In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2662

LAWRENCE KARISA KITHONGO,

Petitioner,

v.

MERRICK B. GARLAND,
Attorney General of the United States,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals.
No. A216-406-099

ARGUED MARCH 31, 2022 — DECIDED MAY 9, 2022

Before MANION, HAMILTON, and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Lawrence Kithongo is a Kenyan citizen who overstayed his authorized period in the United States and now faces removal for committing a "particularly serious crime." An immigration judge denied his applications for adjustment of status, withholding of removal, and relief under the Convention Against Torture ("CAT"). He asks this court to review those decisions. For the reasons discussed

below, we dismiss the first two applications for lack of jurisdiction, and we deny the third on exhaustion grounds.

I

Kithongo was born and raised in Kenya. He alleges he and his family endured several hardships during his childhood there. For example, Kithongo states that his father was regularly harassed and intimidated for political and religious reasons. This harassment was not always limited to his father; Kithongo says he too endured verbal and physical harassment, which resulted in a stab wound on one occasion and a broken arm on another.

Kithongo also claims he watched a police officer murder one of his friends during the political unrest following the 2007 Kenyan national election. Out of concern for his safety, Kithongo moved to his grandmother's house and assumed a new name. His grandmother then arranged for him to work for a company of acrobats so that he would be able to travel outside the country. Four years later, at age 19, Kithongo was admitted into the United States on a P1 nonimmigrant performer visa. He has not left the United States in the last 11 years, and he has overstayed his period of authorization since May 2017. He is now 31 years old and married with children. Although still a Kenyan citizen, Kithongo wishes to remain in the United States.

Over the last seven years, Kithongo has been convicted of misdemeanors for battery, theft, and marijuana possession. Most recently, he was convicted for conspiring with others to rob three victims, two of whom were children. Although Kithongo did not commit the robbery himself, he knowingly accompanied his co-conspirators to the scene of the crime,

likely aware that one of them was carrying a firearm. The robbery was violent. One child victim was struck in the head with the firearm, while the other's head and neck were pinned against the seat of a car. Kithongo was convicted in Indiana state court of felony conspiracy to commit robbery and sentenced to one year in prison on September 3, 2019.[1]

After Kithongo completed his sentence, the Department of Homeland Security served him with a notice to appear, charging him with removability under 8 U.S.C. §§ 1227(a)(1)(B), (a)(2)(A)(iii) for having an aggravated felony conviction. At Kithongo's first removal hearing, the immigration judge determined that his conviction for conspiracy to commit robbery was an aggravated felony. Nevertheless, the judge permitted Kithongo to explore avenues of relief from removal. A month later, Kithongo applied for withholding of removal and relief under the CAT. At a hearing in October 2020, Kithongo "formally admitted all five allegations in the [notice to appear], conceded [his] removability under [8 U.S.C. § 1227(a)(1)(B),] but denied removability under [8 U.S.C. § 1227(a)(2)(A)(iii)]." He also denied that his conviction constituted an aggravated

[1] Under Indiana Code § 35-41-5-2(a), "[a] person conspires to commit a felony when, with intent to commit the felony, the person agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same level as the underlying felony." *Id.* Under Indiana Code § 35-42-5-1(a), "a person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Level 5 felony." *Id.* A Level 5 felony is punishable for "a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years." IND. CODE § 35-50-2-6(b).

felony. That December, Kithongo applied for adjustment of status.

In February 2021, he appeared with counsel for his merits hearing. The immigration judge heard testimony from Kithongo, his wife, and his mother-in-law. The judge ultimately denied each of Kithongo's applications: for adjustment of status, withholding of removal, and relief under the CAT. The judge ordered Kithongo removed to Kenya. Kithongo appealed, and the Board of Immigration Appeals (the "Board") affirmed the immigration judge's decision without an opinion. Kithongo is now in the custody of Immigration and Customs Enforcement. He petitions for review of the Board's affirmance of the immigration judge's decisions.

II

The "first and fundamental question" our court must answer "is that of jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94–95 (alteration in original) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). We begin by considering whether we have jurisdiction to review the Board's discretionary determination under the Immigration and Nationality Act. *See Estrada-Martinez v. Lynch*, 809 F.3d 886, 891 (7th Cir. 2015). First, we consider Kithongo's applications for adjustment of status and withholding of removal, and then we review his application for relief under the CAT, for which jurisdiction is uncontested.

