U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: S[redacted]-E[redacted], J[redacted] V[redacted]... **A[redacted]-159**

Date of this notice: 1/10/2020

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:
Greer, Anne J.
O'Connor, Blair
Wendtland, Linda S.

MalikAr
Userteam: Docket

File: A[redacted]-159 – Hackensack, NJ[1] Date: JAN 10 2020

In re: J[redacted] V[redacted] S[redacted]-E[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Nabila J. Taj, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The applicant, a native and citizen of Nicaragua, appeals from the Immigration Judge's July 17, 2019, decision denying his applications for withholding of removal and protection under the Convention Against Torture. *See* section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. The record will be remanded.

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 the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that the applicant testified credibly as follows. The applicant became interested in politics in Nicaragua when he was a teenager. The applicant supported the Liberal Party (PLC) because the party is pro-democracy, but never became a formal member of the party (IJ at 4). In 2006, the applicant worked as electoral police for the party (IJ at 4). However, when the PLC lost the election, he opposed the outcome of the election, and protested the regime of Ortega and the ruling party, the Sandinistas (IJ at 4-5). The applicant participated in 5 to 7 protests a month, and explained that the protests were largely peaceful, but became violent in 2008. In 2008, the applicant was beaten 2 times by police while protesting—on one occasion, the police grabbed him by the neck, threw him down on the ground, cutting his face, and placed him in a patrol car and abandoned him in an area far away from his home. The applicant credibly testified that after this encounter, he remained in hiding at his home because members of the police had threatened him (IJ at 5; Tr. at 53-54). The applicant then left Nicaragua for the United States (IJ at 5). The applicant explained that, since living in the United States, he posts on his Facebook account, expressing his opposition to the Sandinista party and the Ortega regime (IJ at 5).

[1] In accordance with Operating Policies and Procedures Memorandum No. 04-06, removal proceedings before the Immigration Judge in this matter were completed in the Bergen County Jail, Hackensack, NJ. The applicant was located in Hackensack, NJ, and the Immigration Judge, sitting in the Immigration Court in New York, NY, heard the case through video conference pursuant to section 240(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A). Accordingly, we will consider the applicant's claim under the precedent decisions of the United States Court of Appeals for the Third Circuit.

However, when his friend, who is an activist in Nicaragua, realized that her internet activity was being monitored by the government, and when the protests in 2018 became violent, he removed the posts from his account (IJ at 5; Tr. at 35). The applicant's nephew is also involved in politics in Nicaragua, but after he protested at a university and realized the government was looking for him, he fled to Costa Rica (IJ at 6; Tr. at 39-40). The applicant explained that if he were removed to Nicaragua, he would continue to protest (IJ at 6).

First, the applicant argues that the Immigration Judge erred in finding the harm he suffered does not rise to the level of past persecution. We agree with the Immigration Judge that the 2 beatings the applicant endured, considered in the aggregate, do not amount to persecution. *Ordonez-Tevalan v. U.S. Att'y Gen.*, 837 F.3d 331, 341 (3d Cir. 2016) ("'[P]ersecution' is an extreme concept that does not include every sort of treatment our society regards as offensive.'") (quoting *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993)). While the applicant testified that the police beat him with batons both times, and, during one encounter, threw him to the ground, resulting in a cut to his face, and forced him into a police car and abandoned him at a distance from his home, this treatment is not severe enough to constitute persecution (IJ at 4-5). *See, e.g, Kibinda v. U.S. Att'y Gen.*, 477 F.3d 113, 119-20 (3d Cir. 2007) (holding that a 5-day detention and a facial injury requiring stitches and leaving a scar did not rise to the level of persecution); *Voci v. Gonzales*, 409 F.3d 607, 615 (3d Cir. 2005) ("While this Court has not yet drawn a precise line concerning where a simple beating ends and persecution begins, our cases suggest that isolated incidents that do not result in serious injury do not result in persecution.").

The applicant argues that the Immigration Judge failed to consider his testimony that he was threatened by a group of police officers, which led him to go into hiding (Applicant's Br. at 8-9). However, the applicant did not testify as to the nature, content, or circumstances of these threats (Tr. at 53). Further, even if the Immigration Judge considered these threats cumulatively with the other physical harm the applicant experienced, the incidents the applicant suffered do not amount to persecution. *Li v. U.S. Att'y Gen.*, 400 F.3d 157, 164 (3d 2005) (explaining that unfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution).

As he did not establish that he suffered past persecution, the applicant bears the burden to demonstrate that it is more likely than not that he will face persecution if he returns to Nicaragua. *See* 8 C.F.R. § 1208.16(b)(2). The applicant argued that he faces future persecution on account of his political opinion, as well as on account of his membership in the particular social group "family members of [the applicant's nephew]"[2] (IJ at 11-12). First, we agree with the Immigration Judge that the applicant does not face a likelihood of persecution on account of his familial relationship to his nephew. The applicant argues that particular social groups based on family membership should be assessed on a case-by-case basis, pursuant to *Matter of L-E-A-*, 27 I&N Dec. 581

[2] The applicant does not meaningfully appeal the Immigration Judge's determination that the applicant does not face a clear probability of persecution on account of his membership in the particular social groups of "anti-Sandinista protestors" and "people who oppose the current Sandinista government," and thus we find these issues to be waived (IJ at 11). *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (recognizing that failure to substantively address on appeal an issue addressed in the Immigration Judge's decision results in waiver of the issue).

(A.G. 2019) (Applicant's Br. 16-19). The Attorney General's intervening decision in *Matter of L-E-A-* states that family-based groups do not constitute a particular social group unless the group has been shown to be socially distinct in the eyes of society, rather than the persecutor (Applicant's Br. at 15-19). *Id.* at 582. The applicant has not provided sufficient evidence that his society views him to be a member of the particular social group comprised of "family members of [the applicant's nephew]." Further, we discern no clear error in the Immigration Judge's determination that the applicant has not demonstrated that anyone would be motivated to target him because of his relationship to his nephew (IJ at 11). *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) ("A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error.").

However, we will remand the record for the Immigration Judge to reconsider whether the applicant has established whether it is more likely than not that he will face future persecution on account of his political opposition to the Ortega regime. The applicant testified during his hearing, and stated on his application and his personal statement, that he opposes Ortega and the current government in Nicaragua (Tr. at 45; Exhs. 2 at 5; 3.1; Applicant's Brief at 11-15). The Immigration Judge determined that the applicant does not face a likelihood of future persecution because "[t]he [applicant] has not established that his political opinion has come to the notice of the government," either for his protests while in Nicaragua, or for his political activity while in the United States (IJ at 10-11). However, the Immigration Judge did not take into account the applicant's credible testimony that he will continue to speak out in opposition to the government if removed to Nicaragua, as well as attend protests (Tr. at 45). Additionally, the Immigration Judge did not assess the country conditions reports provided by the applicant, including the 2018 Department of State Human Rights Report on Nicaragua, which indicates that the government has instituted a policy to actively target "anyone perceived as opposition" to the Ortega regime for "exile, jail, or death" (Exh. 4 at 47). *See Zubeda v. Ashcroft*, 333 F.3d 463, 477-78 (3d Cir. 2003) ("Country reports . . . are the most appropriate and perhaps the best resource for information on political situations in foreign nations." (internal quotations and citation omitted)). In light of the foregoing, we will remand the record to the Immigration Judge to determine if it is more likely than not that the applicant will face persecution on account of his political opinion in Nicaragua.

On remand, the parties should be allowed to provide further evidence, including country conditions evidence and additional testimony, regarding the applicant's eligibility for withholding of removal. The Immigration Judge should also reassess the applicant's request for protection under the Convention Against Torture based on his claim that he is a political opponent to the Ortega regime.[3] The parties may supplement the record on remand. We express no opinion as to the outcome of these proceedings.

[3] We note that the Immigration Judge took administrative notice of an article from The Washington Post in her decision regarding the applicant's request for protection under the Convention Against Torture (IJ at 13). Contrary to the applicant's arguments, the United States Court of Appeals for the Third Circuit has stated in an unpublished decision that applicant's do not have a due process right to rebut facts accepted on administrative notice. *Mamo v. Ashcroft*, 106 F. App'x 126, 128 (3d Cir. 2004). However, the Court should only take administrative notice of commonly known facts and official documents. *See* 8 C.F.R. 1003.1(d)(3)(iv); *see also*

Accordingly, the following order will be entered.

FOR THE BOARD

Matter of Gomez-Gomez, 23 I&N Dec. 522, 525 n. 2 (BIA 2002) (applying the regulatory standard to Immigration Judges). In any event, if the Immigration Judge continues to rely on this document on remand, the respondent should be afforded an opportunity to comment on it.