U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: A[redacted] A[redacted], D[redacted]

A [redacted]-643

Date of this notice: 12/19/2019

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

Userteam: Docket

File: A[redacted]-643 – New York, NY Date: DEC 19 2019

In re: D[redacted] A[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Zoe P. Levine, Esquire

ON BEHALF OF DHS: Scott D. Swanberg
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture; remand; reconsideration

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's June 28, 2019, decision denying his (1) applications for asylum, withholding of removal, and protection under the Convention Against Torture; and (2) motion to reconsider the denial of his oral motion to admit supporting documents that were untimely filed. *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and 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 respondent claims to have suffered past persecution and asserts that he has a well-founded fear of future persecution based on (1) an actual political opinion and an imputed political opinion; and (2) his membership in a number of particular social groups, which he defines as (a) "Salvadoran children who are viewed as property"; (b) "Salvadorans who resist gang recruitment"; (c) "Bisexual men"; (d) "LGBTQ persons in El Salvador": and (e) "Men imputed to be gay in El Salvador" (IJ at 13-17; Tr. at 15-16). In support of his applications for relief, the respondent submitted a number of supporting documents, including country condition reports and statements from expert witnesses (IJ at 2; Exhs. 8-9, 13-14). The Immigration Judge excluded the documents because they had been filed a day late and were, therefore, untimely (IJ at 2, 2 n.2, 8, 8 n.16; Tr. at 14-15).

At his individual hearing, the respondent testified that, when he was very young, his uncle would beat him any time he "made a mistake" (IJ at 3; Tr. at 32). He claimed that his father—who had previously been in the United States—also beat the respondent whenever he refused to address his father as "father" (IJ at 3; Tr. at 34). The respondent also claimed that his father would abuse his mother, and that his father would shoot a pistol into the air whenever the respondent's mother did not "do what he wanted" (IJ at 3; Tr. at 36).

The respondent also claimed that he was mistreated by his cousin and his cousin's friends (IJ at 3; Tr. at 38-39). The respondent testified that his cousin joined MS-13 when they were both children, and that his cousin continuously tried to force him to join the gang (IJ at 3; Tr. at 38, 41). The respondent asserted that he would tell his cousin and his cousin's friends that "they were wrong" for joining MS-13, but claimed that they continued to threaten and harass him into joining the gang, despite his protests (IJ at 3; Tr. at 42-43). The respondent alleged that they called him a snitch and attacked him on multiple occasions (IJ at 3; Tr. at 44, 48, 53). During one of the attacks, the gang members attacked the respondent with a knife and cut him on his arm and back (IJ at 4; Tr. at 46-47).

In addition, the respondent asserted that the gang members called him homophobic slurs because they thought he was homosexual (IJ at 4; Tr. at 48-49). The respondent explained that he identifies as bisexual, because he is attracted to men and women (IJ at 5; Tr. at 72). He claimed that, before informing his attorney, he had never told anyone about his bisexuality because he was worried that his family would reject him (IJ at 5; Tr. at 72-74). However, he testified that he had sexual experiences with men on two occasions: once in El Salvador and once in the United States (IJ at 5; Tr. at 74-80). The respondent claimed that he fears that he will be persecuted in El Salvador because of his sexual orientation (IJ at 5; Tr. at 81).

The Immigration Judge denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture (IJ at 20). As relevant here, although the Immigration Judge determined that the respondent had testified credibly, he concluded that the respondent had not provided sufficient corroboration for his claims (IJ at 6-9).[1] The Immigration Judge also determined that the respondent was not eligible for asylum because he made no showing that he qualified for an exception to the 1-year filing deadline (IJ at 9-12). In addition, the Immigration Judge denied the respondent's motion to reconsider his oral motion to admit untimely filed documents (IJ at 19-20).

The Immigration Judge also determined that the respondent had not established his eligibility for withholding of removal (IJ at 12). He found that four of the respondent's particular social groups—"Salvadoran children who are viewed as property," "Salvadorans who resist gang violence," "Bisexual men," and "LGBTQ persons in El Salvador"—were not cognizable (IJ at 13-16). He also concluded that, although "Men imputed to be gay in El Salvador" constituted a cognizable particular social group, the respondent had not established (1) a nexus between the harm he previously suffered and that particular social group, and (2) that the government was unable or unwilling to protect him (IJ at 16-17). The Immigration Judge also determined that the respondent had not established that he was previously harmed on account of his actual political opinion, or that a political opinion had been imputed upon him (IJ at 17-18). Finally, the Immigration Judge determined that the respondent had not established his eligibility for protection under the Convention Against Torture (IJ at 19). The respondent now appeals.

[1] Because the Immigration Judge determined that the respondent had testified credibly, the respondent has a rebuttable presumption of credibility on appeal. *See* sections 208(b)(1)(B)(iii) and 241(b)(3)(C) of the Act; *see also* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C).

