U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: B[redacted]-M[redacted], J[redacted]

A [redacted]-853

Date of this notice: 4/19/2018

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:
Wendtland, Linda S.
Crossett, John P.
Pauley, Roger

Userteam: Docket

File: [redacted] 853 – El Paso, TX Date: APR 19 2018

In re: J[redacted] B[redacted]-M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Margaret D. Stock, Esquire

ON BEHALF OF DHS: Adrian Paredes V.
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, timely appeals an Immigration Judge's October 23, 2017, decision denying the respondent's motion to reopen in order to apply for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the 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) (2017). The appeal will be sustained, the motion to reopen will be granted, and the record will be remanded for further proceedings.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent entered the United States without inspection some time in 2001, and lived with his family in Alaska. At some point, the respondent traveled to Mexico due to a family emergency, and was apprehended trying to re-enter the United States at the New Mexico/Mexico border in December 2003. In 2004, the respondent was placed in removal proceedings in El Paso, Texas. He filed a Form I-589 asylum application in March 2005 (Motion, Exh. C). This application indicates that the respondent's native language is Triqui, and that he spoke "basic Spanish." His case was consolidated with that of his other family members in 2006, and several hearings were held at the Anchorage, Alaska, immigration court. However, numerous hearings needed to be continued due to the inability to locate a qualified Triqui interpreter. On October 30, 2007, at a hearing in El Paso, Texas, the respondent was ordered removed in a short form order that indicates that the respondent conceded that he was removable pursuant to section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, and either did not qualify for relief or declined to apply for same (IJ dated 10/30/07). It further indicates that the respondent waived appeal and was removed to Mexico later that same day. Approximately one week later, the remainder of the respondent's family, who had remained in the Pacific northwest, were all granted asylum (Motion, Exh. L).

In 2012, the Fifth Circuit "held in *Garcia-Carias v. Holder*[, 697 F.3d 257 (5th Cir. 2012)] that an alien has the right to file a motion to reopen under [section 240(c)(7) of the Act, 8 U.S.C.] § 1229a(c)(7) even if he has departed the United States" (IJ at 1, Aug. 7, 2014; Tr. at 18, 27; Respondent's Mot. at 2, July 21, 2014). *Lugo-Resendez v. Lynch*, 831 F.3d 337, 340 (5th Cir. 2016). In addition, in *Lugo-Resendez*, the Fifth Circuit held that, the 90-day statutory deadline for filing motion to reopen removal proceedings under section 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7), "is subject to equitable tolling." *Lugo-Resendez v. Lynch*, 831 F.3d at 344.

On October 11, 2017, the respondent filed for reopening, arguing that the 90-day filing deadline for his motion to reopen should be equitably tolled in light of the fact that he filed his motion as soon as he learned of the changes in law embodied in *Garcia-Carias* and *Lugo-Resendez v. Lynch*. The Immigration Judge denied the respondent's motion, in relevant part, because it was untimely filed, and the filing deadline could not be equitably tolled (IJ at 2-3). The respondent timely appealed this decision to the Board.

In *Lugo-Resendez*, the court stated that an alien "is entitled to equitable tolling of a statute of limitations only if [he] establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Lugo-Resendez v. Lynch,* 831 F.3d at 344 (footnote and citation omitted). "The first element requires the [alien] to establish that he pursued his rights with '"reasonable diligence," not "maximum feasible diligence."'" *Id.* (same). "The second element requires the [alien] to establish that an 'extraordinary circumstance' 'beyond his control' prevented him from complying with the applicable deadline." *Id.* (same).

