U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: B[redacted]-R[redacted], K[redacted] ... **A [redacted]-670**

Date of this notice: 6/22/2020

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:
Goodwin, Deborah K.
Donovan, Teresa L.
Wilson, Earle B.

Userteam: Docket

File: A[redacted]-670 – Charlotte, NC Date: JUN 22 2020

In re: K[redacted] A[redacted] B[redacted]-R[redacted][1]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mark J. Devine, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Honduras, appeals from the Immigration Judge's July 9, 2018, decision denying her application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), as well as protection under the Convention Against Torture, 8 C.F.R. § 1208.16(c). *See* 8 C.F.R. §§ 1208.13, 1208.16-.18. The Department of Homeland Security has not filed a motion in opposition to the appeal. The respondent's appeal will sustained and the record remanded.

We review the Immigration Judge's factual findings, including credibility determinations, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, and judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge erred in determining that she was time-barred from seeking asylum (Respondent's Br. at 6-11). The respondent also contends that she met her burden for withholding of removal and protection under the Convention Against Torture (Respondent's Br. at 11-21).

First, we address the respondent's contention that she demonstrated an extraordinary circumstance exempting her from asylum's one-year filing deadline. *See* sections 208(a)(2)(B), (D) of the Act. In determining that the respondent was time-barred, the Immigration Judge concluded that the respondent had not established an "exceptional circumstance" to justify an untimely asylum application and implied that the respondent should have, but did not, make this showing by "clear and convincing evidence" (IJ at 9). The respondent argues, however, that she was only required to demonstrate an "extraordinary circumstance," and only according to a preponderance of the evidence (Respondent's Br. at 8-9). *See* sections 208(a)(2)(B), (D) of the Act; *see also Viridiana v. Holder*, 646 F.3d 1230, 1236-37 (9th Cir. 2011) (holding that "exceptional circumstances" constitute a higher burden of proof than "extraordinary circumstances"). *Compare* section 208(a)(2)(D) of the Act (requiring that the respondent demonstrate an "extraordinary circumstance" "to the satisfaction of the Attorney General"), *with Matter of Locicero*, 11 I&N Dec. 805, 808 (BIA 1966) (defining the term "to the satisfaction of

[1] Although the respondent's Form I-589 included a rider respondent, the rider respondent did not appeal the Immigration Judge's denial of derivative asylum. *See* Form EOIR-26.

the Attorney General" as a preponderance of the evidence (citing *Matter of Barreiros*, 10 I&N Dec. 536, 538 (1964)).

Despite the Immigration Judge's substitution of terms, "it is clear from the record that . . . [this] was inadvertent and not a legal determination affecting the substance of this analysis." *See Lizama v. Holder*, 629 F.3d 440, 445 (4th Cir. 2011). The Immigration Judge "properly understood [the respondent's] argument to be that" her ignorance of the one-year filing deadline constituted an "extraordinary circumstance" (IJ at 6; Tr. at 21-23). *Id.* However, as the Immigration Judge correctly concluded, ignorance of the law does not constitute an "extraordinary circumstance." *See Cheek v. United States*, 498 U.S. 192 (1991); *see also* 8 C.F.R. § 1208.4(a)(5).

The respondent further contends that the Immigration Judge's time bar analysis was flawed because it did not consider that additional circumstances prevented her from filing her Form I-589. For example, the respondent was only 19 year old when she entered the United States, witnessed traumatic events 5 months before entering the United States, became pregnant with a second child shortly after arriving in the country, and could not understand English. However, these circumstances are not "extraordinary." In fact, many of these circumstances, such as experiencing traumatic events shortly before arrival to the United States and not speaking English, are common for asylum seekers who are unexpectedly forced to flee to the United States. Moreover, the respondent's second pregnancy does not constitute an extraordinary circumstance because she created this circumstance. *See* 8 C.F.R. § 1208.4(a)(5) (excluding circumstances that were "created by the alien through his or her own action or inaction" from the definition "extraordinary").

We are also unpersuaded by the respondent's appellate argument that the Immigration Judge should have, but did not, consider an unpublished BIA decision when determining whether the respondent established an exception to the one-year filing deadline (Respondent's Br. at 7-12). *See* 2017 Immig. Rptr. LEXIS 26297 (BIA May 22, 2017). First, unpublished Board orders do not represent binding precedent in the respondent's case. *See Matter of Zangwill*, 18 I&N Dec. 22, 27 (BIA 1981), *overruled on other grounds*, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). Moreover, this unpublished order considered whether an alien who entered the United States before reaching the age of 18 had demonstrated an "extraordinary circumstance" after failing to apply for asylum after reaching the age of majority, which is distinguishable from the present case, where the respondent entered the United States as a legal adult (IJ at 2; Exh. 1; Exh. 2 at 2). *See also Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002) (holding that even if an alien enters the United States as an unaccompanied minor, "[w]e are not required to excuse [] [her] tardy filing merely because the regulation includes unaccompanied minor status as a possible extraordinary circumstance.").

