

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 21 2023

FOR THE NINTH CIRCUIT

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

Dharwinder Singh,

No. 22-41

Petitioner,

Agency No. A216-570-244

v.

MEMORANDUM*

Merrick B. Garland, U.S. Attorney
General,

Respondent.

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

Submitted March 29, 2023**
San Francisco, California

Before: BOGGS,*** M. SMITH, and OWENS, Circuit Judges.

Dharwinder Singh, a native and citizen of India, petitions for review of the Board of Immigration Appeals' ("BIA") dismissal of his appeal of an immigration judge's ("IJ") denial of his applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). We

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

have jurisdiction under 8 U.S.C. § 1252. We review factual findings for substantial evidence and questions of law de novo. *Bhattarai v. Lynch*, 835 F.3d 1037, 1042 (9th Cir. 2016). As the parties are familiar with the facts, we do not recount them here. We grant the petition for review and remand for further proceedings.

1. Singh sought relief based on his fear of harm on account of his political opinion. He is from Punjab, a member of the Shiromani Akali Dal Amritsar Party (“Mann Party”), and fears members of the Bharatiya Janata Party (“BJP”). Singh stated that he was attacked on two occasions by BJP members.

The BIA upheld the IJ’s determination that Singh’s asylum and withholding claims failed because he did not establish past persecution “committed by the government or forces the government is either unable or unwilling to control.” *J.R. v. Barr*, 975 F.3d 778, 782 (9th Cir. 2020) (citation omitted). We remand for the BIA to consider in the first instance the impact, if any, of our recent decision in *Kaur v. Wilkinson*, 986 F.3d 1216 (9th Cir. 2021).

In *Kaur*, the petitioner was a member of the Mann Party, and we remanded for the BIA to consider the petitioner’s contention that the members of the Indian National Congress Party—“one of India’s major political parties and one of the leading parties in Punjab”—who harmed her were “government actors.” *Id.* at 1227-30. We stated that “when a petitioner credibly asserts that her persecutor is the government itself, she is not required to show that the

persecutor cannot be controlled.” *Id.* at 1229. We relied on our prior decision in *Reyes-Guerrero v. INS*, 192 F.3d 1241 (9th Cir. 1999), which we stated showed that “when a petitioner suffers persecution at the hands of a major political party both during and after its rise to power from a minority voting bloc in the legislature to the head of government, the source of the persecution is the government itself.” *Kaur*, 986 F.3d at 1228.

Here, Singh argues that the BJP members who attacked him were “government actors” because the BJP is “one of India’s major political parties,” *id.* at 1227-28, and had controlled the national government in India for several years at the time of his attacks. We remand for the BIA to consider Singh’s argument in light of *Kaur*. We are not persuaded by the Government’s contention that Singh failed to exhaust this issue.

2. The BIA also upheld the IJ’s alternative determination that even if Singh had established past persecution, the Department of Homeland Security had met its burden to demonstrate that Singh could safely and reasonably relocate within India. Whether Singh could relocate safely and reasonably within India outside of Punjab is linked to whether his attacks by BJP members constitute persecution by the government itself. This is because “[w]here the applicant has established a well-founded fear of future persecution at the hands of the government, a rebuttable presumption arises that the threat exists nationwide.” *Singh v. Whitaker*, 914 F.3d 654, 661 (9th Cir. 2019) (citation omitted). Here, the BIA did not apply a presumption of a nationwide threat.

Nor are we persuaded by the Government's argument that Singh failed to exhaust this issue. Therefore, we also remand for the BIA to potentially reconsider its relocation analysis if it determined that Singh's attackers were government actors. *See Kaur*, 986 F.3d at 1230-31 (remanding for the BIA to reconduct its internal-relocation analysis with the *Singh* presumption applied in the event that the petitioner established on remand that her attackers were government actors).

3. Singh additionally argues that the IJ erred in relying on changed country conditions regarding the role of the BJP within the state government of Punjab. However, the BIA did not address this finding, and therefore this issue is not before us. *See Budiono v. Lynch*, 837 F.3d 1042, 1046 (9th Cir. 2016) ("Our review is limited to those grounds explicitly relied upon by the Board." (citation omitted)). We only note that the parties agree that the IJ appeared to rely on incorrect information regarding the BJP's role in the Punjab government at the time of Singh's attacks.

4. Singh does not raise, and therefore has waived, any challenge to the BIA's determination that he waived his CAT claim. *See Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1079-80 (9th Cir. 2013) (issues not specifically raised and argued in an opening brief are waived).

5. The motion for a stay of removal (Dkt. No. 4) is granted. Singh's removal is stayed pending a decision by the BIA.

PETITION GRANTED; REMANDED.