

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted August 6, 2024*

Decided August 8, 2024

BeforeFRANK H. EASTERBROOK, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

No. 23-3077

HERIBERTA PLANCARTE

MARTINEZ, et al.,

*Petitioners,**v.*Petition for Review of an Order of the
Board of Immigration Appeals.Nos. A206-674-773, A206-674-774, &
A206-674-775

MERRICK B. GARLAND, Attorney

General of the United States,

*Respondent.***ORDER**

Heriberta Plancarte Martinez and her two minor children, all Mexican citizens, petition for review of the denial of their motion to reopen removal proceedings based on “new evidence” calling into question a factual finding that underpinned the immigration judge’s denial of their asylum application. The immigration judge (“IJ”) denied the motion to reopen, concluding that Plancarte Martinez failed to show that her

* The parties agreed to submit this case for decision on the briefs. FED. R. APP. P. 34(f). We granted petitioners’ motion to waive oral argument.

evidence was unavailable during the removal proceedings, and the Board of Immigration Appeals affirmed. Because the record supports the conclusions of the IJ and Board, we deny the petition.

I

In June 2014, Plancarte Martinez and her children, without the requisite authorization, entered the United States via the Otay Mesa Port of Entry in San Diego, California. The Department of Homeland Security initiated removal proceedings. Plancarte Martinez and her family conceded removability but sought asylum and withholding of removal based on membership in a particular social group, as well as protection under the Convention Against Torture.

Plancarte Martinez's application for asylum, as relevant here, expressed her fear of abuse from her husband Jonathan, who, she alleged, had sexually assaulted her, threatened her "almost every day for the years [they] were together," and tried to control "every aspect" of her life. Plancarte Martinez added that Jonathan's efforts to control her had been aided by his brother William.

In advance of a scheduled merits hearing before an immigration judge, Plancarte Martinez filed a brief and affidavit reiterating her claims that Jonathan had abused her. She stated that she feared returning to Mexico because Jonathan—who by this time also had made his way to the United States—threatened to follow her, and she believed that "he or some of his friends would hurt or kill [her] or [her] family."

The merits hearing took place in September 2020, and Plancarte Martinez testified about Jonathan's "jealous" and "controlling" nature. She conceded that she had not been harassed by Jonathan or William during a six-month period in which she had relocated to the neighboring state of Michoacán but stated that Jonathan—once they were in the United States—pressured her to move in with him again. They lived together for less than a month before she left because of his continued attempts to control her. She added that she believed Jonathan had been jailed in Minnesota on rape charges.

The IJ denied Plancarte Martinez's application. The IJ assumed without deciding that Plancarte Martinez could establish past persecution on account of membership in a particular social group (Mexican women who could not leave their marital relationships) but went on to explain that the government had rebutted the presumption that she would face future persecution if she returned to Mexico. Noting

her testimony that Jonathan was now in prison in the United States, the IJ concluded that she failed to show that she could not reasonably relocate within Mexico to stay safe.

Three months later, Plancarte Martinez moved to reopen proceedings based on purportedly new evidence showing that Jonathan was no longer in the United States and had returned to Mexico. She supplemented her motion with an affidavit describing her recent discovery that Jonathan had been removed to Mexico. She recounted that her elder daughter, who—because of the family’s strife—always wanted to conceal her relationship with her father, had showed her text messages exchanged with Jonathan’s mother in early 2019, stating that Jonathan was “in ICE, waiting for deportation.” Plancarte Martinez also described receiving Facebook messages from a woman in Mexico who confided that she had been in a relationship with Jonathan, that he had sexually abused her, and that he was “spying” on Plancarte Martinez through Facebook. In the motion, Plancarte Martinez argued that the information concerning Jonathan’s whereabouts was not available at the time of the hearing: (1) the daughter’s messages were unavailable because the daughter “always wanted to keep her relationship with her father secret” and “was troubled by being caught between” her parents; and (2) the Facebook messages were unavailable because she had blocked the sender upon receiving them and hadn’t thought to further investigate them until learning of the daughter’s text messages.

