U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: P[redacted], R[redacted] R[redacted] **A [redacted]-272**

Date of this notice: 2/22/2019

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:
Donovan, Teresa L.
Greer, Anne J.
Wendtland, Linda S.

Userteam: Docket

File: A[redacted]-272 – Arlington, VA Date: FEB 22 2019

In re: R[redacted] R[redacted] P[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Kaitlyn H. Demers, Esquire

ON BEHALF OF DHS: Philip Villeneuve
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of Guatemala, has appealed from an Immigration Judge's January 16, 2018, decision denying his applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture. The Department of Homeland Security ("DHS") has filed a brief on appeal, and the applicant has filed a reply brief. The request for oral argument is denied. The appeal will be sustained, and the record will be remanded.

We review the Immigration Judge's factual findings for clear error. 8 C.F.R. § 1003.1(d)(3)(i). Questions of law, discretion and judgment and all other issues are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The applicant claims eligibility for withholding of removal because Mara 18 gang members threatened to kill him if he did not make extortion payments and if he interfered with the gang's recruitment of his son (IJ at 6-7). He testified that he and his wife operated a grocery store out of their home and that in 2012 gang members robbed their business at gunpoint and threatened to kill him if he did not comply with their demand to pay 400 quetzales rent every month (IJ at 6-7; Tr. at 21-22; Exh. 3A). He also testified that after he fled to the United States in 2013 and was deported to Guatemala after 2 months, the same gang members approached him and said that they were going to recruit his son into the gang as punishment for his attempt to evade their extortion demands, and they threatened to kill him if he attempted to interfere with their recruitment efforts (IJ at 6-7; Tr. at 26, 28, 35, 46; Exh. 3A). The applicant claimed before the Immigration Judge that the gang's threats to kill him if he interfered with the recruitment of his son constitute persecution on account of his membership in the particular social group of his nuclear family (IJ at 5).

The Immigration Judge held that death threats can constitute persecution, but the applicant did not demonstrate that the threats were on account of his membership in his nuclear family or any other protected ground (IJ at 6-7). In particular, the Immigration Judge found that the gang threatened to kill the applicant as punishment for evading the extortion demands and that the applicant's parental authority over his son's actions and familial relationship with him were merely

incidental to the central reasons for the threats, which were to punish the applicant for evading the extortion and to keep him cooperative with their extortion demands (IJ at 7).

The applicant argues on appeal that the Immigration Judge applied the wrong legal standard by requiring him to show that his relationship to his son was "one central reason" for the gang's threats rather than "a reason" for the threats. The applicant argues that the Board should reconsider its decision in *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), and adopt the "a reason" standard outlined in *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). This case, however, arises in the United States Court of Appeals for the Fourth Circuit, and thus we are not bound by Ninth Circuit law. Moreover, the Fourth Circuit has held that the standard of proof for withholding of removal is higher, requiring the applicant to establish a clear probability of persecution, but the core condition of eligibility for asylum and withholding of removal – that there be a nexus between the threatened persecution and a protected status – is the same. *Salgado-Sosa v. Sessions*, 882 F.3d 451, 456-57 (4th Cir. 2018). Thus, the Immigration Judge applied the appropriate nexus standard (IJ at 6).

The applicant further argues that the Immigration Judge applied an exceptionally narrow interpretation of the "one central reason" standard and erred in finding that his familial relationship with his son was incidental to the central reason for the persecution. We agree. The applicant's case is similar to the facts in *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015). In that case, Mara 18 gang members came to the applicant's home to tell her that her son was old enough to join the gang. She responded that her son was not going to join the gang, and the gang members put a gun to her head and threatened to kill her if she opposed him joining the gang. *Hernandez-Avalos v. Lynch*, 784 F.3d at 947. The gang members threatened to kill her on another occasion when she again said she would refuse to allow her son to join them. *Id.* The Fourth Circuit held that the woman's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18 and that it was unreasonable for the Board to conclude that the fact that she is her son's mother is not *at least one* central reason for her persecution. *Id.* at 949-50.

