U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: M[redacted], Y[redacted]

A [redacted]-937

Date of this notice: 8/14/2018

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:
Crossett, John P.
Wendtland, Linda S.
Greer, Anne J.

Userteam: Docket

File: [redacted] 937 – Atlanta, GA

Date: AUG 14 2018

In re: Y[redacted] M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Khadizeth F. Toure-Samba, Esquire

ON BEHALF OF DHS: Gregory E. Radics
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b) of the Act

This matter was last before the Board on December 16, 2015, when we remanded the record to the Immigration Judge for further proceedings consistent with our decision. On August 16, 2017, the Immigration Judge issued a written decision and returned the record to this Board by certification. *See* 8 C.F.R. § 1003.7 (outlining the mechanism by which an Immigration Judge may certify a matter to this Board). In his August 16, 2017, decision, the Immigration Judge denied the respondent's application for cancellation of removal for certain non-permanent residents pursuant to section 240A(b) of the Act, 8 U.S.C. § 1229b(b). The appeal will be sustained and the record will be remanded to the Immigration Judge for updated background and security checks.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

In denying the cancellation application filed by the respondent, a native and citizen of The Gambia, the Immigration Judge observed that the following statutory requirements are not at issue (1) continuous physical presence, (2) good moral character, and (3) criminal statutory bars (IJ at 5; Tr. at 12). Sections 240A(b)(1)(A)-(C) of the Act. Instead, the Immigration Judge denied the application by finding that (1) the respondent's qualifying relatives—his three United States citizen children—will not experience exceptional and extremely unusual hardship should their father be removed from the United States and (2) relief should be denied in the exercise of discretion (IJ at 5-7). Section 240A(b)(1)(D) of the Act. In addition, the Immigration Judge found that the respondent did not credibly testify in support of his application for relief (IJ at 3-4). The respondent has challenged these findings on appeal.

With respect to the adverse credibility determination, we recognize the Immigration Judge's concerns for the reasons he stated. (IJ at 3). Even if we assume that this finding is not clearly erroneous, however, we do not view it as dispositive with respect to the issues of hardship and discretion. Turning to the exceptional and extremely unusual hardship requirement, the respondent testified to the following. The respondent has daughters and a son, all of whom are United States citizens now ages 6, 17, and 14 years old, respectively (IJ at 5; Tr. at 14-15, 33; Exhs. 3D-E, 3H,

4:2). The two oldest children have a different mother than the youngest child (IJ at 5; Tr. at 15; Exhs. 3D-E, 3H). On June 11, 2014, the Superior Court in Gwinnett County granted the respondent primary physical custody and joint legal custody of his two oldest children (IJ at 5; Tr. at 125; Exh. 7).[1] The respondent also resides with his youngest child and her mother (an individual who does not have lawful status in the United States), and the respondent reported that all of the children would accompany him should he be required to return to his home country (IJ at 5; Tr. at 16, 33, 46-47, 50, 57-58; Exh. 4).

The respondent expressed fear that, in the Gambia, his daughters would be subjected to female genital mutilation (FGM) (IJ at 5; Tr. at 50-51, 53-54; Exhs. 4:5, 8, R1:A-B, R2:1-4). In addition, the respondent expressed concerns about additional hardships attendant to his children relocating to The Gambia relating to education, economic detriment, and political instability (IJ at 6; Tr. at 54-59, 62; Exh. 4:5).

Upon de novo review, we ultimately disagree with the Immigration Judge's conclusion that the respondent's children, and particularly, his daughters, will not experience sufficient hardship should the respondent be required to return to the Gambia (IJ at 5-7). In this regard, the Immigration Judge recognized progress made by the Gambian government in prohibiting the practice of FGM. Nonetheless, other evidence of record indicates that the risk of being subjected to FGM continues. On this basis, we find clear error in the Immigration Judge's finding of fact with regard to the prevalence of FGM and disagree with his legal conclusion that the cumulative hardships presented from the daughters' relocation to The Gambia do not amount to exceptional and extremely unusual hardship in this case. We consider the risk of FGM, family separation issues already experienced due to custody arrangements, and the additional hardships arising from adjusting to a third world country to be quite significant in this case. Accordingly, unlike the Immigration Judge, we conclude that the respondent has demonstrated sufficient hardship to his daughters to satisfy this statutory element (IJ at 5-7). *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001).

With respect to discretion, we recognize the negative factors, including a lack of candor, tax irregularities and not complying with conditions of his status while he was a non-immigrant student (IJ at 7). However, he possesses countervailing equities, including (1) his lengthy residence in the United States of more than 20 years; (2) significant family ties to this country, including his three United States citizen children; (3) the hardship his children would face should he be removed from this country; and (4) his gainful employment as a nurse in providing for his family's support (IJ at 5-7). When balancing the relevant factors, we conclude that discretion

[1] We take administrative notice of the fact that the custody order was entered because, the court found, the children's mother was "unable to care for [them]. . .and has requested that the…[respondent] be their primary custodian as he can provide a stable home for them" (Exh. 7). *See* 8 C.F.R. § 1003.1(d)(3)(iv) (limiting our appellate fact-finding authority to "taking administrative notice of commonly known facts such as current events or the contents of official documents"); *Matter of S-H-*, 23 I&N Dec. 465-66 (BIA 2002).

should be favorably exercised in this case, particularly when considering that most of the conduct giving rise to the Immigration Judge's concerns occurred nearly 2 decades ago (IJ at 5-7; Tr. at 16-22, 67-71, 74-75, 84-92, 99-102, 111-14; Exhs. 3G, 4, 4:2, 6).

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the DHS the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD