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Martinez De Artiga v. Barr

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term 2019

6
7 (Argued: January 8, 2020

Decided: June 10, 2020)

8
9 Docket No. 17-2898-ag

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11
12 PATRICIA XIOMARA MARTINEZ DE ARTIGA, NOE
13 ANTONIO ARTIGA MARTINEZ,

14 *Petitioners,*

15
16 *v.*

17
18 WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL,

19 *Respondent.*
20
21

22
23 Before: KEARSE, CALABRESI, and POOLER, *Circuit Judges.*
24

25 Patricia Xiomara Martinez De Artiga challenges the denial of her
26 application for asylum, withholding of removal, and protection under the
27 Convention Against Torture (CAT). Martinez listed her son as a derivative
28 beneficiary on her application. The Immigration Judge (IJ) found that Martinez
29 testified credibly regarding serious, individualized threats against her and her
30 children by the infamous Mara Salvatrucha (MS-13) gang. Nevertheless, the IJ
31 denied Martinez's claims for asylum and withholding, concluding that the
32 gang targeted Martinez because she had frustrated the gang's recruitment
33 efforts and not on account of membership in her son's family. On the issue of
34 CAT protection, the IJ determined that Martinez failed to meet her burden for
35 relief because she fled El Salvador promptly after MS-13 threatened her. We
36 hold that the IJ erred as a matter of law when it penalized Martinez for her

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1 prompt flight, and we cannot confidently predict that a remand would be
2 futile. We therefore DENY the government's motion for summary denial,
3 GRANT Martinez's petition for review, and REMAND the case. Judge Kearse
4 dissents in a separate opinion.

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6

7 REBECCA R. PRESS, UnLocal, Inc., Community Immigration Legal
8 Services, New York, NY, *for Petitioners*.

9 EVAN P. SCHULTZ, Trial Attorney (Joseph H. Hunt, Assistant
10 Attorney General; Stephen J. Flynn, Assistant Director, *on the*
11 *brief*), Office of Immigration Litigation, U.S. Department of
12 Justice, Washington, D.C., *for Respondent*.

13

14

15 CALABRESI, *Circuit Judge*:

16 Petitioner Patricia Xiomara Martinez De Artiga is a citizen of El
17 Salvador. Martinez seeks relief from threats to her and her children's
18 lives by the infamous Mara Salvatrucha (MS-13) gang. She applied for
19 asylum, withholding of removal, and protection under the Convention
20 Against Torture (CAT) and listed her son Noe Antonio Artiga Martinez
21 as a derivative beneficiary. Martinez testified credibly concerning
22 serious, individualized threats against her and her children. The
23 Immigration Judge (IJ) denied CAT relief due to Martinez's prompt
24 flight from El Salvador following the gang's threats and the fact that

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1 there had been no physical harm prior to her flight. The BIA affirmed. It
2 was error for the IJ to penalize Martinez in this manner, and we cannot
3 confidently predict that a remand would be futile. We therefore **DENY**
4 the government's motion for summary denial, **GRANT** Martinez's
5 petition for review, and **REMAND** the case to the BIA for further
6 proceedings consistent with this opinion. Judge Kearse dissents in a
7 separate opinion.

8 **I.**

9 In June 2014, members of MS-13 targeted Martinez's son Noe as a
10 potential new recruit. Gang violence in El Salvador was pervasive at that
11 time (and still is) due to the rise of two warring groups, MS-13 and
12 Barrio-18 (B-18), both of which trace their origins to Southern California.
13 Their tactics are brutal and well-documented. Certified Administrative
14 Record (CAR) at 219–303.

15 Gang members first approached Noe, then 10 years old and in the
16 fifth grade, outside of his school in San Bartolomé Perulapía. They asked
17 Noe to sell drugs inside the school and to demand money from others
18 on behalf of the gang. When Noe refused the gang members' requests,

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1 they told him that they would kill him and his family. CAR at 113–14,
2 169, 176. After this initial confrontation, the gang members threatened
3 Noe several times each week in front of his school. *Id.* at 176.

4 Around the same time, the school’s principal held a meeting with
5 parents to discuss threats against at least two other students in
6 connection with MS-13’s recruitment efforts. Police officers were
7 stationed in front of the school for a short period as a result of the
8 meeting. Gang members returned to the front of the school after the
9 police left.