Because we discern no legal or clear factual error with the Immigration Judge's determination that the respondent had not met her burden to prove an "extraordinary circumstance," we need not consider her additional appellate argument that she filed for asylum within a reasonable time period of the "extraordinary circumstance" (Respondent's Br. at 11). See *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (As a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach); *see also See Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (holding that if an "asylum application is fatally flawed

in one respect . . . an [I]mmigration [J]udge or the Board need not examine the remaining elements of the asylum claim"). Accordingly, we affirm the Immigration Judge's denial of asylum.

Next, we consider the respondent's contention that the Immigration Judge erred in denying her withholding of removal (Respondent's Br. at 12-18). First, the respondent argues that the Immigration Judge erred in concluding that she had not articulated a cognizable particular social group upon which to seek withholding of removal (Respondent's Br. at 12-14). Aliens must clearly delineate the proposed particular social group before the Immigration Judge, or waive the issue on appeal. *See W-Y-C- & H-O-B*, 27 I&N Dec. 189, 192 (BIA 2018). Before the Immigration Judge, the respondent claimed that she was seeking relief based on her membership in the proposed particular social groups of "perceived prosecutorial witness[es] and her known identity in her family of origin" (Tr. at 56).

An alien's proposed particular social group constitutes a protected ground under the Act if the alien establishes that the group is (l) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). Social group determinations are made on a case-by-case basis, according to the particular factual findings in each case. *Id.* at 242. If the particular social group is based on an alien's membership in her immediate family, the respondent must demonstrate that her "*specific* nuclear family would be 'recognizable by society at large.'" *See Matter of L-E-A-*, 27 I&N Dec. 581, 594 (A.G. 2019) (emphasis in original) (quoting *Matter of A-B-*, 27 I&N Dec. 316, 336 (A.G. 2018)); *id.* at 595 ("[U]nless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the [Act] for purposes of asylum."). Notably, "it is the perception of the relevant society–rather than the perception of the alien's actual or potential persecutors–that" determines whether a nuclear family is socially distinct. *Id.* at 594 (citing *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014)).

The Immigration Judge concluded that the respondent's proposed particular social groups were not legally cognizable under the Act, but did not make any factual findings to support this determination (IJ at 10). Thus, we must remand for the Immigration Judge to make factual findings about the cognizability of both of the respondent's proposed groups (Respondent's Br. at 15-16). *See Cordova v. Holder*, 759 F.3d 332, 338 (4th Cir. 2014) (remanding a case because it did not analyze the cognizability of the alien's purported particular social group); *see also* 8 C.F.R. § 1003.1(d)(3)(iv) ("[T]he Board will not engage in fact finding in the course of deciding appeals."). On remand, the Immigration Judge should consider whether the respondent's perceived membership in the group of prosecutorial witnesses constitutes a particular social group according to the facts provided in this record. *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (those actively opposing gangs by agreeing to be prosecutorial witnesses as well as their family members constitute a cognizable particular social group); *see also, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (concluding that people who testified publicly against gang members in criminal proceedings may constitute a particular social group) (en banc); *Gashi v. Holder*, 702 F.3d 130, 132 (2d Cir. 2012). The Immigration Judge should also make factual findings to determine whether the respondent's brother's professional soccer career in Honduras demonstrates that the respondent's "family unit would be 'recognizable by society at large.'" *See Matter of L-E-A-*, 27 I&N Dec. at 594.

Likewise, although the Immigration Judge determined that there was no nexus between the respondent's proposed particular social groups and the harm that the respondent fears, he did not support his conclusion with any factual findings (IJ at 10-11). Accordingly, we remand this decision for the Immigration Judge to make factual findings about whether the respondent's proposed particular socials groups were or would be one central reason she did or would experience harm.

Although the Immigration Judge concluded that the respondent had not demonstrated a clear probability that she would experience harm rising to the level of persecution in the future, he did not clearly identify the factual findings he made to support this conclusion (IJ at 11). The respondent's brief identifies a number of alleged facts, such as her credible testimony that two of the other witnesses were murdered, that she argues meet her burden of proof (IJ at 8; Tr. at 40; Respondent's Br. at 17-18). For this same reason, we also remand this case to the Immigration Judge to provide factual findings that support his finding that the respondent had not established that she would suffer harm in the future.

Finally, the Immigration Judge should make factual findings to support his conclusion that the respondent had not demonstrated that a government official would harm or acquiesce to her harm (IJ at 11; Respondent's Br. at 20-21). *See* 8 C.F.R. § 1208.18(a)(1), (7).

Accordingly, the following orders are entered.

ORDER: The respondent's appeal from the denial of asylum is denied.

FURTHER ORDER: The respondent's appeal from the denial of withholding of removal under the Act and the Convention Against Torture is sustained, and the record is remanded.

Teresa L. Doran

FOR THE BOARD