The applicant's case is also similar to *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017). In that case, the applicant received threats from her husband's boss, who was involved with organized crime, when her husband disappeared after going on a trip with his boss. The Fourth Circuit held that the Board shortsightedly focused on the persecutor's articulated purpose of preventing the applicant from contacting the police, while discounting the very relationship that prompted her to search for her husband, to confront the boss, and to express her intent to contact the police. The court found that the Board erred by focusing on the explanation the boss gave for his threats, rather than the fact that the applicant had information based on her marital relationship, which caused her husband's boss to threaten her on account of her membership in his nuclear family. *Cruz v. Sessions*, 853 F.3d at 129.

As in *Hernandez-Avalos v. Lynch* and *Cruz v. Sessions*, the Immigration Judge clearly erred in determining that the applicant's familial relationship was merely incidental to the central reason for the threats, which was to punish him for evading the gangs' extortion demands. The applicant testified that after he returned to Guatemala in 2013, the gang members made two threats – one to extort him and kill him if he did not pay and the second threat to kill him if he interfered with the recruitment of his son (Tr. at 46). Moreover, he continued to receive the death threats related to

his son every month when he made the extortion payments (Tr. at 37). The Immigration Judge clearly erred by focusing on the immediate trigger for the threats, which was extortion. The correct analysis is a focus on the applicant and whether one central reason he was targeted was because of family. The gang members may have threatened the applicant in order to punish him for what they perceived as an attempt to evade the extortion payments by fleeing to the United States, but they also threatened to kill him because of his parental relationship with his son, which was one of multiple central reasons for persecuting him. *Hernandez-Avalos v. Lynch*, 784 F.3d at 950 & n.7; *Cruz v. Sessions*, 853 F.3d at 129; *see also Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248 (4th Cir. 2017) (the statutory nexus standard requires the consideration of intertwined reasons for threats). As the applicant points out on appeal, the Immigration Judge erroneously stated that neither the applicant nor his family members experienced harm as long as the extortion was paid (IJ at 8). Rather, the applicant testified clearly that after he returned to Guatemala in 2013, he received the death threats ordering him, as a parent, not to interfere with his son's recruitment into the gang (Tr. at 46). Thus, we reverse the Immigration Judge's finding of no past persecution on account of a protected ground and find that the applicant has shown past persecution on account of membership in his nuclear family. *See Tairou v. Whitaker*, --- F.3d ----, 2018 WL 6252780 (4th Cir. Nov. 30, 2018) (holding that death threats rose to level of past persecution).

However, in order to be eligible for withholding of removal, the applicant has to establish that the Guatemalan government was unable or unwilling to control Mara 18 gang members. *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) (construing persecution as requiring that the claimed harm must be inflicted by the government of a country or by persons that the government is unable or unwilling to control); *see also Matter of A-B-*, 27 I&N Dec. 316, 337-38 (A.G. 2018); *Matter of W-G-R-*, 26 I&N Dec. 208, 224 & n.8 (BIA 2014), *affirmed in relevant part by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018). The Immigration Judge did not make specific findings of fact regarding this issue. If the Immigration Judge determines on remand that the Guatemalan government was unable or unwilling to control the Mara 18 gang at the time of the past persecution, the burden will shift to the government to rebut the resulting presumption that the applicant's life or freedom would be threatened in the future upon removal to Guatemala. 8 C.F.R. § 1208.16(b)(1)(i). The Immigration Judge should then consider whether the government has shown by a preponderance of the evidence that there has been a fundamental change in circumstances or that the applicant could avoid a future threat to his life or freedom by relocating to another part of Guatemala and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. §§ 1208.16(b)(1)(i)(A), (B) and (ii). If the Immigration Judge determines that the Guatemalan government was not unable or unwilling to control the gang, she should still assume as such and assess, in the alternative, whether the government can rebut the presumption of a future threat to the applicant's life or freedom.

The parties should be given the opportunity on remand to update the record and to provide any additional evidence, both testimonial and documentary, regarding the applicant's applications for

withholding of removal and Convention Against Torture protection. We express no opinion regarding the outcome of the proceedings on remand.[1]

Accordingly, the following order is entered.

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Linda S. Wendtland

FOR THE BOARD

[1] In light of this ruling, we need not decide if the Immigration Judge erroneously denied the applicant's application for Convention Against Torture protection (IJ at 8-11; Applicant's Br. at 23-26; DHS's Br. at 12-14; Applicant's Reply Br. at 1-3).