U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: O[redacted], T[redacted]

A[redacted]-343

Date of this notice: 12/30/2019

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:
Cole, Patricia A.
Cassidy, William A.
Rosen, Scott

Userteam: Docket

File: A[redacted]-343 – Buffalo, NY

Date:

DEC 3 0 2019

In re: T[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APEAL

ON BEHALF OF RESPONDENT: Matthew K. Borowski, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Ukraine, timely appeals the Immigration Judge's March 27, 2018, decision. The Immigration Judge found the respondent removable as charged, denied his applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3) (2012), respectively, and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2) (2018), and ordered the respondent removed. On appeal, the respondent contests the denial of all three forms of relief and protection. The appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings and for the entry of a new decision.

The respondent claims to have experienced past persecution, and to fear future persecution, due to his sexual orientation (IJ at 3; Tr. at 71-72; Exh 2). The Immigration Judge denied the respondent's asylum application, as well as his application for withholding of removal under section 241(b)(3) of the Act, on the basis that the respondent was not credible (IJ at 7-12). This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2017); *see also Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (stating that the Board must defer to the factual determinations of an Immigration Judge in the absence of clear error); *Matter of A-S-*, 21 I&N Dec. 1106, 1109-12 (BIA 1998) (noting that because an Immigration Judge has the ability to see and hear witnesses, he or she is in the best position to determine the credibility of such witnesses). We find clear error in the Immigration Judge's adverse credibility finding, and will reverse it. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

The Immigration Judge rendered his adverse credibility finding based on several purported inconsistencies and omissions, which he found served to undermine the respondent's credibility. First, the Immigration Judge observed that the respondent submitted a statement in support of his application in which he referred to a longtime boyfriend, who he consistently referred to as "M[redacted]" (IJ at 7-8; Exh. 6, Tab B). However, in his testimony, the respondent consistently referred to that same person as "K[redacted]" (IJ at 7; Tr. at 73-75). When questioned about the discrepancy, the respondent explained that the name "M[redacted]" was a formal name, while the name "K[redacted]" is the informal form of the same name – an explanation that the Immigration Judge found not to be credible (IJ at 8). We find clear error in this finding.

Notably, the respondent initially submitted his hand-written asylum statement along with his asylum application in 2009 (Exh. 2C). At that time, the translator consistently translated the name as written by the respondent in Ukrainian as "K[redacted]," which is the same name the respondent used in his testimony. The respondent then re-submitted a photocopied version of the same handwritten asylum statement in 2017, along with a new translation of the statement by a different translator (Tr. at 67-68; Exh. 6, Tab B). This new translation closely tracks the prior translation by a different translator in all material respects, with the important exception being that she consistently translated the respondent's boyfriend's name as "M[redacted]" (*Id.*). The fact that two different professional translators translated the same name in the respondent's statement differently - as "Kostya" in one instance and, in the second, as "M[redacted]" - provides strong evidence in support of the respondent's contention that "M[redacted]" and "K[redacted]" are simply two versions of the same Ukrainian name, one formal and one informal, and can be used interchangeably (Tr. at 115).

The Immigration Judge also observed that in his written asylum statement, the respondent set forth six different incidents of harm, spanning from 2002 to 2008, but only testified to five of these incidents at his hearing (IJ at 9-10). Similarly, the Immigration Judge faulted the respondent for not recalling, or recalling incorrectly, the details of some of these incidents (IJ at 8-11). However, as noted by the respondent's counsel on appeal, the respondent wrote this statement in 2009, and submitted it along with his asylum application at that time (Exh. 2). Thus, the incidents were fairly fresh in the respondent's mind at that time he wrote it, with the most recent incident having occurred only 1 year earlier.

By contrast, when the respondent testified in 2018, the most recent incident was fully a decade earlier, with some of the more remote incidents having occurred nearly two decades before his testimony. As such, it was entirely reasonable for the respondent to have forgotten one incident, and forgotten or mixed up the details of these events, which were both numerous and remote in time. Indeed, the respondent himself repeatedly testified that he could not recall certain aspects of the incidents "because it was so long ago," or similar words to that effect (Tr. at 76, 80, 81, 83, 116, 119 and 120). Moreover, we note that these incidents were traumatic in nature, involved the sensitive issue of the respondent's sexuality, and mostly occurred when the respondent was a young teenager (Tr. at 121). Thus, the few difficulties the respondent experienced in recalling these incidents, most of which he testified to in sufficient detail and correctly, are insufficient to support an overall adverse credibility finding.