We conclude, upon de novo review, that equitable tolling of the reopening deadline is appropriate in this case. The respondent asserts that he did not knowingly withdraw his asylum application and agree to be removed on October 30, 2007, because he could not understand the proceedings, which were held in Spanish. There is no dispute that the respondent's native language is Triqui, an indigenous Mexican language wholly unrelated to Spanish, and his ability to communicate in Spanish is limited. The record reflects that hearings for the respondent in Anchorage, Alaska, were repeatedly rescheduled due to an inability to locate a qualified Triqui interpreter, thus strongly implying that he could not sufficiently communicate in and understand Spanish. In addition, while the respondent, like the rest of his family, was represented by counsel, his counsel was unable to assist him at his hearing, as an Immigration Judge granted a motion by the Department of Homeland Security ("DHS") to change venue in the respondent's case from Anchorage, Alaska, to El Paso, Texas, over the written objection of the respondent's counsel, and his counsel was unable to travel to El Paso to assist him.

We acknowledge that the Immigration Judge stated, apparently based on his own memory of events, that at the time of the October 30, 2007, hearing, the respondent spoke Spanish, answered all of the court's questions, and requested to be removed to Mexico (IJ at 1). The Immigration Judge further found that "the record does not reflect that respondent had any trouble whatsoever in responding to this court's questioning during the hearing on October 30, 2007, nor his understanding of what was going on at the time" (IJ at 1). However, the Immigration Judge did not state what item(s) in the record led him to that conclusion, and we have found no relevant evidence from the time of that hearing in the record that might help shed light on the issue. While a hearing transcript would undoubtedly assist in ascertaining whether the respondent in fact had difficulty understanding the proceedings, unfortunately it does not appear that a hearing transcript

was created at the time of the October 30, 2007, order. Given the evidence of record that the respondent spoke Triqui fluently and only "basic Spanish," that multiple hearings were previously rescheduled specifically due to the unavailability of a Triqui interpreter, and the critical importance of adequate translation in immigration hearings, we find clear error in the Immigration Judge's factual finding regarding the ability of the respondent to sufficiently understand Spanish at the time of the October 30, 2007, removal order, and will reverse it. *See United States v. Posada Carriles*, 486 F. Supp. 2d 599, 607 (W.D. Tex. 2007), *rev'd*, 541 F.3d 344 (5th Cir. 2008) (observing that "It is, however, well accepted that "the presence of a competent interpreter is critical to the fairness of a [deportation] hearing," citing *Kotasz v. INS*, 31 F.3d 847, 850 n. 2 (9th Cir. 1994) (discussing an alien's fundamental right to a full and fair hearing in deportation proceedings and the importance of a competent interpreter as an element of such hearing)).

We find that sufficient grounds exist to allow the respondent to seek reopening despite the untimeliness of the request. The language barrier at the time of the October 30, 2007, hearing, and the respondent's resultant misunderstanding of his rights, constitute "extraordinary circumstances . . . beyond his control" that prevented him from timely filing his motion (Respondent's Br. at 9-10). *Id.* In addition, we conclude that the respondent has been pursuing his rights diligently. The respondent's counsel has asserted in a memorandum in support of the respondent's motion to reopen that the respondent contacted the firm for assistance in December 2015, and retained counsel in March of 2016. The respondent's counsel asserts that, after investigating the respondent's case and filing a freedom of information request, he filed the motion to reopen "with all deliberate speed" on the respondent's behalf on October 11, 2017, a little more than a year after *Lugo-Resendez*, which permitted equitable tolling of statutory motions in the Fifth Circuit, was issued. Based on this record, we agree with the respondent that he was pursuing his rights with "reasonable diligence" for purposes of equitable tolling. *Id.* (holding that we should give "due consideration to the reality that many departed aliens are poor . . . and effectively unable to follow developments in the American legal system - much less read and digest complicated legal decisions"). Applying the principle of equitable tolling to this case, we conclude, upon de novo review, that the respondent's motion should be deemed timely. *See id.* at 345 (admonishing us to "take care not to apply the equitable tolling standard 'too harshly'").

Considering the totality of the circumstances, we will grant the respondent's timely motion to reopen. *See* 8 C.F.R. § 1003.2(c). We will therefore remand the record for further consideration of the respondent's eligibility for relief from removal, and any other issues the Immigration Judge deems appropriate. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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

FOR THE BOARD