



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: M [REDACTED], E [REDACTED] D [REDACTED] A [REDACTED]-050

Date of this notice: 1/2/2018

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
Cole, Patricia A.
Wendtland, Linda S.

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Falls Church, Virginia 22041

File: A [REDACTED] 050 – Arlington, VA

Date:

JAN - 2 2018

In re: E [REDACTED] d [REDACTED] M [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin R. Winograd, Esquire

ON BEHALF OF DHS: Thai-Binh Tran
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of El Salvador, timely appeals an Immigration Judge's February 17, 2017, decision. The Immigration Judge found the respondent removable as charged, denied her applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1158 and 1231(b)(3) (2012), respectively, and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2) (2017), and ordered the respondent removed. On appeal, the respondent contests the denial of all three forms of relief and protection. The record will be remanded for further proceedings and for the entry of a new decision.

On appeal, the respondent asserts that the Immigration Judge exhibited hostile and bullying behavior toward the respondent's counsel, and requests that the Board remand the record to a different Immigration Judge pursuant to *Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015) (holding that conduct by an Immigration Judge that can be perceived as bullying or hostile is never appropriate, particularly in cases involving minor respondents, and may result in remand to a different Immigration Judge). In its response brief, the Department of Homeland Security ("DHS") has specifically declined to take a position on the respondent's assertion. Instead, the DHS states that "As to whether the respondent's appeal has established that the Immigration Judge failed to provide the respondent with a fundamentally fair opportunity to present her case and whether the Immigration Judge's conduct demonstrates pervasive bias and prejudice, the DHS will take no position on the matter and request that the Board decide the matter based on existing law" (DHS Appeal Br. at 1). Based on such law, we find that the Immigration Judge engaged in conduct against the respondent's counsel that "can be perceived as bullying or hostile," and thus will remand this matter for assignment to a different Immigration Judge. *See, e.g., Cham v. Att'y Gen. of U.S.*, 445 F.3d 683, 692 (3d Cir. 2006) (observing that conduct by an Immigration Judge that can be perceived as bullying or hostile can have a chilling effect on a respondent's testimony and thereby limit his or her ability to fully develop the facts of the claim); *Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (3d Cir. 2006) (indicating that the mere appearance of bias on the part of an Immigration Judge can diminish the stature of the judicial process that he or she represents).

As one example, during the hearing counsel for the respondent objected to a question posed to the respondent by counsel for the DHS (Tr. at 181-82). When the Immigration Judge implicitly

overruled the objection, the respondent's counsel asked for clarification (Tr. at 182). The Immigration Judge then immediately went off the record. While the contents of the off-the-record exchange are unknown, in large part because the Immigration Judge twice refused requests by the respondent's counsel to state on the record what occurred, the respondent states both in the appeal brief and in a letter submitted in conjunction with a complaint to the Executive Office for Immigration Review that the Immigration Judge "scream[ed] at [her] for a period of over five minutes," "mimick[ed] counsel's voice," "called counsel several disrespectful names," and "referred to counsel as unprofessional" (Respondent's Appeal Br. at 10; Brief Supplement, Tab C at 2).

Once the parties came back on record, the Immigration Judge admonished respondent's counsel to "refrain from being disrespectful," and told her "you don't question the Judge about any particular finding that the Judge is inclined to make before the Judge makes that finding. That is wholly inappropriate" (Tr. at 182). After the Immigration Judge twice refused the respondent's request to recount what transpired during the off-the-record session for the record, she permitted respondent's counsel to characterize the discussion, and respondent's counsel stated that the Immigration Judge told her that she was not professional and had chastised her (Tr. at 183).

Shortly after cross-examination recommenced, the respondent's counsel stated "I'd ask for a break because of the way I was just treated in the courtroom. I don't know that I can effectively represent my client right now given that I'm actually shaking from the way that the Judge had referred to me off the record" (Tr. at 184). The Immigration Judge denied the request without explanation. The respondent's counsel then made explicit that she believed that she was unable to effectively represent her client, noting that she was "having a physical reaction to the manner in which the Court had addressed me" (Tr. 184-85). The Immigration Judge noted the assertion for the record, then asked counsel for the DHS to continue with cross-examination, admonishing the respondent's counsel, "Don't interrupt her cross-examination again" (Tr. at 185). The respondent's counsel then stated, "And I would like the Court to note that my hand is shaking from the manner in which the Court has addressed me. Thank you, Your Honor" (Tr. at 185). The Immigration Judge replied by again admonishing the respondent's counsel not to interrupt cross-examination by counsel for the DHS (Tr. at 185).

We agree with the respondent's counsel that the Immigration Judge acted in a manner which was hostile to her. We do not find that counsel's initial request for clarification was "disrespectful." We also find that respondent's counsel's request for a short break to regain her composure after an apparently heated off-the-record conversation was appropriate (if not professionally required, given her clear statement that she was unable to effectively represent her client in her current emotional state). The Immigration Judge's denial of this reasonable request, without any explanation, appears to solely be a product of her frustration with the respondent's counsel, as was her refusal - again without explanation - of counsel's reasonable request to summarize their off-the-record discussion for the record in order to memorialize what occurred.

We conclude that this hearing was not conducted in a manner that meets the high standards expected of Immigration Judges. Consequently, we find it appropriate to vacate the Immigration Judge's decision and remand the record to the Immigration Court for a new hearing before a different Immigration Judge. *See generally Ali v. Mukasey*, 529 F.3d 478, 492-93 (2d Cir. 2008)

(remanding with instructions to reassign the case where the Immigration Judge's conduct resulted in an appearance of bias or hostility that precluded the court's meaningful review); *Sukwanputra v. Gonzales*, 434 F.3d at 638 (suggesting that the case should be reassigned to a different Immigration Judge on remand "to ensure fairness and the appearance of impartiality"). On remand, the parties should be afforded an opportunity to present additional evidence and arguments regarding the respondent's eligibility for asylum, withholding of removal, and protection under the Convention Against Torture and for any other relief from removal for which she may be eligible.

Accordingly, the following orders will be entered.

ORDER: The decision of the Immigration Judge is vacated.

FURTHER ORDER: The record is remanded to the Immigration Court for assignment to a new Immigration Judge and for further proceedings consistent with the foregoing opinion.


FOR THE BOARD

IMMIGRATION COURT
1901 S. BELL STREET, SUITE 200
ARLINGTON, VA 22202

In the Matter of

Case No.: A-050

M-050, E-050
Respondent

IN REMOVAL

This is a summary of the oral decision entered on February 17, 2017.
This memorandum is solely for the convenience of the parties. If the
proceedings should be appealed or reopened, the oral decision will become
the official opinion in the case.

[X] The respondents was ordered removed from the United States to El Salvador
or in the alternative to .

[] Respondent's application for voluntary departure was denied and
respondent was ordered removed to or in the
alternative to .

[] Respondent's application for voluntary departure was granted until
upon posting a bond in the amount of \$ _____
with an alternate order of removal to .

Respondent's application for:

[X] Asylum was () granted (X) denied () withdrawn.

[X] Withholding of removal was () granted (X) denied () withdrawn.

[] A Waiver under Section _____ was () granted () denied () withdrawn.

[] Cancellation of removal under section 240A(a) was () granted () denied
() withdrawn.

Respondent's application for:

[] Cancellation under section 240A(b)(1) was () granted () denied
() withdrawn. If granted, it is ordered that the respondent be issued
all appropriate documents necessary to give effect to this order.

[] Cancellation under section 240A(b)(2) was () granted () denied
() withdrawn. If granted it is ordered that the respondent be issued
all appropriated documents necessary to give effect to this order.

[] Adjustment of Status under Section _____ was () granted () denied
() withdrawn. If granted it is ordered that the respondent be issued
all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal () deferral of
removal under Article III of the Convention Against Torture was
() granted (X) denied () withdrawn.

[] Respondent's status was rescinded under section 246.

[] Respondent is admitted to the United States as a _____ until _____.

[] As a condition of admission, respondent is to post a \$ _____ bond.

[] Respondent knowingly filed a frivolous asylum application after proper
notice.

[] Respondent was advised of the limitation on discretionary relief for
failure to appear as ordered in the Immigration Judge's oral decision.

[] Proceedings were terminated.

[] Other:

Date: ~~May 16, 2016~~

February 17, 2017

QUYNH V. BAIN
Immigration Judge

Appeal: Waived/Reserved Appeal Due By:

by Respondents, due March 29, 2017

ALIEN NUMBER: [REDACTED]-050

NAME: M [REDACTED], E [REDACTED]

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: ☐ ALIEN ☐ ALIEN c/o Custodial Officer ☒ ALIEN's ATT/REP ☒ DHS

DATE: 2/17/2017 BY: COURT STAFF QVB/JP

Attachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other

Q6