U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: G[redacted], S[redacted] J[redacted]

A [redacted]-005

Date of this notice: 9/23/2019

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:
Greer, Anne J.
Noferi, Mark
Wendtland, Linda S.

Userteam: Docket

File: A[redacted]-005 – New York, NY Date: SEP 23 2019

In re: S[redacted] J[redacted] G[redacted] a.k.a. [redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Georgina J. Brown, Esquire

ON BEHALF OF DHS: Hayden Windrow
Assistant Chief Counsel

APPLICATION: Cancellation of removal; asylum; withholding of removal; Convention Against Torture

This matter was last before the Board on December 29, 2017, when we dismissed the respondent's appeal of the Immigration Judge's January 31, 2017, decision finding him to be removable as charged, denying his applications for cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2012), 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), respectively, and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2) (2018), and ordering the respondent removed. This matter is again before the Board following the December 21, 2018, grant by the United States Court of Appeals for the Second Circuit of the parties' joint stipulation and order of remand. The appeal will be sustained, in part and dismissed, in part, and the record will be remanded to the Immigration Judge for further adjudication and the entry of a new decision.

In our prior decision, we affirmed the Immigration Judge's finding that the respondent's December 16, 2010, conviction for the criminal sale of marijuana in the third degree, in violation of New York Penal Law ("NYPL") § 221.45, was for an aggravated felony under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), to wit: illicit trafficking in a controlled substance under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (BIA at 1-4). We thus affirmed the Immigration Judge's determination that the respondent's aggravated felony conviction rendered him statutorily ineligible for cancellation of removal, pursuant to section 240A(a)(3) of the Act (BIA at 4). We also affirmed her finding that the respondent's conviction for an aggravated felony automatically constituted a particularly serious crime for purposes of precluding asylum, pursuant to sections 208(b)(2)(A)(ii) and (B)(i) of the Act (BIA at 4). We also agreed that this conviction constituted a particularly serious crime for withholding purposes, and affirmed her denials of withholding of removal under section 241(b)(3) of the Act and withholding of removal under the Convention Against Torture (BIA at 4). Finally, we affirmed the Immigration Judge's denial of deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17 (BIA at 5).

In their joint stipulation and order of remand, the parties agreed that, pursuant to the intervening Second Circuit decision of *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), the respondent's conviction under NYPL § 221.45 is not an aggravated felony. Nevertheless, the respondent is removable as an alien convicted of a controlled substance violation under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i). The parties agreed that a remand was required to determine whether the respondent was eligible for cancellation of removal and merited a favorable exercise of discretion, and whether his conviction, while no longer an aggravated felony, nevertheless still constituted a particularly serious crime for purposes of asylum and withholding of removal, both statutory and under the Convention Against Torture. We will now address these forms of relief.

As to cancellation of removal, we observe that in our prior decision, we not only affirmed the Immigration Judge's denial of cancellation of removal due to statutory ineligibility (BIA at 4), but also specifically affirmed her discretionary denial (BIA at 5). The fact that the respondent's conviction is not an aggravated felony means that the respondent is no longer statutorily ineligible for cancellation of removal. However, we agree with the respondent that a remand is required for additional consideration of whether the respondent warrants such relief in the exercise of discretion.[1]

In this regard, on remand the respondent asserts that there are new facts that are potentially relevant to a discretionary determination, and which the Immigration Judge should now consider. For example, the respondent claims that his long-term partner recently gave birth to a United States citizen child, which would enhance the respondent's family ties in the United States as an equity (Respondent's Br. at 9). In addition, the respondent argues that he has not engaged in criminal conduct since 2010, which is almost a decade ago, and his lack of recidivism over time is a form of rehabilitation that may be considered in a discretionary analysis.[2] Furthermore, evidence of hardship to the respondent and his family is a relevant consideration in discretion, and we find merit to the respondent's argument that he should have been permitted to present such evidence before the Immigration Judge (Tr. at 91; Respondent's Br. at 9). *See, e.g. Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). Under these circumstances, we find it appropriate to remand to the Immigration Judge to permit the respondent to supplement the record, and for the Immigration

