IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUBEN PEREZ-SCARPATO, Petitioner	:	CIVIL ACTION
v.	:	
TOM RIDGE, et al, Respondents	:	NO. 04-4920

MEMORANDUM

Gene E.K. Pratter, J. December 22, 2004

Petitioner, Ruben Perez-Scarpato, filed a Petition for Writ of Habeas Corpus and Stay of Removal on October 20, 2004. The Court issued an Order on October 21, 2004 Enjoining Removal until this matter is decided. The Government's Response was timely filed on November 10, 2004. After reviewing the Petition, the Government's Response, and the decisions of the Immigration Judge and the Board of Immigration Appeals, the Court finds that this matter should be remanded to the Board of Immigration Appeals for further consideration.

BACKGROUND

Petitioner Perez-Scarpato ("Mr. Perez"), 45 years old, is a native and citizen of Argentina. Mr. Perez entered the United States as a lawful permanent resident on October 12, 1963, when he was four years old. On January 5, 2000, Mr. Perez pleaded guilty and was convicted in the District of New Jersey of conspiracy to distribute heroin. He received a sentence of five years (60 months).

On May 11, 2000, the Department of Homeland Security ("DHS") issued Mr. Perez a

Notice to Appear (NTA), charging him with removability pursuant to the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) and pursuant to 8 U.S.C. § 1227(a)(2)(B)(i), as an alien who has been convicted of a violation of a controlled substance law.

Mr. Perez basically conceded his removability by neither admitting or denying it, but admitting the four allegations in the NTA ((1) not a citizen; (2) citizen of Argentina; (3) admitted to the United States as an immigrant; and (4) on January 5, 2000, Mr. Perez was convicted of conspiracy to distribute narcotics in violation of 21 U.S.C. § 846 and his term was 60 months). The Immigration Court sustained both charges of removability. However, on April 22, 2004, Immigration Judge Charles M. Honeyman ("IJ") denied Mr. Perez's applications for asylum and withholding of removal, but granted his deferral of removal pursuant to the Convention Against Torture.

The Government filed a timely appeal to the IJ's decision, and the Board of Immigration Appeals ("BIA") reviewed the decision. On September 30, 2004, the BIA issued a decision sustaining the Government's appeal and denying the deferral of removal. One member of the three member Board dissented from the decision.

STANDARD OF REVIEW

Federal district courts have jurisdiction over constitutional claims raised in habeas corpus petitions. Chmakov v. Blackman, 266 F.3d 210, 216 (3d Cir. 2001). However, the district courts can only rule on questions of law, not review the factual determinations or discretionary decisions of the Attorney General. See INS v. St. Cyr, 533 U.S. 289, 306 (2001) ("[T]he courts generally did not review factual determinations made by the Executive. However, they did

review the Executive's legal determinations." (citations omitted)).

LEGAL BACKGROUND

Under 8 U.S.C. § 1227(a)(2)(A)(iii), an "alien who is convicted of an aggravated felony at any time after admission" is removable. "Aggravated felony" includes illicit trafficking in a controlled substance (as defined in 21 U.S.C. § 802), including a drug trafficking crime (as defined in 18 U.S.C. § 924(c)(2)). 8 U.S.C. § 1101(a)(43)(B). Additionally, under 8 U.S.C. § 1227(a)(2)(B)(i), an alien is removable if, after admission, he or she is convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [21 U.S.C. § 802]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana."

The term "drug trafficking crime" includes "any felony punishable under the Controlled Substance Act (21 U.S.C. §§ 801 *et seq.*)." 18 U.S.C. § 924(c)(2). Under the Controlled Substances Act, 21 U.S.C. § 802(13), a felony is defined as "any Federal or State offense classified by applicable Federal or State law as a felony." In the current case, Mr. Perez was convicted of conspiracy to distribute narcotics (heroin) under 21 U.S.C. § 846, which subjects a person convicted of a conspiracy under this subsection to the same penalty as the crime conspired to be committed, namely distributing narcotics (heroin) pursuant to 21 U.S.C. § 841(a)(1). Distribution of narcotics (heroin) is a felony. 21 U.S.C. § 841.

Under 8 U.S.C. § 1231(b)(3), an alien cannot be removed to a country "if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." However, this protection does not apply to aliens convicted of a particularly serious crime, which

include any “aggravated felony” with a term of imprisonment of at least five years. 8 U.S.C. § 1231(b)(3)(B). Furthermore, drug trafficking crimes are considered particularly serious crimes within the meaning of 8 U.S.C. § 1231(b)(3)(B)(ii). Matter of Y-L-, 23 I. & N. Dec. 270, 274 (2002).

Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (hereinafter “Convention Against Torture”), no nation shall remove a person to another nation “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture, Art. 3. To effectuate this requirement, the Department of Homeland Security has promulgated a regulation allowing for a deferral of removal (where withholding removal is not allowed as discussed above) if it is determined that the alien is “more likely than not” to be tortured if removed. 8 C.F.R. § 208.16(c)(4). The deferral remains in effect until terminated, such as when or if the Immigration Court determines that it is no longer “more likely than not” that the alien would be tortured. 8 C.F.R. § 208.17(b)(2).

The burden of showing that it is more likely than not that torture will occur is on the applicant. 8 C.F.R. § 208.16(c)(2). For purposes of this analysis, the applicant must show that the torture was inflicted by the instigation of, 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)(6).

To satisfy this burden, the applicant can rely on uncorroborated testimony, as long as the Immigration Court finds the testimony to be credible. Matter of Y-B-, 21 I. & N. Dec. 1136, 1149-50 (1998). In making the determination of the likelihood of torture, the Immigration Court must consider all relevant evidence, including: evidence of past torture; evidence that the

applicant could relocate to a safer area of the country to avoid torture; and evidence of mass violations of human rights. 8 C.F.R. § 208.16(c)(3).

IJ'S DECISION

Initially, the IJ found that Mr. Perez was removable under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), since he has a conviction for conspiracy to distribute narcotics (heroin) in violation of 21 U.S.C. § 846. This crime falls within the definition of an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) and 8 U.S.C. § 1227(a)(2)(B)(i). Furthermore, the IJ found the conviction at issue was for a "particularly serious crime," since it had a term of imprisonment of five years and it involved a drug trafficking crime. Thus, the IJ found Mr. Perez ineligible for asylum and withholding of removal. However, the IJ found that Mr. Perez was eligible for deferral of removal and had met the burden of showing that it was more likely than not that he would be tortured if removed to Argentina.

The IJ relied heavily on the testimony of Michael Levine, an expert witness, who was an agent in the Drug Enforcement Agency stationed in Argentina from December 1978 to January 1982. Since retiring in 1990, Levine has written three books about police corruption in Argentina and testified to keeping abreast of the situation in Argentina. Levine painted an unpleasant picture of Argentinian police randomly stopping people and, upon discovering they were involved with drugs, arresting them on pretextual charges and then torturing the person until they provided the location of the drugs or money. Levine testified that there is a high probability that Mr. Perez would meet with this fate if he was deported to Argentina.

The IJ recognized that the Attorney General requires that the alien demonstrate that government officials are accepting of tortuous activities, and not simply "rogue agents engaging

in extrajudicial acts of brutality." Matter of Y-L-, 23 I. & N. Dec. 270, 283 (2002).[1] The IJ found that, although officially Argentina does not condone the actions of their police, the failure of the Argentinian government to root out the pervasive and widespread problem is equivalent to the government's consent to the torturous activity.

The IJ also addressed the various reports of the State Department. According to the State Department, it was highly speculative that Mr. Perez would be tortured if removed to Argentina. The IJ focused on the internal inconsistencies within the reports, which recognized widespread corruption within and brutality by the Argentinian police, but still determined that Mr. Perez's theory was speculative. Furthermore, the State Department reports were contradicted by the testimony of Mr. Levine and various reports of human rights organizations, including Amnesty International. Therefore, the IJ found that the State Department reports did not accurately reflect the dangers to Mr. Perez.

DECISION OF BOARD OF IMMIGRATION APPEALS

The BIA found Mr. Perez failed to meet his burden of showing that it was more likely than not that he would be tortured if he was returned to Argentina. The BIA recognized that Argentina had a poor human rights situation, but found that Mr. Perez failed to "provide sufficient credible evidence to establish that it is more likely than not that he, as a criminal

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[1] This opinion was disagreed with by the Court of Appeals for the Ninth Circuit in Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003), which reasoned that the standard the Attorney General used in this case was higher than intended by the Senate in approving the Convention Against Torture, and a foreign government's "willful blindness" to the torture of their citizens would be enough to satisfy the requirement that the torture have government involvement. Id. at 1196 (citing Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 355 (5th Cir. 2002)); 8 C.F.R. § 1208.18(a)(6). However, since the IJ in this matter found that the Argentinian government has tacitly consented to the torture committed by its police force, the Court does not feel it needs to address this dispute.

deportee, will be detained upon his return to Argentina." The BIA discounted the testimony of Levine as appearing "to be based upon a speculative chain of assumptions; rather than substantial evidence in the record." Finally, the BIA was critical of the IJ's failure to give greater weight to the State Department reports.

