



U.S. Department of Justice

Executive Office for Immigration Review

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Name: B [REDACTED]-F [REDACTED], J [REDACTED] C [REDACTED] ... A [REDACTED]-622

Date of this notice: 12/23/2019

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:
Mann, Ana
Liebmann, Beth S.
Kelly, Edward F.

User team: Docket

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Falls Church, Virginia 22041

File: A-622 – Adelanto, CA

Date:

DEC 23 2019

In re: J-C-B-F-, a.k.a. [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tania P. Linares Garcia, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of El Salvador, has appealed from the decision of the Immigration Judge dated April 19, 2019, denying his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and his request for protection under the Convention Against Torture. The Department of Homeland Security has not filed a brief in opposition. The respondent's appeal will be sustained.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3)(i), (ii).

As an initial matter, the respondent does not challenge the Immigration Judge's finding that the respondent is statutorily ineligible for asylum because he filed his application more than one year after his last arrival in the United States, and did not establish that he qualifies for an exception to the timely filing requirement (IJ at 8). We therefore need not address this issue further. *See, e.g., Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by party on appeal); *Matter of Gutierrez*, 19 I&N Dec. 562, 565 n.3 (BIA 1988) (same).

We next address the respondent's application for withholding of removal. Upon de novo review, we conclude that the harm the respondent experienced in El Salvador rises to the level of past persecution. The Immigration Judge determined that the respondent was a credible witness (IJ at 7). The respondent testified that he is a law school graduate who advocated for the rights of LGBTI people and faced discrimination, harassment, and physical harm in El Salvador on account of his status as a transgender man (IJ at 3-4; Tr. at 70-78, 82-85). The respondent stated that on one occasion his university classmates attacked him; he suffered a fractured rib and sustained bruises, for which he required medical attention (IJ at 4; Tr. at 72-73).

Persecution is "an extreme concept, marked by the infliction of suffering or harm. . . in a way regarded as offensive." *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (internal quotation marks omitted). We conclude that the serious physical harm the respondent experienced,

¹ The respondent is a transgender man who has adopted the name "[REDACTED]." We therefore use the male pronoun to refer to him.

in conjunction with the harassment and mistreatment he experienced over a period of years, rise to the level of past persecution on account of a protected ground. *See Ruano v. Ashcroft*, 301 F.3d 1155, 1160-61 (9th Cir. 2002); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (Mexican gay men with female sexual identities constitute a particular social group), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), *judgment vacated by Gonzales v. Thomas*, 547 U.S. 183 (2006); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079-80 (9th Cir. 2015).

Furthermore, we find clear error in the Immigration Judge's finding that the respondent did not demonstrate that the persecution was inflicted either by the Salvadoran government or by persons that the government was unwilling or unable to control (IJ at 10). As the Immigration Judge noted, the respondent did not report the attack he suffered to the police (IJ at 9; Tr. at 73). However, the respondent testified he was afraid reporting would put him in greater danger, and we are persuaded by his argument on appeal that country conditions evidence in the record demonstrates that reporting would have been futile. *See Resp. Brief at 3-4, 17-18*. The documentary evidence of record regarding LGBTI individuals' treatment by Salvadoran police and other security forces corroborates the respondent's assertion that the government is unable or unwilling to control persecution. The Immigration Judge cites to the country conditions evidence regarding positive measures the Salvadoran government has taken in recent years to protect the LGBTI population (IJ at 10). However, the record does not establish that such legislation has translated into significantly better protection of LGBTI persons. Rather, the documentary evidence the respondent provided reflects that violence and discrimination against transgender individuals continues, including at the hands of police (Exhs 4, 6).

Given the evidence presented, we conclude that the respondent sufficiently demonstrated that the persecution was inflicted by individuals that the government was unwilling or unable to control. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006) (government officials and employees tacitly accepted abuse applicant suffered on account of his female sexual identity); *see also Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (concluding that an applicant suffered past persecution even if she did not report the persecution to government authorities, where the evidence showed that if she turned to the government for help, they would have been unable or unwilling to control the perpetrator's conduct).

In light of the foregoing, we conclude that the respondent has demonstrated that he suffered past persecution on account of a protected ground, and that he therefore benefits from a presumption of a well-founded fear of persecution. *See Matter of D-I-M*, 24 I&N Dec. 448 (BIA 2008). Furthermore, the DHS did not sufficiently rebut the presumption under the facts presented in this case, given the extensive country conditions evidence in the record. Therefore, we will sustain the respondent's appeal and remand the matter solely for the required security checks.²

² In light of our disposition of this matter, we need not address the Immigration Judge's denial of the respondent's request for protection under the Convention Against Torture.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained, and the record is remanded solely for the required security checks.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).



FOR THE BOARD

Board Member Ana Mann respectfully concurs without separate opinion.