U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: G[redacted], M[redacted]

A [redacted]-029

Date of this notice: 10/30/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Guendelsberger, John
Kendall Clark, Molly

Userteam: Docket

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File: A[redacted]-029 – Port Isabel, TX Date: OCT 30 2018

In re: M[redacted] G[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mohammed S. Omer, Esquire

ON BEHALF OF DHS: Sandra Lindman
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal

The respondent, a native and citizen of Eritrea, has appealed from the Immigration Judge's decision dated January 29, 2018, denying his applications for asylum and withholding of removal. We will remand the record to the Immigration Judge for a new decision as discussed below.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge granted the respondent's application for protection under the Convention Against Torture, finding that the respondent had shown that it is more likely than not that he would be tortured upon return to Eritrea based on his desertion from the Eritrean armed forces (IJ at 35). The Department of Homeland Security (DHS) has not appealed from that decision. However, the Immigration Judge denied the respondent's applications for asylum based on the firm resettlement bar, and denied both asylum and withholding of removal because the respondent did not show that the harm he fears is on account of a protected ground enumerated in section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42). The respondent challenges these findings on appeal.[1]

I. FIRM RESETTLEMENT

The Immigration Judge found that the respondent's asylum claim is subject to the firm resettlement bar, section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. § 1158(b)(2)(A)(vi), finding that the respondent had firmly resettled in Sudan or Israel (IJ at 7-20). As noted by the Immigration

[1] The respondent challenges the Immigration Judge's concerns about his credibility (Respondent's Br. at 8-10). However, as the Immigration Judge did not make an adverse credibility finding, we will presume the respondent's credibility, and we need not address the respondent's arguments regarding credibility.

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Judge, whether an asylum application is subject to the firm resettlement bar is determined under the framework set forth in *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011). In that decision, the Board noted that the framework for making firm resettlement determinations focuses exclusively on the existence of an offer of permanent resettlement and allows for the consideration of direct and indirect evidence. *Id.* at 501. The Board held that the DHS has the initial burden of securing and producing direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely. *Id.*

The Immigration Judge's decision does not address whether Sudan, Israel, or any other country made an offer of permanent resettlement to the respondent. The Immigration Judge found that the respondent's view that Sudan does not give asylum is contradicted by the information contained in the "2010 Country Report," presumably the Department of State's 2010 Sudan Country Report on Human Rights Practices, which stated that the government of Sudan granted asylum to a large number of asylum seekers (IJ at 17). However, the report, as quoted in the Immigration Judge's decision, went on to state that Eritreans are required to register as asylum-seekers rather than being granted refugee status, and furthermore refugees could not become resident aliens or citizens, regardless of their length of stay, and they were not entitled to work permits (IJ at 17). Therefore, to the extent the Immigration Judge found that the respondent could have stayed in Sudan indefinitely, this finding is not supported by the report cited in the Immigration Judge's decision.[2]

As to whether the respondent could have stayed in Israel indefinitely, the respondent testified that he had obtained a temporary status in Israel and applied for asylum, but his application was denied and he was ordered to leave the country (IJ at 7-8). The Immigration Judge found that the respondent did not obtain and submit a copy of the denial decision nor any other data maintained by the Israeli government, thus he failed to corroborate his claims (IJ at 7, n. 4). However, as noted above, the Board held in *Matter of A-G-G-* that the DHS has the initial burden of securing and producing direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely. In this case, the DHS did not secure and produce direct evidence of government documents from Sudan or Israel indicating the respondent's ability to stay in those countries indefinitely. Accordingly, while the Immigration Judge's decision refers to the four-step analysis set forth in *Matter of A-G-G-*, the Immigration Judge did not apply the analysis.

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[2] The Immigration Judge relied extensively on extra-record evidence for his decision on firm resettlement and other issues, taking administrative notice of a number of documents. The regulation allows the Board to take administrative notice of commonly known facts or the contents of official documents, although the Board is not allowed to make a factfinding in deciding an appeal. 8 C.F.R. § 1003.1(d)(3)(iv). In comparison, Immigration Judges are authorized and obligated to make necessary factual findings in the first instance based on the evidence submitted by the parties. If and to the extent the Immigration Judge's factual findings are to be based on administrative notice of extra-record evidence in any significant matters or to any significant degree, due process would be best served if the parties are first given notice of such evidence and an opportunity to address it.