First, contrary to the respondent's argument on appeal, we agree with the Immigration Judge that the respondent did not establish that he expressed an anti-gang political opinion to his cousin and the other MS-13 gang members, or that the gang members imputed an anti-gang political opinion to him (IJ at 17-18; Respondent's Br. at 28-30). *See Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008) (holding that refusal to join gang, "without more, does not constitute a 'political opinion'"); *Matter of S-E-G-*, 24 I&N Dec. 579, 589 (BIA 2008) (rejecting the claim that resistance to gang recruitment constitutes a political opinion because the applicants did not establish what political opinion they held or provide evidence that the gang imputed or would impute an anti-gang political opinion to them), *both clarified by Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), *and Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *aff'd in part and vacated and remanded in part on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

Moreover, even assuming the respondent established an actual or an imputed political opinion against MS-13, we discern no clear error in the Immigration Judge's finding that the respondent has not shown that his cousin and the MS-13 gang members were motivated to harm him on account of an anti-gang political opinion (IJ at 17-18). *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (holding that the motive of a persecutor is a finding of fact to be determined by the Immigration Judge and reviewed for clear error); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (holding that on clear error review, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."). As noted by the Immigration Judge, the respondent testified that he was attacked by his cousin and cousin's friends because he "refused to join" the gang, and that they called him a "snitch" on multiple occasions (IJ at 18). The Immigration Judge determined that this evidence indicated that the gang members were motivated to harm the respondent in order to increase the size and influence of their gang and to control the behavior of others in order to continue their criminal enterprise (IJ at 18). We discern no clear error in these findings. *See Matter of N-M-*, 25 I&N Dec. at 532. We also note that the respondent has not meaningfully challenged the Immigration Judge's motive finding on appeal (Respondent's Br. at 28-30).

With regard to the respondent's first particular social group, we agree with the Immigration Judge's finding that "Salvadorans who resist gang violence" is not cognizable (IJ at 13-14). The Board and the Attorney General have clarified the elements required to establish a cognizable particular social group. *See Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of M-E-V-G-*, 26 I&N Dec. at 237; *see also Matter of W-G-R-*, 26 I&N Dec. 208. An applicant for asylum or withholding of removal based on his or her membership in a particular social group must establish that the group (1) is composed of members who share a common immutable characteristic; (2) is defined with particularity; and (3) is socially distinct within the society in question. *See Matter of M-E-V-G-*, 26 I&N Dec at 237; *Matter of W-G-R-*, 26 I&N Dec. at 212-18. To satisfy the particularity requirement, a group must be discrete and have definable boundaries. *See Matter of W-G-R-*, 26 I&N Dec. at 214. Here, contrary to the respondent's arguments on appeal, the Immigration Judge correctly determined that "Salvadorans who resist gang violence" is not defined with particularity because it does not have discrete and definable boundaries (IJ at 14). As noted by the Immigration Judge, the proposed social group is "overbroad and defuse because it encompasses a large subset of the general population, including those of any age, Salvadorans who resist gang recruitment outside of El Salvador, and Salvadorans who resist recruitment from any

gang" (IJ at 14 (emphasis omitted)). *See Matter of A-B-*, 27 I&N Dec. at 335 (explaining that "groups comprising persons who are 'resistant to gang violence' and susceptible to violence from gang members on that basis 'are too diffuse to be recognized as a particular social group.'").

Turning to the respondent's second particular social group, we agree with the Immigration Judge's determination that the respondent has not established that he was harmed, or will be harmed, on account of his membership in the group "Salvadoran children who are viewed as property" (IJ at 13). *See Acharya v. Holder*, 761 F.3d 289, 298 (2d Cir. 2014) (explaining that applicant must demonstrate his or her "membership in a particular social group . . . was or will be at least one central reason for persecuting the applicant."). Specifically, we discern no clear error in the Immigration Judge's finding that the respondent's attackers—specifically, his father, uncle, cousin, and cousin's friends—were not motivated to harm him on account of his membership in that group. *See Cooper v. Harris*, 137 S. Ct. at 1465; *Matter of N-M-*, 25 I&N Dec. at 532.

In support of his determination, the Immigration Judge first found that, in the future, the respondent's attackers would not be motivated to harm him on account of his status as a "Salvadoran child[]" because the respondent is now an adult (IJ at 13; Tr. at 27). With regard to past persecution, the Immigration Judge noted that the respondent had testified that his cousin and cousin's friends were only 2 years older than he was (IJ at 14; Tr. at 40). Therefore, because the respondent's cousin and his friends were of a similar age to the respondent, the respondent had not established that they were motivated to harm him because of his age or because they viewed him as property (IJ at 14; Tr. at 40). The Immigration Judge also found that the respondent's father and uncle were not motivated to harm the respondent because of his status as a child, or because they viewed him as property (IJ at 14). The Immigration Judge noted that he testified that his father and uncle would beat him based on his actions – such as when he "made a mistake" or refused to call his father "father" (IJ at 14). In addition, the Immigration Judge found that, because the respondent's father also abused the respondent's mother, who is an adult, the respondent's father was not motivated to abuse the respondent specifically because he was a child (IJ at 14). These findings are not clearly erroneous. *See Matter of N-M-*, 25 I&N Dec. at 532. In addition, the respondent has not meaningfully challenged the Immigration Judge's motive finding on appeal (Respondent's Br. at 28).