10 It was at this point that Martinez began escorting Noe to and from
11 school in order to protect him. CAR at 122–23, 169. Martinez arranged
12 with the principal to pick up Noe at the rear entrance of the school. She
13 was able to avoid the gang members for a short time.

14 Approximately two weeks later, gang members confronted
15 Martinez outside her home. CAR at 123–24, 169. They told Martinez that
16 they knew she was protecting Noe and that they would kill Martinez
17 and Noe if Noe did not join MS-13. *Id.* at 124, 169. One of the gang
18 members displayed a knife. *Id.* at 124–25, 169.

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1 That same day, Martinez gathered her children to discuss what
2 had happened. CAR at 124. She decided that she would flee with Noe.
3 They left for the United States within a week. *Id.* at 125. As Martinez
4 explained before the IJ, she took the gang members' threats seriously
5 because she knew "the way that they punish people" and that "they
6 always follow through with their threats." *Id.* at 115, 131.

7 Documents submitted by Martinez to the IJ include a report by
8 the United Nations High Commissioner for Refugees (UNHCR)
9 describing how MS-13 and B-18 target children for recruitment and
10 punish their families for resisting. CAR at 292–93, 299. Martinez also
11 submitted news reports attesting to the particularly high frequency of
12 gang violence in San Bartolomé Perulapía and the surrounding area of
13 Cuscatlán. *Id.* at 160–61, 198–217. Martinez provided the IJ with death
14 certificates for two people she identified as neighbors of hers whom MS-
15 13 had murdered. *Id.* at 192–96. The IJ, however, citing one of the news
16 reports Martinez supplied, questioned whether the deceased might
17 have been members of rival gangs. *Id.* at 53, 119.

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1 Martinez and Noe arrived in the United States in July 2014 after
2 crossing the border without inspection at or near Eagle Pass, Texas. CAR
3 at 348, 362. Agents of the Department of Homeland Security permitted
4 them to reunite with family members in New York.

5 Within months, the gang members began to harass Martinez's
6 daughter Gabriela verbally in an attempt to determine Martinez and
7 Noe's whereabouts. CAR at 158. The gang members' threats included
8 telling Gabriela that they would force her to be a "sex slave" if she
9 refused to divulge her family members' locations. *Id.*

10 This harassment culminated in a particularly frightening episode.
11 In September 2016, a group of gang members blocked Gabriela's path
12 on her way home and ordered her to accompany them to a forested area
13 controlled by MS-13. CAR at 49, 158. They brandished knives and told
14 Gabriela, who was pregnant at the time, that if she did not comply they
15 would kill her and cut her child out of her body. *Id.*

16 Fortuitously, a relative of Gabriela's happened to be walking
17 nearby. CAR at 49, 158. He called out to Gabriela and told her that her
18 grandmother did not like her walking alone. *Id.* The gang members

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1 indicated to Gabriela that she should not tell anyone about the incident
2 and permitted her to leave. *Id.* at 158.

3 That very same night, Gabriela made plans to flee El Salvador and
4 stayed at her sister's home. She left the country the next day. CAR at 49,
5 158. Gabriela stated in an affidavit submitted to the IJ that she believes
6 the MS-13 members would have raped and killed her if she had followed
7 them to the forested area. *Id.* at 158.

8 **II.**

9 DHS served Martinez and Noe with Notices to Appear upon their
10 arrival in the United States on July 19, 2014 and filed these notices in
11 Immigration Court on November 21, 2014. CAR at 348–49, 362–63.
12 Martinez applied for asylum, withholding of removal, and CAT
13 protection on July 16, 2015, listing Noe as a derivative beneficiary. *Id.* at
14 306-14.

15 Appearing without counsel, Martinez admitted at a preliminary
16 hearing on October 7, 2015, that she had entered the country without
17 lawful authorization. CAR at 86–87. At a merits hearing on November
18 16, 2016, and with the assistance of counsel, Martinez testified before the

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1 IJ. *Id.* at 48, 103–37. She also submitted extensive documentary evidence.

2 *Id.* at 151–303.

