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Name: J[redacted], J[redacted]

A [redacted]-686

Date of this notice: 10/23/2019

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:
Wendtland, Linda S.
Wilson, Earle B.
Greer, Anne J.

Userteam: Docket

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File: A[redacted]-686 – New York, NY Date: OCT 23 2019

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

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian D. O'Neill, Esquire

APPLICATION: Withholding of removal; Convention Against Torture; cancellation of removal

The respondent, a native and citizen of the Gambia, appeals from an Immigration Judge's February 8, 2018, decision denying her applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3); protection pursuant to the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18, and cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b).[1] The appeal will be sustained and the record will be remanded.

This Board reviews the Immigration Judge's factual findings, including credibility findings and predictions as to the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent claims that she suffered past persecution in the form of female genital mutilation ("FGM") (Exh. 3). Additionally, the respondent asserts a clear probability of future persecution on account of her membership in a particular social group related to her diagnosis with HIV, which she contracted from her second husband from an arranged marriage (Exh. 3). The respondent further avers that if forced to return to the Gambia, she will be unable to stop her United States citizen daughter from undergoing FGM (Exh. 3).

In assessing the respondent's credibility, the Immigration Judge found that she offered little testimony regarding her claim that she was forced to marry her second husband (IJ at 2, 9-10; Tr. at 30-34). The Immigration Judge further determined that the respondent's claim of a forced marriage was undermined by the fact that she waited about 10 years after her arrival in the United States to raise this claim in an amended asylum application, after omitting it from her initial asylum application (IJ at 10; Tr. at 47; Exhs. 2-3). In addition, the Immigration Judge found that the respondent never told an asylum officer about her forced marriage during an asylum interview

[1] The respondent has not challenged the Immigration Judge's ruling that she is subject to the asylum time bar of section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B), and she has not established eligibility for an exception to the time bar (IJ at 8-9). *See* 8 C.F.R. § 1208.4(a)(2)(i), (a)(4), (a)(5). We therefore hold that this issue has been waived on appeal. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

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(IJ at 10; Tr. at 47-48). Finally, the Immigration Judge determined that the respondent's testimony that her United States citizen daughter traveled to Senegal was inconsistent with her asylum statement, which provides that her daughter went to the Gambia (IJ at 10; Tr. at 55-59, 97-99; Exh. 3). For these reasons, the Immigration Judge "did not find the respondent to be a credible witness" (IJ at 10).

We do not understand the Immigration Judge's adverse credibility finding concerning the respondent's arranged marriage to extend to her testimony that she was forced to endure FGM (IJ at 10). In this regard, rather than denying the respondent's FGM claim on credibility grounds, the Immigration Judge provided several reasons in support of his conclusion that the respondent had not met her burden of proof (IJ at 10-11). For the following reasons, we reverse the Immigration Judge's burden of proof ruling.

As corroborating evidence of her testimony that she was forced to undergo FGM, the respondent presented an examination record from a medical doctor in the United States (Exh. 5, Tab K; Respondent's Br. at 1). We disagree with the Immigration Judge's conclusion that this examination record is entitled to limited weight because it describes the results of a "routine" examination and it was prepared for the purpose of litigation (IJ at 10). The respondent properly obtained the examination report to demonstrate that she had undergone FGM given her burden of presenting reasonably available corroborating evidence. *See* section 240(c)(4)(B) of the Act, 8 U.S.C. § 1229a(c)(4)(B). Further, we conclude that the Immigration Judge erroneously found that the report establishes that the respondent's FGM is a "new problem," as there is no indication that the procedure was inflicted upon the respondent after she left the Gambia for the United States (IJ at 10). Also, even if the respondent had not previously sought treatment in this country for complications arising from FGM (IJ at 10), that would not be dispositive of her FGM claim under governing precedent. The Immigration Judge properly determined that the respondent inaccurately told the doctor that she had never been diagnosed with HIV (IJ at 10-11; Exh. 5, Tab K at 109), and her statement that she suffered FGM when she was 10 years old was inconsistent with her testimony that it happened when she was 17 (IJ at 11; Tr. at 40; Exh. 5, Tab K at 107). Nevertheless, the examination record does corroborate the respondent's testimony that she underwent FGM in the Gambia (Tr. at 40, 43, 63; Exh. 5, Tab K at 107). Therefore, we conclude that the respondent has demonstrated that she suffered past harm which was sufficiently egregious to constitute persecution. *See Bah v. Mukasey*, 529 F.3d 99, 112 (2d Cir. 2008); *Matter of A-T-*, 25 I&N Dec. 4, 10-11 (BIA 2009).

The Immigration Judge did not determine whether the respondent showed that she suffered this harm on account of a protected ground. Therefore, we will remand the record for relevant fact-finding in accordance with *Matter of A-T-*. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (stating that the Board may remand when additional fact-finding is required in a given case); *Matter of A-B-*, 27 I&N Dec. 316, 343 (A.G. 2018) (the motive of a persecutor is a factual question, and thus an Immigration Judge's findings with respect to that question are entitled to deference on appeal and may be reversed only if clearly erroneous); *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (same).