One member of the three member BIA panel dissented. His one paragraph dissent simply argued that the Board made a *de novo* review of the record, when the proper review was to determine if the IJ's "conclusion is supported by fact-finding that has not been shown to be clearly erroneous."

PETITION FOR WRIT OF HABEAS CORPUS AND THE RESPONSE

Mr. Perez makes three arguments supporting his petition: (1) the BIA used a *de nova* standard of review in reviewing the decision of the IJ, when the proper standard of review was whether the IJ's conclusions were clearly erroneous; (2) the BIA applied a higher burden of proof than is actually required by the more-likely-than-not requirement in federal regulations; and (3) the BIA denied Mr. Perez's due process right by failing to give meaningful review of the evidence in the record.

Standard of Review

Mr. Perez cites to 8 C.F.R. § 1003.1(d)(3), which states:

(3) Scope of Review

(i) The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the Immigration Judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

Mr. Perez argues that the BIA's review here is clearly *de novo*. Specifically, the majority

of the BIA found that the decision of the IJ was based upon speculation of a "chain of evidence," but the BIA did not address the findings of fact of the IJ that credited Levine and called into question the State Department reports. In fact, the BIA found the State Department reports should have been given more weight.

The Government does not dispute that the correct standard of review is "clearly erroneous," but argues the BIA applied this standard. Citing Anderson v. Bessemer City, 470 U.S. 564 (1985), the Government argues that clearly erroneous means "although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." Id. at 573 (defining "clearly erroneous" as applied in a matter relating to Federal Rule of Civil Procedure 52(a)). Specifically, the Government argues the BIA found the IJ had made a mistake in giving more weight to Levine's testimony than to the reports of the State Department.

Although it is certainly within the discretion of the BIA to find that the IJ's decision is "clearly erroneous," the decision by the BIA before the Court does not appear to make this finding. Instead, the BIA seemed to have undertaken an independent review of the record, making its own evaluation of credibility of the evidence presented to the IJ. In fact, the BIA seemed to discount the weight that the IJ placed on the testimony of Levine. The BIA argued that Levine's testimony was "based on a speculative chain of assumptions," but the BIA failed to state why the IJ's decision to rely on this "speculative chain" was clearly erroneous.

Furthermore, the BIA failed to address in any significant manner why the IJ's expressed concerns over the State Department reports were clearly erroneous. In fact, the BIA seems to simply rely on one of these reports, the Advisory Opinion from the United States Department of

State's Bureau of Democracy, Human Rights, and Labor, which stated that there were no known instances where deported drug dealers were targeted. However, the IJ discussed this very report, and this specific language, but found it unpersuasive, especially considering the Advisory Opinion itself stated that "corruption was systemic within some police forces, and police were often involved in drug trafficking and kidnapping."

The Court finds the BIA had inappropriately undertaken an independent review of the record, rather than a review of the IJ's opinion to determine if it was clearly erroneous. This independent review is not the proper role for the BIA, and this matter must be remanded for the BIA to undertake another review of the IJ's decision applying the "clearly erroneous" standard of review.

Because this matter is remanded to the BIA, the Court finds that Mr. Perez's remaining arguments are now moot. Therefore, the Court will not address Mr. Perez's remaining arguments in his Petition.

CONCLUSION

For the foregoing reasons, the Court remands this matter to the Board of Immigration Appeals. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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O R D E R

Gene E.K. Pratter, J. December 22, 2004

AND NOW, this 22d day of December, 2004, upon consideration of the Petitioner Ruben Perez-Scarpato's Petition for Writ of Habeas Corpus (Docket No. 1) and the Respondents' Brief in Opposition to Habeas Petition (Docket No. 4), it is hereby ORDERED that this matter is REMANDED to the Board of Immigration Appeals for further proceedings consistent with this Memorandum and Order.

It is also ORDERED that this matter should be placed in SUSPENSE pending the Board of Immigration Appeals issuance of a new decision.

It is further ORDERED the Court's October 21, 2004 Order enjoining removal of the Petitioner Ruben Perez-Scarpato continues in effect until further order of this Court.

BY THE COURT:

/S/________________________
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE