



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**Draghia, Smaranda
Justice for our Neighbors
5084 De Zavala Rd
N203-1
San Antonio, TX 78249**

**DHS/ICE Office of Chief Counsel - PSD
566 Veterans Drive
Pearsall, TX 78061**

Name: R [REDACTED] -M [REDACTED], [REDACTED]

A [REDACTED] -308

Date of this notice: 11/22/2019

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:
Guendelsberger, John
Kendall Clark, Molly
Grant, Edward R.

Userteam: Docket

For more unpublished decisions, visit
www.irac.net/unpublished/index

22

Falls Church, Virginia 22041

File: [REDACTED]-308 – Pearsall, TX

Date: **NOV 22 2019**

In re: I- [REDACTED] R- [REDACTED] -M- [REDACTED] a.k.a. [REDACTED]
[REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Smaranda Draghia, Esquire

ON BEHALF OF DHS: Ross Kurtz
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, has appealed the Immigration Judge's May 10, 2019, decision denying her¹ applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A), as well as her request for protection under the Convention Against Torture. 8 C.F.R. §§ 1208.16(c), 1208.18. The Department of Homeland Security ("DHS") has filed a request for summary affirmance. The appeal will be sustained in part and dismissed in part.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent claims past and future persecution in Mexico on account of her membership in the particular social group, "Mexican transgender women" (IJ at 9). The Immigration Judge determined that the respondent was statutorily barred from asylum as a result of the 1-year filing deadline (IJ at 7). The Immigration Judge also denied the respondent's application for withholding of removal and request for protection under the Convention Against Torture based on a determination that the respondent did not meet her burden of proof to establish eligibility (IJ at 7-11).

We uphold the Immigration Judge's determination that the respondent was statutorily barred from applying for asylum because she did not file for asylum within 1 year of her arrival, and did not provide to the satisfaction of the Immigration Judge that an exception applied (IJ at 7). See sections 208(a)(2)(B) and (D) of the Act, 8 U.S.C. §§ 1158(a)(2)(B), (D); 8 C.F.R. § 1208.4. The respondent arrived in the United States in 2007 and filed her asylum

¹ We acknowledge the respondent's transgender status and will refer to the respondent using female pronouns.

application in the spring of 2019 (IJ at 7; Exhs. 1 and 2). The respondent generally claimed that she did not know she could file for asylum after entering illegally, but did not specifically provide any other explanation of why she waited over 12 years to file for asylum. Her generalized reason for not filing a timely asylum application is insufficient to prove that an exception applied.

On appeal, the respondent argues that she meets an exception to the 1-year filing deadline based on the existence of extraordinary circumstances relating to the delay in filing. Sections 208(a)(2)(B), (D) of the Act; 8 C.F.R. § 1208.4(a)(5). The respondent argues that she experienced numerous traumatic experiences after she entered the United States, including abuse at the hands of companions, an HIV diagnosis, depression and drug use (Respondent's Br. at 8-10). These arguments were not, however, presented to the Immigration Judge.

The Immigration Judge did consider the respondent's HIV diagnosis, and whether that diagnosis was an exception (IJ at 7). 8 C.F.R. §§ 1208.4(a)(4)(ii) and 1208.4(a)(5). The respondent was diagnosed in 2013, but the respondent did not file her asylum application until 2019, long after her HIV diagnosis. The respondent did not specifically testify that mental health issues prevented her from filing a timely asylum application, or from filing one within a reasonable time after her HIV diagnosis. Contrary to counsel's argument on appeal, the respondent did not testify that a real or perceived sense of isolation or her abusive relationship prevented her from filing an asylum application.

We therefore agree with the Immigration Judge that, based on the evidentiary record, the respondent does not warrant an exception to the filing deadline. Thus, the respondent has not established that she warrants an exception to the 1-year filing deadline for asylum. The respondent remains eligible to apply for withholding of removal under the Act and protection under the Convention Against Torture.

The Immigration Judge found that the respondent credibly testified (IJ at 5-6). During early adolescence, the respondent was physically and mentally abused by her father because he perceived her as feminine and because she intervened on behalf of her mother, who was also abused (IJ at 7-8; Tr. at 40-44). The respondent met someone on the internet and eventually traveled to the United States and entered illegally. In the United States, the respondent was involved in a series of relationships, most of which involved abuse, and all of which ended.

The Immigration Judge accepted that the respondent was a member of a cognizable particular social group involving Mexican transgender women, but denied relief because the harm to the respondent involved domestic violence in her family of origin. *See Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018) (as a general matter, domestic violence claims by "nongovernmental actors will not qualify for asylum.").

On appeal, the respondent argues that she proved that one central reason for the harm she suffered was her gender identity. We agree. The evidence indicates that the father had mixed motives for the harm he inflicted. *See Gonzales-Veliz v. Barr*, 938 F.3d 219, 224 (5th Cir. 2019). The respondent testified that she was beaten because she was feminine, in addition to the domestic violence inflicted on her mother and siblings. Her credible testimony established that one central

reason she was targeted was because of her gender identity (Tr. at 40-45). She has therefore shown that she suffered past persecution on account of a protected ground.

Given the Immigration Judge's resolution of the issues in this case, the Immigration Judge did not consider whether the government was unable and unwilling to protect the respondent in the past. We will therefore remand this proceeding for consideration of whether the Mexican government has the willingness and ability to protect her, which must be decided before determining whether a presumption of future harm exists, as well as whether the respondent or the DHS has the burden of proving a future threat to life or freedom. 8 C.F.R. § 1208.16(b)(1) and (2).²

We also agree with the Immigration Judge's determination that the respondent did not meet her burden of establishing that it is more likely than not that she will be subject to torture upon removal to Mexico (IJ at 10-11). See 8 C.F.R. § 1208.16(c)(2). To qualify for protection under the Convention Against Torture, an applicant must show that it is more likely than not that he or she would be tortured if removed to the proposed country of removal by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 1208.18(a)(1). Acquiescence "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7); see also *Morales v. Sessions*, 860 F.3d 812, 818 (5th Cir. 2017).

The Immigration Judge found that government officials had not tortured the respondent, or acquiesced in her torture, in the past, and has not shown that she would be tortured in the future (IJ at 11). See 8 C.F.R. § 1208.16(c)(3) (stating that in assessing whether it is more likely than not that an alien would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture must be considered, including evidence of past torture). We find no basis for disturbing these findings.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed with respect to the Immigration Judge's denial of the respondent's application for asylum as untimely and for protection under the Convention Against Torture.

FURTHER ORDER: The appeal is sustained with respect to the Immigration Judge's denial of the respondent's application for withholding of removal.

² The respondent also requested asylum and withholding on account of religion, as well as her membership in a particular social group of Mexican people perceived as gay. There was insufficient testimony presented as to harm related to her religion, and the Immigration Judge found that the respondent did not present sufficient evidence that she was a member of the group of Mexican people perceived as gay (IJ at 8-9). On appeal, the respondent does not pursue either of these issues.

FURTHER ORDER: The record is remanded for further proceedings in accordance with this decision.



FOR THE BOARD