The Immigration Judge also concluded that the objective reasonableness of the respondent's fear of future persecution is undercut by the passage of laws in the Gambia making FGM illegal

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(IJ at 11). However, if the respondent demonstrates a "nexus" to a protected ground, it would then be presumed that she has a clear probability of future persecution on the same basis of the original claim and the burden would shift to the Department of Homeland Security ("DHS") to rebut this presumption by establishing either a fundamental change in circumstances or that the respondent could reasonably avoid future persecution by relocating to another part of the Gambia. *See* 8 C.F.R. § 1208.16(b)(1)(i)-(ii). Thus, the Immigration Judge should reconsider his objective reasonableness ruling on remand, shifting the burden of proof to the DHS if warranted.[2]

Turning to the respondent's application for cancellation of removal, the Immigration Judge concluded that the respondent had not shown that her removal would cause exceptional and extremely unusual hardship to her United States citizen daughter, who is her qualifying relative under section 240A(b)(1)(D) of the Act (IJ at 12-13). In this regard, the Immigration Judge found that the respondent did not provide sufficient corroborating evidence, such as affidavits from other family members who have undergone FGM, of her claim that her family members in the Gambia want to subject her daughter to FGM (IJ at 13). The Immigration Judge further determined that the respondent presented insufficient corroborating evidence of her claim that she will be unable to obtain treatment for HIV in the Gambia (IJ at 13).[3] Furthermore, the Immigration Judge found that the respondent's daughter is healthy, and the economic detriment and emotional hardship that she would suffer in the event of the respondent's removal did not rise to the level of exceptional and extremely unusual hardship (IJ at 13).

On appeal, the respondent notes that she testified that she would be isolated in the Gambia because her HIV-positive status would cause her to be viewed by others (including her family) as a threat to them, and she would lack access to medication (Tr. at 38, 45, 63-64, 75-77, 80; Respondent's Br. at 2). Along these lines, the respondent identifies background evidence she submitted describing societal discrimination against and mistreatment by the government of persons with HIV/AIDS in the Gambia (Exh. 5, Tabs N-Q; Respondent's Br. at 1). The respondent also submitted the opinion of an expert witness regarding the social and economic consequences that the respondent's HIV-positive status would have on her in the Gambia (Respondent's Br. at 4-5; Exh. 5, Tab U). We agree with the respondent that the Immigration Judge erroneously overlooked this evidence (IJ at 13; Respondent's Br. at 4, 7-8).

Specifically, while hardship to the respondent herself does not provide a basis for satisfying section 240A(b)(1)(D) of the Act, it is relevant in deciding whether the hardship that the respondent's qualifying relative will experience in the Gambia or while remaining in the

[2] On the other hand, the Immigration Judge was correct in ruling that the respondent may not qualify for withholding of removal based on her fear of her United States citizen daughter being forced to undergo FGM (IJ at 10). *See Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007).

[3] As the respondent observes on appeal, she has presented corroborating evidence of her testimony that she has been diagnosed with and treated for HIV in this country (Tr. at 34-36, 45-46, 60, 67-68; Exh. 5, Tabs E-F, M; Respondent's Br. at 5-6). Considering this evidence and the Immigration Judge's acknowledgement that the respondent has HIV in his cancellation of removal analysis (IJ at 13), we conclude that the respondent's HIV-positive status is not a contested issue of fact.

Cite as: J-J-, AXXX XXX 686 (BIA Oct. 23, 2019)

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United States rises to the level of "exceptional and extremely unusual" (Respondent's Br. at 8). It is thus necessary on remand for the Immigration Judge to evaluate this evidence, make relevant fact-findings, and newly decide whether the respondent has met her burden of proving that her removal would cause exceptional and extremely unusual hardship to a qualifying relative. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

Lastly, the Immigration Judge did not address the respondent's claim that she is eligible for withholding of removal and protection under the Convention Against Torture due to her membership in a particular social group related to her HIV-positive status (Exh. 3). On remand, the Immigration Judge should do so in the first instance.

The Immigration Judge may take whatever steps he deems necessary to comply with our order. We express no opinion regarding the ultimate outcome of the case.

Accordingly, the following order is entered.

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

FOR THE BOARD

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File: A[redacted]-686 – New York, NY

Date: OCT 23 2019

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

DISSENTING OPINION: Earle B. Wilson, Appellate Immigration Judge

I respectfully dissent from the majority's decision. I agree with the majority's determination that the Immigration Judge "did not find the respondent to be a credible witness." However, rather than proceeding based on the "understand[ing]" that the adverse credibility finding did not extend to the issue of whether the respondent was subjected to undergo a forced FGM procedure, I would remand for the Immigration Judge to clarify, in the first instance, whether the respondent presented credible testimony and evidence concerning her FGM claim. *See* IJ at 10-11 (expressing concern regarding the medical records submitted by the respondent and her inconsistent statements regarding her age when the FGM procedure was performed). Pending such a ruling, it is premature to decide whether the respondent has established past persecution in the form of FGM.

On the other hand, I agree with the majority's decision regarding the need for further fact-finding and analysis concerning the respondent's burden of demonstrating that her removal would cause exceptional and extremely unusual hardship to her qualifying relative under section 240A(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1)(D). Likewise, I concur that it is necessary for the Immigration Judge to address in the first instance the respondent's claim that she qualifies for withholding of removal and protection pursuant to the Convention Against Torture in connection with her HIV-positive status.

Earle B. Wilson
Appellate Immigration Judge

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