
the Board's determination that petitioner failed to establish eligibility for withholding of removal under the regulations implementing the Torture Convention is amply supported by the evidentiary record.

Petitioner's Torture Convention claim was premised on his assertion that he had been detained for two weeks in 1993 by governmental officials who were attemptj -3 to mtitilirom thethe Biaras

² In cases involving the new judicial review provisions of INA § 242, the Attorney General is the respondent rather than the

attend Washburn University in Topeka, Kansas. A.R. 50-51, 264. However, petitioner violated the terms of his visa when he stopped attending classes at the university in the fall semester of 1995. A.R. 71, 264. On August 20, 1998, petitioner was convicted, in accordance with his plea, of domestic battery, in violation of section 21-3412(c) of the Kansas Criminal Code, and child endangerment, a violation of Kansas Criminal Code § 21-3608. A.R. 251. The district court suspended execution of the sentence for these offenses, and placed petitioner on 12 months of supervised probation. Id. On October 14, 1999, after violating the conditions

conviction "of a crime of domestic violence." Id.

P.2d 637, 647 (1999)(Kansas common law marriage has the following "essential" elements: "(1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public"). Less than one month after the birth of

received into evidence the State Department's 1999 Country Reports on Human Rights Practices for Kenya ("Country Reports"). A.R. 87; see A.R. 138-74. The Immigration Judge, noting that petitioner did not appear to have met the statutory deadline for submission of his

⁹ While petitioner asserted that he was "harassed and threatened" as a result of his union activities, he neither identified his alleged harassers nor elaborated on the nature or frequency of this harassment. A.R. 190.

¹⁰ According to petitioner, his "unofficial" affiliation with the FORD party commenced in 1990, A.R. 99, 113, although opposition parties were baat byth thKANUis tilin 12nt. A.re

department" wanted to speak with him. A.R. 105-106, 186.

These investigators

denied his tuberculosis medication.¹⁵ Id. Finally, petitioner's sister convinced a family friend, an ae4major,im tinistvenes" aed

¹⁵ Although not reflected in his testimony, petitioner alleged in his asylum application that the police "crushed peppers on my eyes" and subjected him to "electric shocks all over my body." A.R. 187.

As a preliminary matter, the Immigration and Naturalization Service found, that

not establish that it was more likely than not that he would be

which I am challenging as unconstitutional the said conviction."
A.R. 28. Finally, he asserted that he had presented sufficient
evidence to qualify for asylum and for withholding under either INA §

¹⁶ In his Notice of Appeal, petitioner also alleged that the Immigration Judge's statement that petitioner "had no right to be in the United States," evidenced that the judge was "prejudiced...against me." A.R. 46.

political activism, union membership, or tribal origins. A.R.

5. It found that this claim was belied by the fact that "he did not indicate at the hearing that the police discussed these subjects with him," and by petitioner's own stated belief that his detention was a "shakedown to gain control of his money."

Id. Furthermore, petitioner's release from custody, the absence of any pending criminal charges, and petitioner's ability to leave the country and subsequently renew his passport, undercut the reasonableness of his claimed fear of future torture. A.R. 6. These facts, coupled with petitioner's inability to explain why the government would still be interested in persecuting him after the passage of six years, convinced the Board that he had "failed to show that he more likely than not would be tortured for any reason if removed to Kenya." Id.

SUMMARY OF ARGUMENT

Petitioner asserts for the first time in this appeal that the failure to provide him counsel or access to a "law/legal library" in the course of his removal proceedings was violative of his due process rights. Because aimed fears to ausccess 9s

constitutional right to legal representation in a civil



¹⁸ Petitioner's reliance on former section 242(b) of the INA, 8 U.S.C. § 1252(b) (1994), and the implementing regulation at 8 C.F.R. § 242.16(c) (1994), for his purported right to "the appointment of a government trial attorney" is misplaced. See Pet. Brief at 8. As a preliminary matter, this statutory section was significantly amended by IIRIRA, and is inapposite to petitioner's case which is controll0" is

access to [a] law library" was a violation of due process,

Pet. Brief at 11, is crippled by the fact that he has not shown a
at 351. Peue a les o. 4B ofas not wn arabearhindofd ihholpatsite,ed o
resultant "actual injury." See Lewis v. Casey, 518 U.S. 343, 349

(1996). In this regard, the "injury requirement is not satisfied by
just any type of frustrated legal claim." Id. at 354. The detained
alien claiming actual injury must "demonstrate that the alleged
shortcomings in the library or legal assistance program hindered his
efforts to pursue a legal claim." Id. at 351. Petitioner has simply
raised a bald allegation that "at the Shawnee County Jail...he did
not have access to a legal library." Pet. Brief at 11. He does not
state whether he requested and was denied any legal materials; he
does not address the availability of other legal resources; and, he
does not show how his efforts to pursue a legal claim have been
hindered.

At the March 21, 2000 hearing before the Immigration Judge,
petitioner was fully apprised of the considerore t y oqueablis (hgid) Tj
See

court conviction, or go behind the judicial record to determine, in immigration proceedings, the guilt or innocence of the alien"); Gouveia v. INS, 980 F.2d 814, 817 (1st Cir. 1992)("Criminal convictions cannot be collaterally attacked during immigration proceedings").

INS, 171 F.3d 994, 1005-06 (5th Cir. 1999). Petitioner's Kansas disposition comes squarely within this definition. He was convicted and sentenced to twelve months of supervised probation. A.R. 251.

(9th Cir. 2000). The Torture Convention is a non-self-executing treaty. See S. Treaty Doc. No. 100-20 (9188); 136 Cong. Rec. S17486-01, 1990 WL 168442 (Daily Ed. Oct. 27, 1990); *Ali v. Reno*

²⁰ The substantial evidence standard requires the evidence in petitioner's favor to be so strong that, were this a civil

1997)("Any disagreement we might have with the BIA's appraisal of the facts is not a sufficient ground for reversal");

The burden of proof for an applicant seeking withholding of removal under the Convention, like that for an applicant seeking withholding of removal under INA § 208(b)(3), is
8n

²¹ It must also be noted that petitioner has not been active in the FORD party, or any other political party, since
(continued...)

Additionally, petitioner's role as a union representative had
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²¹(...continued)
his departure from Kenya in 1993. A.R. 112-13.

²² According to the Country Report, petitioner, as a civil servant employee of a government bank, would be required to obtain government permission for international travel. A.R. 158.

F.3d at 1242 (quoting

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2001, I caused two copies of the foregoing "Brief for Respondent" and one copy of a computer diskette containing the brief to be served upon petitioner,