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]-M[redacted], J[redacted] M[redacted]

A [redacted]-580

Date of this notice: 5/16/2018

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:
Pauley, Roger
Greer, Anne J.
Wendtland, Linda S.

Userteam: Docket

File: [redacted] 580 – Port Isabel, TX Date: MAY 16 2018

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

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin J. Osorio, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent is a native and citizen of Honduras. This case was last before the Board on September 7, 2017, when we remanded the record to the Immigration Judge to consider the respondent's claims to relief or protection from removal based on his mental health condition.[1] On December 8, 2017, the Immigration Judge denied the respondent's applications for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158; withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); and protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c), 1208.18. The respondent appeals the Immigration Judge's decision. The Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be sustained, in part, and the record remanded to the Immigration Judge.

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 a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent claims he is eligible for asylum and related protection from removal because he was and will be persecuted in Honduras on account of his membership in a particular social group comprised of "Hondurans with severe, permanent bipolar disorder who exhibit erratic behavior." He challenges the Immigration Judge's determination that his proposed group was not a cognizable particular social group (Respondent's Br. at 23-28). He further challenges the Immigration Judge's adverse credibility determinations (Respondent's Br. at 11-20). Additionally, he argues that the Immigration Judge erred in not assessing his claim of past persecution and in determining that he did not have a well-founded fear of future persecution in Honduras (Respondent's Br. at 20-22, 28-29). Finally, he challenges the Immigration Judge's denial of his application for protection under the Convention Against Torture (Respondent's Br. at 31-33).

[1] In our September 7, 2017, decision, we found no clear error in the Immigration Judge's determination that the respondent was competent for the purposes of these removal proceeding. *See Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015). That determination is not at issue here.

Upon de novo review, we disagree with the Immigration Judge that the respondent did not establish a cognizable particular social group (IJ at 14-16). *See Matter of A-R-C-G-*, 26 I&N Dec. 388, 390 (BIA 2014) (holding that the question of whether a group is a "particular social group" is a question of law that the Board reviews de novo). Rather, the record establishes that "Hondurans with severe, permanent bipolar disorder who exhibit erratic behavior" satisfies the immutability, particularity, and social distinction requirements. *See, e.g., Temu v. Holder*, 740 F.3d 887, 892-97 (4th Cir. 2014) (concluding that "individuals with bipolar disorder who exhibit erratic behavior" was a cognizable particular social group); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *vacated in part by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied*, *Reyes v. Sessions*, 138 S. Ct. 736 (2018). The record reflects that the respondent has a mental health diagnosis of bipolar disorder, which is an immutable characteristic he cannot change, even though medication may control his symptoms (Exhs. 9-10). *See Temu v. Holder*, 740 F.3d at 896-97; *Matter of W-G-R-*, 26 I&N Dec. at 212-13.

The respondent's proposed group is also defined with particularity. As the Immigration Judge acknowledged, bipolar disorder is a recognized mental illness characterized by a common set of symptoms (IJ at 14-15). This established medical definition and common set of symptoms provides definable boundaries which create a clear benchmark for determining who falls within the respondent's proposed group. *See Matter of M-E-V-G-*, 26 I&N Dec. at 239; *Matter of W-G-R-*, 26 I&N Dec. at 213-14. The fact that the average lay person may not be able to accurately diagnose an individual who suffers from bipolar disorder does not, as the Immigration Judge erroneously concludes, make the definition subjective or the group amorphous (IJ at 15). Additionally, although the Immigration Judge found there are different categories of bipolar disorder (IJ at 15), this does not make the proposed group of "Hondurans with severe, permanent bipolar disorder who exhibit erratic behavior" overbroad.

Finally, the respondent's proposed group satisfies the social distinction requirement. Social distinction does not mean ocular visibility. *Matter of M-E-V-G-*, 26 I&N Dec. at 238; *Matter of W-G-R-*, 26 I&N Dec. at 216. Thus, contrary to the Immigration Judge's decision, the fact that members of Honduran society may not be able to identify the respondent's erratic behavior as being a result of his bipolar disorder—as opposed to the result of some other mental illness or simply erratic behavior not caused by mental illness—is not fatal to the respondent's claim (IJ at 15-16). The record contains evidence that mental illness is stigmatized in Honduras and mentally ill individuals are subjected to degrading treatment, thus establishing that Honduran society perceives, considers, or recognizes people sharing the particular characteristics of the proposed group as distinct within society (Exh. 5, Tab C at 29-30; Exh. 8, Tabs K, P). *See Matter of W-G-R-*, 26 I&N Dec. at 217.