A

Under 8 U.S.C. § 1255, a visa-eligible noncitizen may seek long-term permanent residence in the United States by applying for an "adjustment of status." *Id.*; *see Dijamco v. Wolf*, 962 F.3d 999, 1001 (7th Cir. 2020). An adjustment-of-status determination is committed to the discretion of the Attorney General, who in turn has delegated his authority to immigration judges, subject to review by the Board. 8 U.S.C. § 1255(a); *Hadayat v. Gonzales*, 458 F.3d 659, 663 (7th Cir. 2006); 8 C.F.R. §§ 1003.1(b)(3) & (d)(1); 8 C.F.R. § 1003.10; 8 C.F.R. § 1245.2(a)(1). Kithongo applied for an adjustment of status, but his request was denied for two reasons. First, the immigration judge deemed him ineligible for an adjustment because of his criminal history and failure to provide an affidavit from a valid sponsor. Second, the judge concluded he did not merit a favorable exercise of discretion. Kithongo disagrees, claiming that he can now provide a sponsor.

Our jurisdiction is limited by 8 U.S.C. § 1252(a)(2)(B)(i), which states, in part, that "no court shall have jurisdiction to review … any judgment regarding the granting of relief under section … 1255 of this title." *Id.* Under this statutory provision, we "lack jurisdiction to review a variety of agency decisions denying discretionary relief, including an [immigration judge's] decision to deny an application for adjustment of status." *Wroblewska v. Holder*, 656 F.3d 473, 477 (7th Cir. 2011) (citations omitted); *see Pouhova v. Holder*, 726 F.3d 1007, 1016 n.7 (7th Cir. 2013). This court's "jurisdiction is not so limited, however, when it comes to 'constitutional claims or questions of law' that are related to the denial of an application for adjustment of status." *Wroblewska*, 656 F.3d at 477

(quoting 8 U.S.C. § 1252(a)(2)(D); *Jarad v. Gonzales*, 461 F.3d 867, 868–69 (7th Cir. 2006)); *Pouhova*, 726 F.3d at 1016 n.7.

Here, the immigration judge denied Kithongo's application for adjustment of status "both due to his ineligibility for such relief … and as a matter of discretion." The judge balanced positive factors such as the potential hardship of removal on Kithongo and his family, against negative factors like the details of Kithongo's criminal history. "Even if" Kithongo "were otherwise eligible" for an adjustment, the judge concluded he would still deny the application as a "matter[ ] of discretion." "Ultimately," the immigration judge concluded that "the negative factors in this case far outweigh[ed] the positive ones."

Because Kithongo's application for adjustment of status was denied in part "as a matter of discretion," we lack jurisdiction to review it unless he can identify a legal or constitutional issue to evaluate. He has failed to do so, therefore the application must be dismissed.

B

Next, we examine if there is jurisdiction to review Kithongo's application for withholding of removal. A noncitizen is entitled to withholding of removal if his "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." 8 U.S.C. § 1231(b)(3)(A); *see Tsegmed v. Sessions*, 859 F.3d 480, 484 (7th Cir. 2017). There are exceptions, though. For example, § 1231(b)(3)(B)(ii) states that this rule does not apply if the Attorney General decides "that the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the

United States." *Id.* For purposes of withholding of removal, an aggravated felony conviction with a term of imprisonment of at least five years is, per se, a "particularly serious crime." *Id.* § 1231(b)(3)(B).

A sentence of less than five years does not preclude the immigration judge from determining that an applicant has been convicted of a particularly serious crime. *Id.* Nor does the offense need to be an aggravated felony for it to be particularly serious. *Id.* In such cases, the judge "may examine 'the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts'" of the crime to determine if the conviction is particularly serious. *Estrada-Martinez*, 809 F.3d at 889 (quoting *In re N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007)). Crimes against persons, rather than property, are more likely to qualify as particularly serious. *In re S-V-*, 22 I. & N. Dec. 1306, 1308 (BIA 2000).

