2020).[2] Acquiescence of a public official requires that the public official was aware of the actions constituting torture "prior to" the actions and "thereafter breach[ed] his or her legal responsibility to intervene." *Id.* § 1208.18(a)(7).

To obtain review of a final order of removal, however, an applicant must have exhausted his administrative remedies.

[2] Amendments to the rule have been (and remain) enjoined. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 80,398 (Dec. 11, 2020) (adding to the rule language that the official also must be "acting in an official capacity"); *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021) (enjoining the amended rule in a preliminary injunction that has not been lifted). Although it doesn't affect our analysis, we cite the regulatory language as it existed prior to the promulgation of the now-enjoined rule.

8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right."). Though non-jurisdictional, exhaustion is a mandatory "claim-processing rule." *Santos-Zacaria v. Garland*, 598 U.S. 411, 419, 423 (2023).

The family failed to exhaust their claim for Convention relief. Before the board, they argued only about their asylum and withholding-of-removal claims. They made no mention of the immigration judge's finding that no torture was likely to occur, much less that any government official would consent or acquiesce to torture. Accordingly, the board determined the issue was waived. Because the government argues the failure to exhaust, and Armas Riveron made no argument on appeal as to the board's finding of waiver, we enforce the rule and dismiss the petition as to the Convention claim. *See Kemokai v. U.S. Att'y Gen.*, 83 F.4th 886, 891 (11th Cir. 2023) ("The government argues [on appeal] . . . that . . . [the applicant] failed to exhaust his challenge before the [board]. . . . [Exhaustion] is generally applied where, as here, it has been asserted by a party.").[3]

[3] In any event, because the family failed to establish eligibility for asylum, they necessarily failed to establish eligibility for relief under the Convention. *See Forgue v. U.S. Att'y Gen.*, 401 F.3d 1282, 1288 n.4 (11th Cir. 2005) ("Because [the applicant] has failed to establish a claim of asylum on the merits, he necessarily fails to establish eligibility for . . . protection under [the Convention].").

CONCLUSION

For these reasons, we **DENY IN PART** and **DISMISS IN PART** the petition.