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Based on the above, the Immigration Judge's decision regarding firm resettlement is erroneous as a matter of law, and is clearly erroneous as a matter of fact. We therefore conclude that the respondent's asylum application is not subject to the firm resettlement bar.

II. NEXUS TO A PROTECTED GROUND

The Immigration Judge found that the respondent's claimed grounds for harm, i.e., desertion from the Eritrean armed forces and unauthorized departure from that country, were not protected grounds for asylum and withholding of removal, and they were not a basis for cognizable particular social groups[3] (IJ at 22-23). As to the respondent's political opinion claim, the Immigration Judge found that the respondent was subjected to discipline or punishment while in Eritrean national service because of his desertion, rather than because of a political opinion (IJ at 23). The Immigration Judge also found that punishment for illegal departure from a country is not persecution within the meaning of the Act (IJ at 34).

The respondent argues that punishment for violating departure laws may constitute persecution for purposes of asylum law if the punishment is severe, and he cites a number of cases to support his argument (Respondent's Br. at 15-16). The United States Court of Appeals for the Fifth Circuit, in a case that also involved an Eritrean who fled forced conscription, held that punishment for violating conscription laws of general applicability does not in itself constitute persecution on account of political opinion. *Milat v. Holder*, 755 F.3d 354, 361 (5th Cir. 2014). Rather, the Fifth Circuit concluded that prosecution for avoiding military conscription may constitute "persecution" only if the applicant shows either (1) the penalty imposed would be disproportionately severe on account of a protected ground, or (2) the applicant would be required to engage in inhumane conduct as part of military service. *Milat v. Holder*, 755 F.3d at 361; *see also Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992); *Matter of A-G-*, 19 I&N Dec. 502, 506 (BIA 1987).

The respondent argues that he has demonstrated eligibility for asylum based on military desertion under this standard (Respondent's Br. at 17-18). The respondent does not argue that he was required to engage in inhumane conduct as a result of military service required by the Eritrean government. Rather, the respondent argues that the Eritrean government imposes "disproportionate punishment," because the punishment for desertion is disproportionately severe for the offense (Respondent's Br. at 18-19). We need not reach this issue because we will remand the record to the Immigration Judge because the Immigration Judge's decision did not adequately address whether the respondent has suffered past persecution on account of a political opinion or imputed political opinion. The respondent argues that, even accepting that his first two arrests

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[3] The Immigration Judge denied the respondent's asylum claim based on religion (IJ at 24-25), but the respondent has not addressed this matter on appeal. The Immigration Judge also found that the respondent's proposed particular social groups – (1) individuals who left Eritrea without authorization, (2) individuals who deserted from national service, (3) Eritreans who did not pay a tax while abroad, and (4) those who expressed opposition to the government when questioned by Eritrean authorities while residing in other countries – are not cognizable under the Act (IJ at 22-23). The respondent has not contested the Immigration Judge's findings regarding lack of nexus to a cognizable particular social group. We thus deem these issues waived. *Matter of R-A-M-*, 25 I&N Dec. at 658 n.2.

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were based on his leaving the military service without authorization, the third arrest occurred because he spoke against the government in a meeting (Respondent's Br. at 14; Tr. at 47-49). The respondent testified that he was arrested for the third time shortly after he spoke out at a meeting against indefinite military service and hardship to his family (IJ at 6). The Immigration Judge's decision does not show that the Immigration Judge considered the respondent's political opinion or imputed political opinion claim based on his opposition to the government practice.

The motivation of the persecutor for asylum and withholding of removal purposes is a factual question to be determined by the Immigration Judge. *Matter of D-R-*, 25 I&N Dec. 445, 453 (BIA 2011). Accordingly, we will remand the record to the Immigration Judge to fully address these claims. If the Immigration Judge finds that the third arrest and detention was on account of the respondent's actual or imputed political opinion, the Immigration Judge shall also address whether the harm suffered by the respondent from this incident rose to the level of persecution, such that the respondent is entitled to a presumption of a well-founded fear of persecution on the same ground. *See Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008) (holding that the Immigration Judge must make a specific finding that the applicant has or has not suffered past persecution based on a statutorily enumerated ground). In light of our decision, we need not reach other issues. Based on the above, the following order shall be issued.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision, and for the issuance of a new decision.

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