Finally, the Immigration Judge faulted the respondent for testifying that he is now heterosexual, but then indicating that he is in fact bisexual (IJ at 11-12). This characterization does not sufficiently reflect the nuance of the respondent's statements. The respondent's counsel asked the respondent how he identified "as far as sexual orientation is concerned," to which the respondent replied "I don't know how to respond" (Tr. at 90). The respondent was then asked about his current relationship, to which testified that he is currently in a relationship with a woman, with whom he fathered a 4-year-old child (Tr. at 90). The respondent's counsel then asked the respondent "So, are you heterosexual now?" to which the respondent answered "You can say so. Yes" – a rather equivocal response (Tr. at 90). However, the respondent then immediately clarified that he was still interested in men, and sometimes still had sexual relationships with men (Tr. at 90-93). The respondent was then directly asked "Do you identify as bisexual," to which he

responded "Yes" (Tr. at 93). We discern no real inconsistency here. The respondent clearly was initially unsure how to answer the question about his sexual orientation, and only answered when questions were posed in a way as to essentially "put words in his mouth," to which he could give only a "yes" or "no" answer. The respondent's overall testimony that he was attracted to, and had relations with, both men and women indicates that he is bisexual, regardless of the respondent's difficulty and unease in adopting a strict label. Accordingly, we will reverse the Immigration Judge's adverse credibility finding, and we determine that the respondent is credible.

In addition, the Immigration Judge found that the respondent had not met his burden of proof for asylum or withholding of removal because he had not supported his claim with reasonably-available corroborating evidence (IJ at 12-13). *See* section 208(b)(1)(B)(ii) of the Act (stating that "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence"); *Matter of L-A-C-*, 26 I&N Dec. 516, 519 (BIA 2015) (stating that the REAL ID Act makes it "clear that an applicant who seeks asylum or withholding of removal has the burden of demonstrating eligibility for such relief, which may require the submission of corroborative evidence"). On de novo review, we disagree with this determination.

The only corroborating evidence the Immigration Judge deemed missing was "documentary evidence of his sexual orientation" (IJ at 12). Specifically, the Immigration Judge found that the respondent should have provided a statement from his mother, who the respondent testified was aware of his sexual orientation, as well as statements from "any of his sexual partners" in the United States (IJ at 12-13). We believe it is not reasonable to expect the respondent to provide statements from his sexual partners in the United States, with whom he had short-lived or even one-time relations, and the names of several of whom he could not even recall. We do agree with the Immigration Judge that a statement from the respondent's mother would have been helpful. However, we note that statements from family members are often given diminished weight. *See Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 215 (BIA 2010) (affording diminished weight to unsworn letters from the alien's friends and family because they were from interested witnesses not subject to cross-examination and appeared to be created for the purpose of litigation), *remanded on other grounds by Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). In any case, we do not believe that the lack of a letter from this one source is sufficient to defeat the respondent's claims for lack of corroboration.

In addition, the respondent stated that at the time he filed his asylum application, he was assisted by a woman named "O[redacted]," who held herself out to be an attorney, but in fact was not (Tr. at 86-89, 122-23). The respondent indicated that he did not submit letters or declarations from people because she did not inform the respondent that he needed to do so, and that, by the time his current counsel was hired many years later, he had lost contact with several people from his past (Tr. at 113). We find merit to this assertion. Notably, the Immigration Judge found that the assistance provided by O[redacted] was so ineffective that it constituted an "extraordinary circumstance" sufficient to excuse the untimely filing of his asylum application (IJ at 6-7). Thus, it is likely that she did not advise the respondent of the need to provide corroborating evidence.

Moreover, we observe that the Immigration Judge did not indicate that he considered all of the potentially corroborating evidence that the respondent did submit. For example, the respondent provided medical records contemporaneous to the periods in which he claimed to have been attacked and suffered injuries, which appear to corroborate his claims (Exh. 2D; Exhs. 6C and E). Therefore, we will reverse the Immigration Judge's determination that the respondent did not sufficiently corroborate his claims.

Accordingly, we will remand the record to the Immigration Judge for him to re-assess whether the respondent has met the burden of proof for the relief he seeks, with consideration of the respondent's credible and corroborated testimony. On remand, the parties should be afforded an opportunity to update the record, and to make any additional legal and factual arguments desired regarding the respondent's eligibility for relief from removal. The Board expresses no opinion regarding the ultimate outcome of these proceedings.

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.

FOR THE BOARD