U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: G[redacted] M[redacted], M[redacted]

A [redacted]-152

Date of this notice: 2/22/2019

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:
Wendtland, Linda S.
O'Connor, Blair
Donovan, Teresa L.

Userteam: Docket

File: A[redacted]-152 – Kansas City, MO Date: FEB 22 2019

In re: M[redacted] G[redacted] M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew L. Hoppock, Esquire

ON BEHALF OF DHS: Mahdi J. Abdelaziz
Assistant Chief Counsel

APPLICATION: Withholding of removal

In a final administrative order dated March 27, 2017, this Board sustained the Department of Homeland Security's (DHS) appeal from an Immigration Judge's November 3, 2016, decision granting the respondent's application for withholding of removal. Section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). The respondent, a native and citizen of Mexico, thereafter sought judicial review of the Board's decision before the United States Court of Appeals for the Eighth Circuit, which has now remanded the matter to us for further consideration. *See Garcia-Mata v. Sessions*, 893 F.3d 1107 (8th Cir. 2018). The parties have submitted briefs after remand. Upon further consideration, we will remand the record to the Immigration Judge for further proceedings.

The Eighth Circuit specified that we should make clear the standard of review we are applying. We now do so. First, an Immigration Judge's predictive findings of fact, or predictive findings regarding future harm, are subject to a clear error standard of review. *Matter of J-C-H-F-*, 27 I&N Dec. 211, 218 (BIA 2018); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) ("[W]e now hold that an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review."). In the present case, the Immigration Judge found that, based upon the respondent's testimony and the threatening text messages to her husband, she had established that the criminal organization had the capability, knowledge, and inclination to target her for harm if she were returned to Mexico (IJ at 8-9). This finding is not clearly erroneous. The Immigration Judge found that the criminal smugglers had connections to local police in Mexico, as well as to the Border Patrol in the United States, and had the financial means to locate the respondent (IJ at 9). The DHS has not established that these findings are clearly erroneous and we decline to disturb them.

Second, whether an alien has met her burden of proof as to questions of law, judgment, or discretion is reviewed de novo. *See Etenyi v. Lynch*, 799 F.3d 1003, 1007 (8th Cir. 2015) (recognizing that burden of proof evaluations are akin to legal conclusions, which the Board has the authority to review de novo under 8 C.F.R. § 1003.1(d)(3)(ii)); *Ibrahimi v. Holder*, 566 F.3d 758, 763 (8th Cir. 2009). Here, the parties agree that the respondent did not establish past

persecution (Respondent's Br. at 17; DHS Brief at 11). Rather, the question is whether the respondent established that she is more likely than not to suffer harm rising to persecution in the future.

In his decision, the Immigration Judge found that the DHS had agreed to "defer to the Court" regarding whether the respondent had proffered a valid particular social group (IJ at 8; Tr. at 85). Although we previously commented on the validity of that particular social group, (BIA at 3 n.4), that issue was not raised on appeal (BIA at 4, dissent), and our comments constituted dicta. Rather, by stating it would defer to the Court on this issue and failing to argue it on appeal, the DHS has waived its opportunity to challenge the validity of the particular social group. [1] *See Garcia-Moctezuma v. Sessions*, 879 F.3d 863, 868 (8th Cir. 2018) (enforcing the "doctrine of waiver" where the alien was represented before the Immigration Judge and Board but did not raise the nexus argument, and did not explain to the circuit why the issue was not raised previously). Thus, we assume that the respondent has established a valid particular social group.

The Immigration Judge also found that the respondent's harm would be on account of that particular social group (IJ at 8-9). That finding in regard to the persecutor's actual subjective motive is also reviewable for clear error only. *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). We discern no such clear error here. Although, twice during his oral decision the Immigration Judge misstated the standard for withholding of removal (IJ at 8, 9; DHS Brief at 13-15), he also correctly recited the legal standard and then applied it (IJ at 3, 9). Based upon the factual findings made by the Immigration Judge without clear error, including his predictive fact-finding as well as his finding in regard to the persecutor's subjective motivation, we agree that the respondent has met her burden of proof with regard to the likelihood of persecution on account of a protected ground.

However, importantly, the Immigration Judge did not address whether the Mexican government is unable or unwilling to protect the respondent. The Immigration Judge made a finding that the criminal organization had connections to the local police, but also found that the respondent had not shown the government would acquiesce in her torture (*Compare* IJ at 9, *with* IJ at 10). Thus, we conclude it is appropriate to remand the record to the Immigration Judge for the sole purpose of making clear findings regarding whether the Mexican government would be unable or unwilling to protect the respondent.

Therefore, the record is remanded to the Immigration Judge for further proceedings, if needed, and for the entry of findings regarding whether the Mexican government is unable or unwilling to protect the respondent. Upon remand, the parties may present additional evidence, both testimonial and documentary, with respect to the relevant issues in this case.

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[1] The 2017 DHS Brief to the Board stated at 15, "Even if the respondent's proposed particular social group of 'witnesses in criminal proceedings who will be targeted in Mexico' constitutes a particular social group, she would not be targeted on account of membership in that particular group." This is an argument that the respondent would not be targeted "on account of" her membership in the social group, not that the social group as put forth was invalid or not cognizable. The DHS raised a similar "on account of" argument after the Eighth Circuit remand.

ORDER: The record is remanded to the Immigration Judge to issue a new decision in compliance with this order.

FOR THE BOARD