3 The IJ found Martinez to be credible and noted that her testimony
4 “was detailed, plausible, internally consistent, and consistent with her
5 documentary evidence.” CAR at 49–50. The IJ added that Martinez
6 “sufficiently corroborated her testimony, including her submission of
7 statements from her three children and mother.” *Id.* at 50. Nonetheless,
8 in an unpublished decision issued on January 19, 2017, the IJ denied all
9 forms of relief sought by Martinez.

10 The IJ rejected Martinez’s claims for asylum and withholding,
11 concluding that Martinez failed to demonstrate a nexus between the
12 persecution she alleged and a protected ground. CAR at 50–52. An
13 applicant for asylum “must establish that race, religion, nationality,
14 membership in a particular social group, or political opinion was or will
15 be at least one central reason for persecuting the applicant.” 8 U.S.C. §
16 1158(b)(1)(B)(i). Likewise, a person seeking withholding of removal
17 must show that his or her “life or freedom would be threatened in that
18 country *because of* the alien’s race, religion, nationality, membership in a

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1 particular social group, or political opinion.” *Id.* § 1231(b)(3)(A)
2 (emphasis added). Assuming without deciding that Noe’s nuclear
3 family is a cognizable social group, the IJ concluded that MS-13 had not
4 targeted Martinez on account of her membership in this group. CAR at
5 50. The IJ acknowledged that Martinez protected Noe from MS-13
6 “because she is Noe’s mother,” but determined that “it was not
7 Respondent’s status as a member of Noe’s nuclear family that the gang
8 wanted to overcome, but her interference with the gang’s recruitment
9 efforts.” *Id.* at 50–51.

10 As to CAT protection, the IJ identified two sets of reasons for
11 denying relief. First, the IJ observed that Martinez “was only threatened
12 once before leaving El Salvador,” that “[s]he was never physically
13 harmed by MS-13,” and that “Gabriela and Noe were also threatened,
14 but not physically harmed.” CAR at 53. Second, the IJ determined that
15 Martinez failed to establish that her neighbors had been killed for
16 interfering with MS-13’s recruitment efforts. *Id.*

17 The BIA affirmed the IJ’s denial of relief in a single-member
18 decision on August 24, 2017. CAR at 2–3. The Agency agreed with the IJ

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1 that asylum and withholding were not available because “the gang’s
2 motivation was found to be to increase its ranks and not to punish the
3 respondent because she is a member of her son’s family.” *Id.* at 2. On the
4 issue of CAT protection, the Agency did not specify reasons for
5 affirming beyond stating that Martinez and Noe had “not met their
6 burden of proof.” *Id.*

7 After Martinez petitioned our Court for review, the government
8 moved for summary denial. Dkt # 1, 38. A member of our Court, sitting
9 on the non-argument calendar panel, transferred this case to our regular
10 argument calendar. Dkt #61. Following transfer, the government
11 renewed its motion for summary denial. Dkt # 93.

12 **III.**

13 **A.**

14 We discuss Martinez’s claim for CAT protection first. An
15 applicant for CAT relief bears the “burden of proof . . . to establish that
16 it is more likely than not that he or she would be tortured if removed to
17 the proposed country of removal.” 8 C.F.R. § 208.16(c)(2). Torture means
18 “any act by which severe pain or suffering, whether physical or mental,

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1 is intentionally inflicted on a person . . . by or at the instigation of or with
2 the consent or acquiescence of a public official or other person acting in
3 an official capacity.” *Id.* § 208.18(a)(1). Severe pain or suffering includes
4 “prolonged mental harm caused by or resulting from . . . [t]he threat of
5 imminent death.” *Id.* § 208.18(a)(4)(iii).

6 We review the IJ’s findings of fact for substantial evidence,
7 *Gurung v. Barr*, 929 F.3d 56, 60 (2d Cir. 2019), and “administrative
8 findings of fact are conclusive unless any reasonable adjudicator would
9 be compelled to conclude to the contrary,” 8 U.S.C. § 1252(b)(4)(B).
10 Findings of fact include determinations regarding the likelihood of
11 future events. *Hui Lin Huang v. Holder*, 677 F.3d 130, 134 (2d Cir. 2012).
12 But for the IJ or BIA to rule categorically that certain facts preclude CAT
13 protection may be erroneous as a matter of law. When such an error is
14 made, a remand is required unless remanding would be futile. *Gurung*,
15 929 F.3d at 62 (citing *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943), and *Li*
16 *Hua Lin v. U.S. Dep’t of Justice*, 453 F.3d 99 (2d Cir. 2006)). That is, we can
17 only avoid a remand where there has been an error of law if we are

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1 “confident that the agency would reach the same result upon a
2 reconsideration cleansed of errors.” *Li Hua Lin*, 453 F.3d at 107.