The IJ denied the motion to reopen proceedings, concluding that Plancarte Martinez had not met her burden of demonstrating that the messages were “unavailable, undiscoverable, and unpresentable” for purposes of the merits hearing. The judge explained that the matter of Jonathan’s whereabouts had been discussed at the merits hearing, and Plancarte Martinez had failed to pursue available “avenues” beforehand to communicate with her daughter and to track down the Facebook messages received earlier in 2020.

Plancarte Martinez appealed to the Board, arguing that the IJ had failed to consider her argument that the daughter’s messages were unavailable because the daughter was too “traumatized” by the conflict between Plancarte Martinez and Jonathan to reveal them. The Board upheld the IJ’s decision. The Board explained, first, that Plancarte Martinez’s daughter—as a respondent, herself, in the removal proceedings—bore some responsibility “for ensuring that the evidence presented in support of the applications for relief [was] accurate and complete.” And Plancarte Martinez offered no evidence supporting the notion that her daughter had been too traumatized to disclose the information earlier. As for the Facebook messages, the

Board explained that Plancarte Martinez's decision to block the sender rather than investigate the messages did not render them unavailable.

II

Plancarte Martinez petitioned this court for review of the Board's order denying her motion to reopen removal proceedings. Our scope of review is, thus, limited to that order. *See Melesio-Rodriguez v. Sessions*, 884 F.3d 675, 678 (7th Cir. 2018). Where, as here, the Board affirms and supplements the IJ's decision, we review the IJ's decision together with the Board's additional reasoning. *See Cojocari v. Sessions*, 863 F.3d 616, 621 (7th Cir. 2017). We review the decision to deny a motion to reopen removal proceedings for an abuse of discretion. *I.N.S. v. Abudu*, 485 U.S. 94, 107–08 (1988). We review legal issues—misinterpretations of law, application of the wrong legal standard, and failure to exercise discretion at all—de novo. *Aparicio-Brito v. Lynch*, 824 F.3d 674, 681, 686 (7th Cir. 2016).

Plancarte Martinez's brief generally repeats the arguments she raised before the IJ and Board. She concedes that her purportedly new evidence existed at the time of her merits hearing but maintains that the Board wrongly rejected her argument that the daughter's age and "trauma" rendered the evidence "unavailable" for purposes of the merits hearing. Plancarte Martinez relies on two seemingly adverse cases: *Krougliak v. I.N.S.*, 289 F.3d 457 (7th Cir. 2002) (purportedly new evidence was not unavailable, because petitioner did not show that the evidence could not have been sent to him before hearing) and *Malik v. Holder*, 546 F. App'x 590 (7th Cir. 2013) (unpublished) (affidavit of petitioner's ex-wife was not unavailable, because petitioner did not show that he had attempted to contact ex-wife before hearing).

Plancarte Martinez's reliance on these cases is unpersuasive. For purposes of a merits hearing, evidence is considered unavailable if it "could not by the exercise of due diligence have been discovered earlier." *Krougliak*, 289 F.3d at 460 (quoting *Matter of Coelho*, 20 I. & N. Dec. 464, 472 n.4 (BIA 1992)) (cleaned up). Here, both the IJ and Board examined Plancarte Martinez's proffered evidence and concluded that she had failed to show it could not have been discovered through due diligence. That conclusion was not an abuse of discretion: Although Plancarte Martinez attested that her daughter kept her relationship with Jonathan secret, nothing in the record demonstrates that the daughter was traumatized at all—much less that she was too traumatized to share, in the exercise of due diligence, evidence bearing on the merits of her family's asylum application. And nothing in the record suggests that Plancarte Martinez exercised any diligence to discover Jonathan's whereabouts.

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Plancarte Martinez next contends that the IJ and Board legally erred when they “completely failed” to consider her argument that her daughter’s trauma rendered the text-message evidence unavailable. But her premise is demonstrably false. The Board directly addressed and refuted the argument:

The respondents have not presented any evidence supporting their claim that the daughter was too ‘traumatized’ by the relationship between her parents to tell her mother the true location of her father. If the daughter had information reflecting that her father was in Mexico, and not serving a prison sentence in the United States, it was incumbent on her to present that information in relation to the lead respondent’s applications for relief.

And Plancarte Martinez does not identify any abuse of discretion in the Board’s analysis.

For these reasons, we DENY the petition for review.