

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 6 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

YUNIOR CABRERA-RODRIGUEZ,

No. 20-72336

Petitioner,

Agency No. A203-615-371

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted November 7, 2022
Portland, Oregon

Before: BUMATAY and SANCHEZ, Circuit Judges, and BAKER,** International
Trade Judge.

Dissent by Judge BUMATAY.

Yunior Cabrera-Rodriguez, a native and citizen of Cuba, petitions for review
of a decision by the Board of Immigration Appeals (BIA) denying him asylum,
withholding of removal, and relief under the Convention Against Torture (CAT).

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable M. Miller Baker, Judge for the United States Court of
International Trade, sitting by designation.

We have jurisdiction under 8 U.S.C. § 1252. We deny in part and grant in part his petition for review and remand to the agency for further proceedings.

1. “We may reverse the decision of the BIA only if the applicant shows that the evidence *compels* the conclusion that the asylum decision was incorrect. This strict standard precludes us from independently weighing the evidence and holding that the petitioner is eligible for asylum, except in cases where compelling evidence is shown. We look at the totality of the circumstances in deciding whether a finding of persecution is compelled.” *Guo v. Sessions*, 897 F.3d 1208, 1212 (9th Cir. 2018) (simplified). “We review de novo questions of law and mixed questions of law and fact.” *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014).

Cabrera-Rodriguez bases his asylum claim on the following: He fled Cuba after local police subjected him to escalating threats and two detentions and beatings on account of his opposition to Cuba’s communist regime. Specifically, he testified that he was told to report to the police station at least ten times but did not testify to suffering any physical abuse by the police except for two incidents in January and February 2019. During those incidents, the police beat Cabrera-Rodriguez, who required minor medical attention after the second beating. He also testified that his wife was “touched” and threatened in connection with the second of those incidents.

Cabrera-Rodriguez’s mistreatment was serious, but “persecution is an extreme concept that does not include every sort of treatment our society regards as

offensive” and whether particular treatment constitutes persecution “is heavily fact-dependent.” *Singh v. I.N.S.*, 134 F.3d 962, 967 (9th Cir. 1998). For example, the record has compelled us to find past persecution in cases involving “significant physical violence” that resulted in “serious injuries that required medical treatment.” *Sharma v. Garland*, 9 F.4th 1052, 1061 (9th Cir. 2021). Our cases finding past persecution explain that incidents involving some physical harm may not compel a finding of persecution unless they involve “something more, such as credible death threats.” *Aden v. Wilkinson*, 989 F.3d 1073, 1082 (9th Cir. 2021) (emphasis removed).

A reasonable factfinder *could* conclude that the totality of the circumstances here rises to the level of past persecution, but the totality of the circumstances doesn’t *compel* this conclusion. *See, e.g., Prasad v. I.N.S.*, 47 F.3d 336, 339 (9th Cir. 1995) (being hit and kicked during detention by police could support a finding of past persecution but did not compel it); *Sharma*, 9 F.4th at 1063–64 (being hit with a baton, detained for 18 to 19 hours with some physical abuse that did not result in serious bodily harm, and threatened with “big trouble”); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1181–82 (9th Cir. 2003) (prolonged harassment, death threats, and one serious beating); *Gu v. Gonzales*, 454 F.3d 1014, 1018, 1020 (9th Cir. 2006) (detention, beating, and multiple requests to report to the police); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1153 (9th Cir. 2005) (harassment, threats, and property damage).

2. Because Cabrera-Rodriguez failed to produce evidence compelling a finding of past persecution, he is not entitled to a presumption of a “well-founded fear of future persecution.” *See Sharma*, 9 F.4th at 1065. That does not mean he cannot establish future persecution. To establish a well-founded fear claim, he must show his fear of persecution is both subjectively genuine and objectively reasonable. *See Al-Harbi v. I.N.S.*, 242 F.3d 882, 888 (9th Cir. 2001). The objective prong requires a showing of at least a ten-percent chance of persecution on account of one or more protected grounds (here, political opinion) committed by the government or actors the government is unable or unwilling to control. *Wakkary v. Holder*, 558 F.3d 1049, 1052, 1061 (9th Cir. 2009). Remand of this claim is warranted for the following reasons.

First, the BIA found that Cabrera-Rodriguez “testified to experiencing arrests and incidents of harm in Cuba on account of his political opinion.” Therefore, he has established that his mistreatment was on account of his political opinion.¹

Second, the BIA essentially rubber-stamped the IJ’s finding that Cabrera-Rodriguez “has not established that he ... would suffer persecution at the hands of

¹ Even if the BIA had not so found, the evidence compels the conclusion that the police harassed him at least in part because he refused to vote in favor of a new constitution under which the Communist Party would remain Cuba’s only legally recognized political party. After all, *refusing* to vote in a one-party state is itself a form of passive resistance to the regime and thus an expression of political opinion, which is precisely why the police harassed him.

the Cuban government.” But that finding relied on the IJ’s dismissal of the abuser as a mere “provincial police captain.” “Police officers are the prototypical state actor for asylum purposes,” so “persecutory acts by a single governmental or quasi-government official are sufficient to establish state action.” *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005). Thus, to the extent the BIA’s analysis relied on the finding that any mistreatment was not by the Cuban government, the BIA erred.