Regarding the Immigration Judge's findings as to the credibility of the respondent's witnesses, we conclude based upon the totality of the evidence that the Immigration Judge's adverse credibility determinations were clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (noting that a finding is "clearly erroneous" when based on the entire evidence the reviewing court is left with "the definite and firm conviction that a mistake has been committed"). An adverse credibility determination must be based on the totality of the evidence and must be supported by specific and cogent reasons

derived from the record. Section 208(b)(1)(B)(iii) of the Act; *Singh v. Sessions*, 880 F.3d 220, 225 (5th Cir. 2018). It cannot be based on pure speculation or conjecture. *Mwembie v. Gonzales*, 443 F.3d 405, 410 (5th Cir. 2006).

The Immigration Judge does not identify specific and cogent reasons for finding the testimony of the respondent's son during the December 8, 2017, hearing not credible. The Immigration Judge found the son's testimony that the respondent and his wife would live with him if the respondent were released not credible based on the Immigration Judge's speculation that the son would not have room for the respondent in his house, would not be able to care for the respondent given that the son works full-time, and the Immigration Judge's assumption that because the respondent's wife does not currently live with this son, she and the respondent would not live with him in the future (IJ at 6 n.3, 8 n.7, 9 n.10). These speculations and assumptions are not a valid basis for an adverse credibility finding. *See Mwembie v. Gonzales*, 443 F.3d at 410.

The Immigration Judge also did not identify specific and cogent reasons for finding the testimony of the respondent's wife not credible. The Immigration Judge found problematic the wife's general statement that she took her husband to the mental health hospital in Tegucigalpa on a monthly basis starting in 1982 (IJ at 10 n.11). To the extent the Immigration Judge considered this statement inconsistent with her testimony that the respondent went to the United States for approximately 1 year in 2004, the Immigration Judge did not give the witness the opportunity to explain the perceived inconsistency. *See Singh v. Sessions*, 880 F.3d at 225. Additionally, we do not consider these statements inconsistent. The witness was asked by DHS counsel how many years she took her husband to the hospital on a monthly basis and answered that it had been since 1982 (Tr. at 41). She was not asked whether there were any months during that over 30-year period that she did not take her husband to the hospital. When she was later questioned about the respondent's 2004 trip to the United States, she testified that the respondent went without her knowledge and that when he returned, she resumed her monthly trips with him to Tegucigalpa (Tr. at 48-51). Because the witness was never asked nor did she state that there were no breaks in her monthly trips to Tegucigalpa, her testimony was not inconsistent. Thus, the Immigration Judge clearly erred in basing his adverse credibility determination on this perceived inconsistency. 8 C.F.R. § 1003.1(d)(3)(i).

Turning to the issue of corroboration, the Immigration Judge identified various aspects of the respondent's son's and wife's testimony that were not corroborated by documentary evidence. *See* section 208(b)(1)(B)(ii) of the Act. Specifically, he found that the record lacked corroboration regarding the respondent and his wife's lack of a car in Honduras, the travel distance by bus between the respondent's hometown and the mental health hospital, the location of the respondent's brother, and the neglect and maltreatment the respondent suffered during the time he was an inpatient at the mental health hospital in Honduras (IJ at 5 n.2, 7 n.5, 8 n.6, 9 n.9). Although the respondent bears the burden to provide reasonably available evidence to corroborate his claim for asylum and related relief, the Immigration Judge did not give the respondent the opportunity to explain the unavailability of documentary evidence corroborating the witnesses' testimony. *See Matter of L-A-C-*, 26 I&N Dec. 516, 519 (BIA 2015) ("If the evidence is unavailable, the Immigration Judge must afford the applicant an opportunity to explain its unavailability and ensure that the explanation is included in the record.").