As this court has previously noted, Board precedent "appears to support more than one method for determining whether a crime is 'particularly serious.'" *Estrada-Martinez*, 809 F.3d at 893. In making a determination, the Board or immigration judge "may use a case-by-case approach" or a categorical approach. *Id.* at 893 (citing *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006) (stating that it is not legal error for the Board to apply the case-by-case approach)). When applying the categorical approach, a judge considers exclusively "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (citations omitted); *see Estrada-Martinez*, 809 F.3d at 893. By contrast, when applying the case-by-case approach, a judge considers the "actual underlying conduct

and circumstances." *See Estrada-Martinez*, 809 F.3d at 893 (quoting *Moncrieffe*, 569 U.S. at 190). These parties dispute whether Kithongo's conviction for conspiracy to commit robbery under Indiana law constitutes a particularly serious crime.

Our jurisdiction to review this determination is limited by 8 U.S.C. § 1252(a)(2)(B)(ii), which states, in part, that:

> no court shall have jurisdiction to review … any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

Id. Under this statute, we may review the Board's "particularly serious crime" determination as legal error, but it is "beyond our jurisdiction" to review whether the "Board's decision incorrectly weighed the relevant factors." *Estrada-Martinez*, 809 F.3d at 893–94 (citing 8 U.S.C. § 1252(a)(2)(B)(ii)).

Kithongo argues the Board and the immigration judge committed a legal error by adopting a categorical approach when they decided that his conviction for conspiracy to commit robbery was particularly serious. This court considered a similar argument in *Estrada-Martinez*. There, a petitioner tried "to avoid this jurisdictional bar to our review of the Board's 'particularly serious crime' determination by framing his challenge as a legal issue." *Id.* at 892. The petitioner argued "the Board made a legal error by adopting a categorical approach to deciding whether his statutory rape conviction was

'particularly serious.'" *Id.* According to the petitioner, "the Board failed to consider individual aspects of his conviction," such as the age of the victim and "the significance of his sentence of probation rather than prison time." *Id.* at 892–93. The court stated that while these were "cogent arguments for reweighing the factors leading to" the Board's determination, the petitioner's attempt to "frame [the] argument as a legal error [was] not convincing." *Id.* at 893. At bottom, the petitioner wanted the court to reweigh the factors, which was beyond its jurisdiction. *Id.* at 893–94.

In this case, the immigration judge considered "the nature" of Kithongo's conviction, as well as "the facts and circumstances of the case." The judge noted that Kithongo "conspired with others to rob three victims of their iPhones and a key ring." Although he "did not personally commit the robbery," Kithongo "knew that his co-conspirators planned to rob the victims and accompanied them as they walked to the victims' vehicle." Kithongo also likely knew that "one of the co-conspirators was carrying a firearm," and ultimately did "nothing to prevent" the crime. The judge concluded that the "violent nature of the crime, the use of a firearm to strike a victim, and the young age of the victims" all constituted aggravating factors. He also noted that Kithongo's limited personal involvement was "a mitigating factor … only to a limited extent."

The immigration judge here applied a case-by-case approach that weighed factors particular to Kithongo when determining that his conviction constituted a "particularly serious" crime. This detailed analysis is not only consistent with the case-by-case approach but also inconsistent with the categorical approach, which considers only the statute defining

the crime of conviction. *Id.* at 893 (quoting *Moncrieffe*, 569 U.S. at 190). Kithongo tries but fails to reframe his argument as one of legal error. It is beyond our jurisdiction to reweigh the factors the immigration judge considered. 8 U.S.C. § 1252(a)(2)(B)(ii). This application is thus also dismissed for lack of jurisdiction.

III

Finally, we turn to Kithongo's claim that he is eligible for relief under the Convention Against Torture. 8 C.F.R. §§ 1208.16, 1208.17, 1208.18. He argues the immigration judge overlooked relevant evidence and failed to consider cumulative evidence. Although our court has jurisdiction, we need not reach the merits of this application because he failed to raise these arguments before the Board. *Nyandwi v. Garland*, 15 F.4th 836, 841–42 (7th Cir. 2021).