Third, the BIA rejected Cabrera-Rodriguez’s well-founded fear claim on the basis that he was permitted to voluntarily depart from Cuba. Our precedent makes clear that a petitioner’s ability to leave his country “does not undermine [his] claim of a well-founded fear of future persecution, even when [he] succeeds in obtaining government documents that permit [him] to depart.” *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1137 (9th Cir. 2004). In the context of political dissent, “persecutors may want to eliminate their political opposition and to achieve that end will either persecute them or allow them to leave.” *Turcios v. I.N.S.*, 821 F.2d 1396, 1402 (9th Cir. 1987).

Because the BIA misapplied the governing legal standards in its rejection of Cabrera-Rodriguez’s claim of well-founded fear, we remand for reconsideration of

the claim under the correct standard. *See Wakkary*, 558 F.3d at 1059.² On remand, the BIA may consider Cabrera-Rodriguez’s credibility in the first instance, as its decision assumed his credibility without deciding it. *See Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 993–94 (9th Cir. 2000).

3. The BIA found that because Cabrera-Rodriguez failed to demonstrate eligibility for asylum, “he has necessarily not established eligibility for withholding of removal” under the more stringent “more likely than not” standard for fear of future persecution applicable to withholding. The same problems that necessitate a remand on the asylum issue therefore necessitate a remand on the withholding claim.

4. Finally, the BIA erred in rejecting Cabrera-Rodriguez’s CAT claim without analyzing evidence relevant to that claim. Although the BIA need not discuss every piece of evidence in the record, “where there is any indication that the BIA did not consider all of the evidence before it, a catchall phrase does not suffice, and the decision cannot stand.” *Cole v. Holder*, 659 F.3d 762, 771–72 (9th Cir. 2011). The BIA’s “fail[ure] to mention highly probative or potentially dispositive evidence” is one such indication. *Id.* at 772. Here, the BIA concluded in boilerplate terms that

² The BIA also noted as a basis for rejecting the well-founded fear claim the IJ’s finding that Cabrera-Rodriguez “was not persecuted in the past in Cuba.” To the extent the BIA required Cabrera-Rodriguez to show past persecution to succeed on his well-founded fear claim, it erred. *See Avetova-Elisseva v. I.N.S.*, 213 F.3d 1192, 1197–98 (9th Cir. 2000) (past harm insufficient to constitute persecution may nonetheless support a well-founded fear of future persecution).

“the record evidence does not support” the likelihood of torture and failed to mention probative evidence. The record shows that the Cuban police continued to search for Cabrera-Rodriguez after he fled the country. While we have held that evidence of continued police targeting may be accorded less weight when future persecution or torture is unlikely in view of other evidence, *see Singh v. Holder*, 753 F.3d 826, 836 (9th Cir. 2014), the converse is also true: Where, as here, country conditions evidence shows political dissidents are likely to be targeted, evidence that the police are seeking out a known dissident (one the BIA found had been harassed based on his political opinion) is more probative. Yet there is no indication that the BIA considered that evidence or the country conditions evidence showing active suppression and abuse of political opposition in Cuba. We therefore remand the CAT claim for the BIA to consider “all evidence relevant to the possibility of future torture.” *See Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (quoting 8 C.F.R. § 1208.16(c)(3)).

PETITION GRANTED in part, DENIED in part, and REMANDED.

JAN 6 2023

Cabrera-Rodriguez v. Garland, No. 20-72336
BUMATAY, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I agree with the majority that Yunion Cabrera-Rodriguez has not established past persecution. But I disagree that remand is necessary for the Board of Immigration Appeals to reconsider his claim of future persecution. I thus dissent from the court's grant of the petition for review.

Without evidence of past persecution, Cabrera-Rodriguez had the burden of presenting a "well-founded fear of future persecution." *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1029 (9th Cir. 2019). Such fear must be both subjectively and objectively reasonable. *Id.* Evidence of an objective fear must be "credible, direct, and specific." *Nahrvani v. Gonzales*, 399 F.3d 1148, 1152–53 (9th Cir. 2005). Speculation does not suffice to meet this evidentiary burden. *Id.* at 1154.

Cabrera-Rodriguez's claim of future persecution is purely speculative. The immigration judge found, and the Board of Immigration Appeals affirmed, that Cabrera-Rodriguez could not show that he would suffer persecution at the hands of the Cuban government. Cabrera-Rodriguez testified that a single police captain harassed him at his home and ordered him to report to the police station ten times. Despite this, Cabrera-Rodriguez never received a summons or citation from Cuban police. And while some of his treatment while at the police station was serious, they did not raise to the high standard of persecution. He also testified that he had no problems obtaining a passport or leaving Cuba. Since his departure, his wife and

family have continued to live in Cuba without any incidents of persecution. Finally, Cabrera-Rodriguez did not testify to problems with any other Cuban government officials.

Based on this testimony, the IJ concluded that Cabrera-Rodriguez only had problems with a single provincial police captain. Such a finding is well supported by substantial evidence. Even assuming a single officer's actions may constitute government action, we all agree that none of the police captain's past actions constitute persecution. And Cabrera-Rodriguez has not offered any "credible, direct, and specific" evidence that the police captain would escalate his harassment in the future. If the police captain did not previously persecute Cabrera-Rodriguez, then—without more—it's purely speculative to assume that the police captain would do so in the future. Indeed, in ten incidents with the police captain, not once did the captain cross the line into persecution. So Cabrera-Rodriguez hasn't shown he's entitled to asylum.

And because Cabrera-Rodriguez can't establish his claim to asylum, I would also deny his claims for withholding of removal and relief under the Convention Against Torture. *Sharma v. Garland*, 9 F.4th 1052, 1066–67 (9th Cir. 2021).

I respectfully dissent.