3 The IJ found Martinez’s testimony about the individualized
4 threats against her and her children and her country conditions evidence
5 detailing the power and brutality of MS-13 to be credible. Yet, relying
6 on its observations that Martinez “was only threatened once before
7 leaving El Salvador” and that she and her children were “threatened,
8 but not physically harmed,” the IJ concluded that Martinez nevertheless
9 failed to meet her burden. CAR at 53.

10 To hold categorically that an applicant for CAT relief must be
11 threatened more than once and that such a person must suffer physical
12 harm before fleeing is an error of law. *See* 8 C.F.R. § 208.16(c). Martinez
13 and her children left within days of when gang members threatened
14 them. The IJ credited Martinez’s testimony that the threats received
15 were believable and in no way remote. Under the circumstances, it was
16 error to require that the petitioners wait until they suffered physical
17 harm or until the threats recurred before they fled.

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1 In light of the agency's error, we must examine whether it is
2 obvious that without this error the agency would have reached the same
3 conclusion. That is, whether a remand would be futile. With this in
4 mind, we examine the credible evidence that was before the agency to
5 see whether we can say with confidence that the agency would have
6 reached the same result absent the error. In doing so, we are not
7 weighing the evidence against the standard for CAT relief ourselves.
8 Rather, we consider only whether "a) [] the IJ articulate[d] an alternative
9 and sufficient basis for her determination; b) [] her reliance on the
10 erroneous aspect of her reasoning is substantially tangential to her non-
11 erroneous findings; or c) [] overwhelming evidence in the record makes
12 it clear that the same decision is inevitable on remand." *Li Hua Lin*, 453
13 F.3d at 107.

14 Here, we cannot confidently predict that the agency would reach
15 the same result without the error. Martinez's testimony, which the IJ
16 credited, established that she and her children were facing a sustained
17 campaign of violent confrontations. These included when gang
18 members flashed a knife at Martinez and when they attempted to force

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1 Martinez's pregnant daughter into a secluded area and threatened to cut
2 her child out of her body.

3 The latter incident, though it occurred after Martinez had fled El
4 Salvador, remains relevant to our analysis. The standard for CAT
5 protection asks whether an applicant "*would* be tortured *if* removed to
6 the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (emphasis
7 added). MS-13's continued targeting of Martinez's family undoubtedly
8 strengthens Martinez's argument that she would have been tortured or
9 killed had she remained in El Salvador longer and that she would be
10 tortured or killed upon returning.

11 We cannot say that the IJ's second stated reason for denying
12 Martinez's claim for CAT relief was "an alternative and sufficient basis"
13 for its decision. *Li Hua Lin*, 453 F.3d at 107. The IJ discounted Martinez's
14 country conditions evidence because death certificates and news articles
15 submitted by Martinez did not show that the individuals killed by MS-
16 13 in San Bartolomé Perulapía were murdered for interfering with gang
17 recruitment. CAR at 53. In other words, the IJ held against Martinez the
18 fact that she did not establish that MS-13 had killed people in her

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1 hometown for precisely the same reason that they had threatened to kill
2 her.

3 That Martinez did not produce such evidence does not render
4 remand futile, and indeed does not necessarily undermine her claim. In
5 fact, her testimony regarding the individualized threats she and her
6 children received provided some support for her argument that it is
7 more likely than not that members of MS-13 would have retaliated
8 against her had she stayed longer and would do so now if she returns to
9 El Salvador. Consistent with the threats against Martinez, the country
10 conditions evidence—at the least—confirms that MS-13 retaliates
11 against perceived opposition by committing torture and murder.

12 Stripped of its error regarding Martinez’s prompt flight, the IJ’s
13 decision certainly recounts enough credible evidence such that it is more
14 than possible that the agency might have otherwise concluded that
15 Martinez met her burden for CAT relief. Accordingly, a remand on the
16 likelihood of torture cannot be deemed futile. The agency, in deciding
17 whether it would reach the same conclusion absent the erroneous

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1 reliance on the speedy departure, might well wish to send the case back
2 to the IJ for further factual development.

