U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: W[redacted], S[redacted] ... **A[redacted]-623**

Date of this notice: 5/2/2019

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:
Greer, Anne J.
Donovan, Teresa L.
Rosen, Scott

Userteam: Docket

File: [redacted]-623 – Arlington, VA Date: MAY - 2 2019

In re: S[redacted] G[redacted] W[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Daniel Diskin, Esquire

APPLICATION: Reopening and remand

This case was last before us on April 9, 2015, when we remanded the record to the Immigration Judge for the issuance of a new decision with sufficient findings of fact and conclusions of law to enable us to adequately review the appeal. On May 4, 2018, the Immigration Judge again denied the respondent's motion to reopen, and it is from that decision that the respondent now appeals. The Department of Homeland Security (DHS) has not filed an opposition to the appeal.

The respondent, a native and citizen of Ethiopia who was granted withholding of removal by an Immigration Judge on June 16, 2005, argues that reopening is warranted to allow him to apply for asylum. We agree with the respondent's threshold argument that he was not required to pay a filing fee because the only relief he seeks is asylum. *See* 8 C.F.R. § 1003.24(b)(2)(i).

The motion to reopen has been filed out of time. Pursuant to 8 C.F.R. § 1003.2(c)(2), a motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision. In the instant case, a motion to reopen would have been due on or before September 14, 2005. The record reflects, however, that the respondent did not file the motion until July 19, 2013, nearly 8 years after it was due. The respondent does not dispute the untimeliness of the motion but argues that it should be granted pursuant to our *sua sponte* authority to reopen proceedings or because there have been changed country conditions in Ethiopia. *See* 8 C.F.R. §§ 1003.2(a), (c)(3)(ii), and 1003.23(b)(1), (4).

We consider first whether the respondent has established that there are changed circumstances in Ethiopia and whether the evidence is material and was not available and could not have been discovered or presented at the previous hearing. *See* 8 C.F.R. §§ 1003.23(b)(4). The respondent has submitted evidence with his motion and with this appeal that describes worsening conditions in Ethiopia, particularly in regards to religious freedom, which was the basis of the respondent's application (Respondent's July 19, 2013, Motion to Reopen at Tab G; Respondent's Mar. 26, 2018, Response to IJ Request for Information at Tab 2). Indeed, the Immigration Judge recognized that conditions in Ethiopia for a person in the respondent's situation are "very bad," that the government is oppressive, and that "dissidents are jailed, tortured, even killed" (May 4, 2018, IJ at 2). The Immigration Judge also found without citing any evidence that conditions at the time of the respondent's hearing were "equally bad," but the country conditions documents in the record do not support that conclusion. *Compare, e.g.*, United States Department of State's (USDOS) *2016 International Religious Freedom Report*, Respondent's Mar. 26, 2018, Response to IJ Request for Information at Tab 2, *to* USDOS's *2004 International Religious Freedom Report*, Grp.

Exh. 5 at Tab 57. The country conditions evidence is material because it is relevant to the respondent's asylum claim and was not available at the time of the respondent's 2005 hearing because it was published since that time. Therefore, the respondent has established that reopening is warranted for consideration of his asylum application.

We recognize the Immigration Judge's conclusion that the only reason that the respondent was ineligible for asylum was discretionary because the grant of withholding of removal to the respondent indicates that he also met the lower threshold for establishing that he qualified for asylum (May 4, 2018, IJ at 2). On remand, the Immigration Judge will consider whether the respondent has established that he warrants asylum in discretion, taking into account all relevant factors. Further, if the only basis for denying asylum is a discretionary one, "the denial of asylum will be reconsidered." 8 C.F.R. § 1208.16(e).

Because we have found that reopening is warranted, we need not address whether the circumstances of the respondent's case constitute an "exceptional situation" appropriate for reopening under our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). We note however, that, although the respondent argues that he withdrew his asylum application against the advice of counsel in 2005 due to his "mental state and psychological inability to proceed under aggressive cross-examination," the respondent has not submitted medical evidence to corroborate his claim of a cognitive impairment or psychological stress. As such, the respondent has not established sufficient indicia of a lack of competency at the time of the hearing such that further consideration of the respondent's competency was warranted. *See Matter of M-A-M-*, 25 I&N Dec. 474, 477 (BIA 2011) ("Absent indicia of mental incompetency, an Immigration Judge is under no obligation to analyze an alien's competency").[1]

ORDER: The appeal is sustained and the motion to reopen is granted.

FURTHER ORDER: The record will be remanded for further consideration in accordance with this decision.

Teresa L Donovan

FOR THE BOARD

[1] We do not reach the respondent's arguments regarding changes in the law, but the arguments may be raised and addressed on remand (Respondent's Br. at 19-20).