[1] We note that the Immigration Judge appeared to require that the respondent show "unusual or outstanding equities" in order to warrant cancellation of removal in the exercise of discretion (IJ at 8-9). In *Matter of Sotelo*, 23 I&N Dec. 201, 204 (BIA 2001), we held that an applicant for cancellation of removal need not meet a threshold test requiring a showing of "unusual or outstanding equities" before a balancing of the favorable and adverse factors of record will be made to determine whether relief should be granted in the exercise of discretion. Thus, on remand the Immigration Judge should ensure that the correct standard is applied.

[2] We recognize that the Immigration Judge attributed a lack of credibility to the respondent for having minimized his role in the crime for which he was convicted (IJ at 8-9). However, this aspect of the respondent's testimony is relevant to rehabilitation in this context.

Judge to reassess whether the respondent merits cancellation of removal, with consideration of the passage of time and any added equities.[3]

As to asylum and withholding of removal, the Immigration Judge presumed that the respondent's offense was a particularly serious crime, as she found it to be "an aggravated felony involving the unlawful trafficking in a federally controlled substance," citing to *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270, 274 (A.G. 2002) (IJ at 10). As the respondent's offense is not an aggravated felony, he is no longer presumed to have committed a particularly serious crime under *Matter of Y-L, A-G- & R-S-R-*. However, his conviction could still constitute a particularly serious crime for such purposes. *See, e.g., Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) (holding that an offense need not be an aggravated felony under section 101(a)(43) of the Act in order to constitute a particularly serious crime). Therefore, on remand the Immigration Judge should re-assess whether the respondent was convicted for a particularly serious crime, without presuming that it is.

The Immigration Judge alternatively denied the respondent's applications for asylum[4] and withholding of removal based on her determination that the respondent did not meet his burden of proof. Specifically, the Immigration Judge assessed the respondent's fear of persecution on account of his anti-gang political opinion, as well as his membership in the particular social groups of "criminal deportees opposed to the gangs" and "family members of an individual killed by the gangs" (IJ at 11, 14). We agree with the respondent that the Immigration Judge appears to have analyzed his claim based on an incorrect particular social group. In this case, the respondent claimed membership in the particular social group of "close male family members of N[redacted] G[redacted] [the respondent's uncle]," while the Immigration Judge analyzed a group she more broadly defined as "family members of individuals killed by gangs" (IJ at 14; Exh. 18; Respondent's Br. at 14-16). On remand, the Immigration Judge should re-assess the respondent's eligibility for asylum and withholding of removal under the particular social group offered by the respondent. *See Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

However, we discern no legal error or clear factual error in the Immigration Judge's finding that the respondent did not establish that it is more likely than not he will be subject to torture that is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if returned to Jamaica, and we affirm her determination on this issue for the reasons she provided in her decision (IJ at 15-16). *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a)(1)-(5); *Hui Lin Huang v. Holder*, 677 F.3d 130, 134 (2d Cir. 2012) (holding that an Immigration Judge's determination of what will occur in the future and the degree of likelihood of the occurrence is fact-finding subject to review by Board for clear error, and may be rejected only

[3] The respondent argues that the Immigration Judge should not have admitted the pre-sentence investigative report and the two newspaper articles found at Exhibits 6 and 16 into evidence, or at least should have given them minimal weight, as they are inherently unreliable and unduly prejudicial (Respondent's Br. at 6). The respondent will have an opportunity to make such arguments before the Immigration Judge on remand.

[4] The Immigration Judge did not specifically address the issue of the burden of proof for asylum in her decision, as she found the respondent to be statutorily barred.

in those instances where the Immigration Judge lacks an adequate basis in the record for his or her determination that a future event will, or is likely to, occur).

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained as to the issues of cancellation of removal, asylum and withholding of removal.

FURTHER ORDER: The appeal is dismissed as to the issue of protection under the Convention Against Torture.

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