Having considered the totality of the circumstances and all relevant factors, we conclude that the Immigration Judge clearly erred in finding the testimony of the respondent's son and his wife not credible.[2] Section 208(b)(1)(B)(iii) of the Act; 8 C.F.R. § 1003.1(d)(3)(i). Because the witnesses testified about harm suffered by the respondent in Honduras because of his mental illness, remand is necessary for the Immigration Judge to make factual findings and analyze the respondent's claim of past persecution. 8 C.F.R. § 1208.13(b)(1); *see Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (noting that the Board has limited fact-finding authority).

We also find it appropriate to remand proceedings because the Immigration Judge did not make sufficient factual findings regarding the harm the respondent will likely suffer in Honduras because of his mental illness. *See Matter of A-H-*, 23 I&N Dec. 774, 790-91 (A.G. 2005) (noting the Board has broad authority to remand a case to the Immigration Judge to ensure that the Board "is not denied essential facts that bear on the appropriate resolution of a case"). It is not clear from the Immigration Judge's decision that he adequately considered all the evidence in the record, including the extensive medical documentation of the respondent's condition and the country conditions evidence regarding mental health treatment in Honduras (Exh. 8, Tabs K-Q; Exhs. 9-10). *See Matter of S-H-*, 23 I&N Dec. at 465 (noting that the Immigration Judge must make comprehensive findings of fact); *Matter of A-P-*, 22 I&N Dec. 468, 477 (BIA 1999) (holding that the Immigration Judge is responsible for the substantive completeness of the decision).

The Immigration Judge mischaracterizes the respondent's well-founded fear of persecution claim as being based on a fear that he will not have access to necessary medication and mental health treatment, which the Immigration Judge concludes does not constitute persecution on account of a protected ground (IJ at 21). *See Khan v. Att'y Gen. of U.S.*, 691 F.3d 488, 499 (3d Cir. 2012). The respondent, however, contends that he will be intentionally harmed or abused by authorities because of his mental illness (Respondent's Br. at 34). On remand, the Immigration Judge should address—after considering the documentary evidence regarding the treatment of mentally ill individuals in Honduras—the respondent's claim that the police will harm him because of his erratic behavior and that he will be forcibly restrained, subjected to unsanitary conditions, and otherwise abused at a government-operated mental health facility (Exh. 8, Tabs K-Q; Respondent's Br. at 34).

The Immigration Judge should also reconsider the issue of internal relocation. If an alien establishes past persecution, or fears future persecution by a government agent, it is presumed that internal relocation is not reasonable and the burden shifts to the DHS to establish that it would be reasonable for the alien to relocate. 8 C.F.R. § 1208.13(b)(3)(ii). To the extent the respondent fears persecution by the police or a government agent, the Immigration Judge must determine whether the DHS has satisfied its burden of proving that the respondent could avoid persecution by relocating within Honduras and that relocation would be reasonable. On remand, the

[2] On appeal, the respondent once again challenges the adverse credibility determination in the Immigration Judge's March 22, 2017, decision (Respondent's Br. at 12-14). Because the Immigration Judge's December 8, 2017, decision does not address the credibility of the respondent's daughter and other son with respect to the instant asylum claim, we need not address the respondent's arguments.

Immigration Judge should consider the respondent's argument on appeal that he could not avoid persecution by relocating because regardless of where in Honduras he lives, his condition will eventually become uncontrolled, which will lead either to his involuntary commitment in a mental health facility or his detention and abuse by police because of his erratic behavior (Respondent's Br. at 31).

If necessary, the Immigration Judge should also consider on remand whether the respondent has satisfied his burden of proving eligibility for protection under the Convention Against Torture. 8 C.F.R. §§ 1208.16(c), 1208.18.

Turning to the respondent's argument on appeal that the Immigration Judge was biased against him, we do not find it necessary to remand this case to a different Immigration Judge (Respondent's Br. at 9-11). *See Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015). Although the errors the respondent identifies in the Immigration Judge's decision are sufficient to warrant remand in this case, we are not persuaded that they are indicative of the Immigration Judge's bias against the respondent or asylum-seekers in general. We do not discern any unprofessional or inappropriate conduct from the Immigration Judge during the course of these proceedings. The Immigration Judge appears to have acted as a neutral fact-finder and reached his conclusions based on his legal analysis in which we have identified error. The respondent does not allege that the Immigration Judge acted inappropriately during any of the hearings or prevented him from presenting evidence in support of his applications. Thus, we find no basis to remand to a different Immigration Judge.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained in part.

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

FOR THE BOARD