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

Flanagan, John Francis
Becker & Lee LLP
1322 Webster Street
Suite 300
Oakland, CA 94612

DHS/ICE Office of Chief Counsel - SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: [redacted] **A [redacted]-297**

Date of this notice: 5/30/2019

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

[illegible]
Userteam: Docket

File: A[redacted]-297 – San Francisco, CA Date: MAY 30 2019

In re: J[redacted] J[redacted] I[redacted]-I[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: John F. Flanagan, Esquire

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

In a decision dated September 17, 2018, an Immigration Judge denied the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(b), 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b), 1231(b)(3) (2012); 8 C.F.R. §§ 1208.16(c), 1208.18 (2018). The respondent, a native and citizen of Mexico, has appealed from this decision. While his appeal was pending, the respondent filed a motion to remand. The record will be remanded for further proceedings.

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 is a member of the certified class in *Franco-Gonzalez v. Napolitano*, No. CV-10-02211 DMG DTBX, 2011 WL 11705815, at *1-2 (C.D. Cal. Nov. 21, 2011), who was found incompetent to represent himself in removal proceedings on February 22, 2018 (IJ at 2-3). For this reason, he was assigned a qualified representative and provided with other procedural safeguards below pursuant to *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX, 2014 WL 5475097, at *8 (C.D. Cal. Oct. 29, 2014).

The sole issue we must decide at this time is whether the Immigration Judge properly concluded that the respondent is statutorily ineligible for asylum under section 208(b) of the Act (IJ at 3-4).[1] For the following reasons, we will not affirm the Immigration Judge's conclusion in this regard.

The Immigration Judge concluded that the respondent was statutorily ineligible for asylum because his application for this form of relief was not filed within 1 year of his arrival in the United States (IJ at 3-4). The respondent must establish either: (1) "[b]y clear and convincing evidence

[1] The Department of Homeland Security has not challenged the Immigration Judge's determination that the respondent has not been convicted of a particularly serious crime, and we consider any arguments in this regard to be waived (IJ at 4-5). *See, e.g., Matter of A.J. Valdez & Z. Valdez*, 27 I&N Dec. 496, 496 n.1 (BIA 2018).

that [his] application has been filed within 1 year of the date of [his] arrival in the United States"; or (2) "[t]o the satisfaction of . . . the immigration judge[] or the Board that he . . . qualifies for an exception to the 1-year deadline." 8 C.F.R. § 1208.4(a)(2)(A), (B). It is undisputed that the respondent's application was not filed within this deadline (IJ at 3-4; Exh. 13 at 1; Respondent's Br. at 3). To qualify for an exception to the deadline, the respondent must demonstrate "either the existence of changed circumstances which materially affect [his] eligibility for asylum or extraordinary circumstances relating to the delay in filing [his] application" within the 1-year period. Section 208(a)(2)(D) of the Act.

We agree with the Immigration Judge that the respondent has not shown that his delusional disorder is an "extraordinary circumstance" that prevented him from timely filing for asylum given the uncertainty around when he entered the United States,[2] when his mental health issues developed, and how severe his mental health issues were prior to May 30, 2017—when he was placed in removal proceedings (IJ at 3; Exhs. 1, 10, 13, 14).

Nevertheless, we will not affirm the Immigration Judge's decision that the respondent's mental health issues cannot qualify as "changed circumstances" within the meaning of section 208(a)(2)(D) of the Act (IJ at 4; Tr. at 201; Respondent's Br. at 8). 8 C.F.R. § 1208.4(a)(4)(i)(B) (providing that changed circumstances under this provision include "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum"). The Immigration Judge reasoned that the respondent's mental health issues cannot qualify as changed circumstances under section 208(a)(2)(D) of the Act because his "mental state during his time while in the United States may have fluctuated and at times may have been more severe than other[s]" (IJ at 4). We do not find this reasoning persuasive.

The record does not establish whether the respondent's mental health issues have remained at the same degree of severity throughout his time in the United States, or whether they have fluctuated over time. But even if we assume, like the Immigration Judge, that the latter is true, the record reflects that he was, in the Immigration Judge's words, "severely mentally ill" as of at least April 4, 2018—about 2 months before he filed his application for asylum—when he underwent a forensic competency evaluation (IJ at 4; Exh. 11). Following this evaluation, the respondent was diagnosed with intellectual disabilities, "psychiatric instability[,] and [an] inability to sustain attention due to psychosis" (IJ at 3-4; Exh. 10). Therefore, even if the respondent's mental health issues were less severe in the past, this fact does not preclude him from demonstrating that the *current* severity of his mental health issues qualifies as a "change [in his] circumstances" within the meaning of section 208(a)(2)(D) of the Act. *See* 8 C.F.R. § 1208.4(a)(4)(i)(B).

It nevertheless remains to be seen whether these changes "materially affect [the respondent's] eligibility for asylum." *Id.* But we cannot make this determination absent additional fact-finding.

[2] As the Immigration Judge noted, the respondent's criminal record reflects that he has been present in the United States since at least 2014, although the respondent asserts that he came to this country in 2003 (IJ at 3; Exh. 13 at 1, 37; Respondent's Br. at 3).

The Immigration Judge assumed, without deciding, the viability of the respondent's proposed particular social groups[3] and that the harm he fears in Mexico will be inflicted on account of his membership in these groups (IJ at 5; Respondent's Br. at 11). But he found that the respondent had not met his burden of establishing his eligibility for withholding of removal (IJ at 5). Significantly, the Immigration Judge did not analyze whether the respondent's mental health issues materially affect his ability to establish a well-founded fear of future persecution on account of his membership in these groups for purposes of asylum.[4]

In light of our limited fact-finding ability on appeal, *see* 8 C.F.R. § 1003.1(d)(3)(i), we will remand the record to allow the Immigration Judge to address whether the respondent's proposed social groups are cognizable under applicable legal standards and whether he has demonstrated a well-founded fear of future persecution in Mexico on account of membership in these groups, including whether feared harm stems from persecutory intent. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) ("A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis . . . ." (citation omitted)); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (holding that "an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact"). Once this is done, the Immigration Judge should determine whether the respondent has demonstrated "changed circumstances" within the meaning of section 208(a)(2)(D) of the Act and filed his application for asylum "within a reasonable period given those 'changed circumstances.'" 8 C.F.R. § 1208.4(a)(4)(ii); *see also Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 193 (BIA 2010).[5]

On remand, the parties should be given the opportunity to submit additional evidence, testimony, and arguments regarding these issues and any other issues the Immigration Judge deems appropriate. Accordingly, the following orders will be entered.

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

FURTHER ORDER: The motion to remand is denied as moot.

FOR THE BOARD

[3] The respondent claims that he is a member of particular social groups comprised of the following: (1) Mexicans with incurable delusion disorder who exhibit manic symptoms and bizarre, grandiose delusions; (2) Mexicans viewed as "loco"; (3) Mexicans suffering from severe mental illness; and (4) Mexican individuals subject to institutionalization for severe mental illness (IJ at 5).

[4] In assessing the respondent's eligibility for withholding of removal, the Immigration Judge found that it was not "more likely than not" that he would be persecuted on account of his membership in his proposed groups, but this is "a higher standard than the well-founded fear required for asylum" (IJ at 5-6). *Ming Dai v. Sessions*, 884 F.3d 858, 874 (9th Cir. 2018).

[5] Because we are remanding the record for further consideration of the respondent's eligibility for asylum, we need not address additional issues at this time.