On appeal, the respondent first asserts that the Immigration Judge erred by determining that "Bisexual men" and "LGBTQ persons in El Salvador" are not cognizable social groups (Respondent's Br. at 27-28). We agree. We have previously held that particular social groups based on an applicant's sexual orientation are cognizable because they (1) are based on immutable characteristics, (2) are defined with particularity, and (3) are socially distinct within the society in question. *See Matter of M-E-V-G-*, 26 I&N Dec. at 237-39; *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (holding that homosexuals in Cuba were shown to be a particular social group). On remand, the Immigration Judge should reassess whether the respondent is eligible for his requested relief based on these cognizable particular social groups.

Turning to the respondent's remaining arguments on appeal, he asserts that the Immigration Judge "[m]anifested [c]lear [b]ias" against his previous attorney and his previous attorney's employer, Brooklyn Defender Services, which is an organization that provides legal services under the New York Immigrant Family Unity Project ("NYIFUP") (IJ at 8 n.16; Respondent's Br. at

14-15). Specifically, he asserts that the Immigration Judge's bias against NYIFUP caused him to reject the respondent's supporting documents as untimely (Respondent's Br. at 14). The record does not support the respondent's contention that the Immigration Judge was biased or otherwise violated his duty to act as a neutral and impartial adjudicator. We note that the Immigration Judge has broad discretion to set filing deadlines and may exclude evidence that is not in compliance with those deadlines or the deadlines set in the Immigration Court Practice Manual. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010). Although the Immigration Judge noted that he had previously informed NYIFUP attorneys that they needed to be aware of—and comply with—filing deadlines, he acted within his discretion when excluding the documents from the record and did not manifest any bias against the respondent's attorney by doing so (IJ at 8 n.16; Respondent's Br. at 15; Tr. at 19).

The respondent also asserts that the Immigration Judge was biased against him based on his sexual orientation (Respondent's Br. at 15-18). However, based on this record, we do not find that the Immigration Judge was biased or that the proceedings lacked fundamental fairness. *See Matter of G-*, 20 I&N Dec. 764, 780-81 (BIA 1993) (explaining that immigration "proceedings must conform to the basic notions of fundamental fairness"); *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982) (explaining that, "[a]s a general rule, in order to warrant a finding that an [I]mmigration [J]udge is disqualified from hearing a case it must be demonstrated that the [I]mmigration [J]udge had a personal, rather than judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion on the merits on some basis other than what the [I]mmigration [J]udge learned from his participation in the case."). Rather than exhibiting bias, the record indicates that the Immigration Judge misapplied existing case law when analyzing whether two of the respondent's particular social groups were cognizable (IJ at 15-16). As noted above, we agree with the respondent that remand is warranted based on that issue.

Upon remand, the parties may update the record with evidence—including testimony from expert witnesses—regarding the respondent's eligibility for relief.[2] After the record has been updated, the Immigration Judge should specifically reassess (1) whether the respondent's credible testimony has been sufficiently corroborated; (2) whether the respondent has adequately demonstrated changed or extraordinary circumstances that would excuse his untimely-filed application for asylum from the 1-year filing deadline; (3) whether the respondent has established his eligibility for asylum or withholding of removal based on his three sexual orientation-based particular social groups (including the questions whether the respondent has established a nexus

[2] We acknowledge that, on appeal, the respondent challenges the Immigration Judge's exclusion of his supporting documents by asserting that (1) his right to due process was violated when the documents were excluded from the record, and (2) he received ineffective assistance of counsel because the documents were submitted late (Respondent's Br. at 8-11). However, we need not address these arguments because, in light of our ultimate holding in this case, the respondent may submit the previously excluded evidence for full consideration by the Immigration Judge on remand. We also need not consider the respondent's argument that the Immigration Judge erred in denying his motion to reconsider the oral motion to admit the supporting documents because that motion is moot since the record is being remanded for further fact finding and the respondent can present his additional evidence (Respondent's Br. at 11-13).

to any of those groups, and has established that the Salvadoran government was or is unable or unwilling to control the alleged persecutors); and (4) whether the respondent has established his eligibility for protection under the Convention Against Torture. We express no opinion regarding the ultimate outcome of the respondent's case.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Linda J. Wendtland
FOR THE BOARD