Under 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." *Id.* The exhaustion requirement "includes the obligation first to present to the Board any arguments that lie within its power to address." *Lopez-Garcia v. Barr*, 969 F.3d 749, 752 (7th Cir. 2020) (quoting *FH-T v. Holder*, 723 F.3d 833, 841 (7th Cir. 2013); 8 U.S.C. § 1252(d)(1)). This requirement is a case-processing rule, rather than a jurisdictional requirement, which "limits the arguments available to an alien in this court when those arguments have not been raised properly at the agency level." *FH-T*, 723 F.3d at 841 (citation omitted). It provides the Board the opportunity to "apply [its] 'specialized knowledge and experience' in this legal area, which then lends us 'reasoning to review.'" *Lopez-Garcia*, 969 F.3d at 752 (quoting *Minghai Tian v. Holder*, 745 F.3d 822, 826 (7th Cir. 2014)).

"To exhaust an argument and thus avoid waiver, it must be 'actually argued' in the administrative proceedings." *Nyandwi*, 15 F.4th at 841 (quoting *Duarte-Salagosa v. Holder*, 775 F.3d 841, 846 (7th Cir. 2014)). An argument is "actually argued only when it puts the [Board] 'on notice' that the petitioner is trying to challenge the [immigration judge's] decision based on that argument." *Id.* (citing *Hamdan v. Mukasey*, 528 F.3d 986, 991 (7th Cir. 2008)). In other words, "[i]t is not enough that the new argument bears some relation to the evidentiary record." *Id.* (citing *Duarte-Salagosa*, 775 F.3d at 846).

Here the immigration judge found that, among other things, Kithongo "failed to provide sufficient corroborating evidence to carry his burden of proof," even though such evidence was reasonably available. For example, the judge concluded that Kithongo could have presented written statements or telephonic testimony from his parents or sister, all of whom continue to live in Kenya and remain in contact with him. Kithongo also could have provided documentary evidence to corroborate his claim, such as the death certificate for his friend, the medical records from his hospitalization, or documentation identifying his father's political and religious affiliations.[2] Instead, Kithongo provided only the written

[2] It is common for an immigration judge to require this type of corroborative evidence. *See, e.g.*, *Weiping Chen v. Holder*, 744 F.3d 527, 533–35 (7th Cir. 2014) (denying the petition for review because the immigration judge did not err by requiring the petitioner to provide additional corroborating evidence such as an affidavit from his wife and other merchants familiar with the events); *see also Darinchuluun v. Lynch*, 804 F.3d 1208, 1214 (7th Cir. 2015) (stating that, in the asylum context, "an immigration judge now enjoys substantial leeway to demand corroboration of an … applicant's allegations whether or not the judge finds the applicant credible" (quoting *Krishnapillai v. Holder*, 563 F.3d 606, 618 (7th Cir. 2009))).

statement and testimony of his wife, who was not personally familiar with the events from his childhood. Even though the immigration judge found Kithongo generally credible, he determined that Kithongo "failed to adequately corroborate his testimony and thus failed to carry his burden … under the Convention Against Torture."

In his brief before the Board, Kithongo argued that the immigration judge "overlooked the submitted evidence substantiating" his fear of torture. This evidence included a 2019 report from the U.S. Department of Justice, which described the Kenyan police's use of torture, excessive force, and forced disappearances against government opposition. Kithongo also points to a 2016 Quartz Africa article, which stated that a Kenyan citizen is "five times as likely to be shot by the police than a criminal."

Before the Board, Kithongo failed to contest the decision that he did not produce reasonably available corroborating evidence to support his application. Although he argued that the immigration judge overlooked a report and article describing country conditions in Kenya, he never challenged the immigration judge's findings as to corroboration. At best, Kithongo's argument "bears some relation to the evidentiary record." *Nyandwi*, 15 F.4th at 841 (citing *Duarte-Salagosa*, 775 F.3d at 846). Even so, this contention was not "actually argued" because the Board was not put "on notice" that he was challenging the immigration judge's corroboration determination. *See id.* (citing *Hamdan*, 528 F.3d at 991). Not raising these issues before the Board constitutes a failure to exhaust. As a result, Kithongo has waived his arguments for relief under the CAT, and we need not consider their merits.

IV

For these reasons, we DISMISS for lack of jurisdiction Kithongo's applications for adjustment of status and withholding of removal, and we DENY his petition for review under the Convention Against Torture.