3 An applicant for CAT protection must, however, also
4 demonstrate that “such pain or suffering [would be] inflicted by or at
5 the instigation of or with the consent or acquiescence of a public official
6 or other person acting in an official capacity.” 8 C.F.R. § 208.18(a)(1).
7 Under our cases, an applicant satisfies this requirement by showing that
8 “government officials kn[e]w of or remain[ed] willfully blind to an act
9 and thereafter breach[ed] their legal responsibility to prevent it.” *De La*
10 *Rosa v. Holder*, 598 F.3d 103, 109 (2d Cir. 2010) (quoting *Khouzam v.*
11 *Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004)). The IJ, having concluded that
12 Martinez failed to establish a likelihood of torture, never addressed
13 whether Salvadoran government officials were willfully blind to MS-
14 13’s actions and breached a legal responsibility to prevent harm to
15 Martinez. If on remand the agency finds that Martinez met her burden

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1 of demonstrating a likelihood of torture, then fact-finding by the IJ on
2 the question of government acquiescence will be needed.¹

3 **B.**

4 In her application for relief, Martinez also sought asylum and
5 withholding of removal. CAR at 50–52. Before this court, Martinez
6 argues that she faces persecution on account of her membership in her
7 son’s nuclear family and her political opinion opposing MS-13. The IJ
8 and BIA, assuming without deciding that Noe’s family is a cognizable
9 social group, ruled that Martinez failed to meet the nexus requirement
10 because MS-13 targeted her not on account of her membership in Noe’s
11 family but rather due to her efforts to stymie the gang’s recruitment
12 operations. Although the IJ acknowledged that Martinez protected Noe
13 from MS-13 “because she is Noe’s mother,” the IJ determined that “it

¹ The dissent describes what the IJ held as a nuanced discussion of what suffices to meet the requirement for CAT relief. But, on any reading of the record, the IJ held that, without previous physical harm, a credible threat of being killed did not meet the requirement of torture. The IJ then went on to discuss why additional evidence presented by Martinez did not make that credible threat more than just a credible threat that she would be killed.

We therefore do not see how the IJ’s decision is not a holding as a matter of law that more is necessarily required than a credible threat of death to establish a likelihood of torture. It is hence a holding that one must produce additional evidence that torture is sufficiently probable or that one must wait to be physically injured or be killed to qualify for CAT relief.

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1 does not follow that gang members targeted her, even in part, on
2 account of that relationship.” *Id.* The IJ and BIA did not address
3 Martinez’s political opinion claim, and the government contends that
4 this was proper, given that Martinez did not adequately raise and argue
5 this claim.

6 The cognizability of social groups defined by family membership
7 and of political opinions defined by opposition to gangs are not only
8 fact-intensive inquiries but also issues with respect to which the
9 approaches of the BIA and of our Court are currently in a state of flux.
10 See *Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020); *Matter of L-E-A-*
11 *, 27 I. & N. Dec. 581* (U.S. Att’y Gen. 2019). Given our decision to remand,
12 we need not address these issues now. And, in view of the present
13 changing context, we deem it advisable to forgo any discussions at this
14 time.

15 Since our remand may require fact-finding on the CAT question
16 and the BIA may not engage in such fact-finding, 8 C.F.R. §
17 1003.1(d)(3)(iv), the case may ultimately return to the IJ. If this happens,
18 the IJ may consider Martinez’s political opinion and social group

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1 arguments for asylum and withholding, along with any new evidence
2 that Martinez might offer. *See Diallo v. U.S. Dep't of Justice*, 548 F.3d 232,
3 237 (2d Cir. 2008); *Matter of Patel*, 16 I. & N. Dec. 600, 601 (BIA 1978). Any
4 consideration of these questions by us, if then appropriate, can await a
5 more complete record.

6 **CONCLUSION**

7 We **DENY** the government's motion for summary denial,
8 **GRANT** Martinez's petition for review, **VACATE** the BIA's decision,
9 and **REMAND** the case to the BIA for further proceedings consistent
10 with this opinion.