U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted] G[redacted], H[redacted] ... **A [redacted]-420**

Date of this notice: 5/8/2019

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:
Donovan, Teresa L.
Wendtland, Linda S.
Greer, Anne J.

Userteam: Docket

File: A[redacted]-420 – Arlington, VA Date: MAY - 8 2019

In re: H[redacted] A[redacted] C[redacted] G[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alexandra Ribe, Esquire

ON BEHALF OF DHS: Deborah K. Todd
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

The respondent, a native and citizen of Honduras, timely appeals an Immigration Judge's August 28, 2017, decision. The Immigration Judge found the respondent removable as charged, denied his 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) (2018), but granted him the privilege of voluntarily departing pursuant to section 240B(b)(1) of the Act, 8 U.S.C. § 1229c(b)(1). The respondent's request for oral argument before this Board is denied. *See* 8 C.F.R. § 1003.1(e). On appeal, the respondent contests the denial of all three forms of relief and protection. The appeal will be sustained, and the record will be remanded to the Immigration Judge for further adjudication and the entry of a new decision.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

As an initial matter, on appeal[1] the respondent, through counsel, contests the Immigration Judge's jurisdiction over these proceedings, arguing that, pursuant to the Supreme Court's decision in *Pereira v. Sessions*, the notice to appear was defective because it did not provide the time and date of the removal proceedings (Respondent's Reply Br. at 7-8). *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (holding that a notice to appear that does not designate a specific time and place of an alien's removal proceedings does not trigger the Act's stop-time rule ending his period of continuous presence in the United States for purposes of section 240A(b) of the Act, 8 U.S.C. § 1229b(b)). Subsequent to this decision, the Board issued a precedent decision distinguishing *Pereira v. Sessions*. In *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), we held that a notice to appear that does not specify the time and place of an alien's initial removal hearing vests

[1] We grant the respondent's motion to accept his reply brief.

an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a), so long as a notice of hearing specifying this information is later sent to the alien. In this case, a notice of hearing specifying the time, date, and place of the respondent's removal proceeding was sent, and the respondent in fact attended this hearing. Accordingly, we find no merit to the respondent's argument.

The respondent bases his asylum claims on alleged past persecution suffered, and future persecution feared, by his abusive father, as well as by members of the MS-13 gang to which he formerly belonged. We agree with the Immigration Judge that the respondent is statutorily ineligible for asylum because he did not meet his burden of demonstrating by clear and convincing evidence that he filed his asylum application within 1 year of his 2011 arrival in the United States, and did not establish either changed or extraordinary circumstances sufficient to excuse the untimely filing of his asylum application, for the reasons set forth by the Immigration Judge in his decision (IJ at 2). *See* section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 1208.4(a). Notably, when asked at his hearing why he did not file for asylum when he first arrived in the United States, the respondent replied that he did not know about the availability of asylum, and did not want to be deported – reasons that are insufficient to excuse the untimely filing of his application (Tr. at 50).

We recognize that in his closing argument, the respondent's counsel stated that the respondent suffered from post-traumatic stress disorder ("PTSD"), and that both his father's abuse of others and country conditions in Honduras in general have recently worsened, which could provide a valid reason for the late filing (Tr. at 73). However, the Immigration Judge rejected the assertion that the respondent's claimed PTSD could serve as an exception, as the record did not contain any evidence showing that the respondent had actually been diagnosed with this disorder, or showing its nature, severity, and extent (IJ at 2). We find no reason to disturb this finding. Moreover, even if the respondent's father's behavior has recently worsened, the respondent's claim is based on domestic abuse by his father when the respondent was a child, many years ago, and he has not explained how his father's alleged worsening behavior in recent years materially affects his asylum claim. Similarly, the respondent has not explained how a general worsening in violence in Honduras materially affects his claim, as his gang-related claim is based on specific incidents of threats and past harm he experienced by members of his former gang, and fears of future harm from these individuals.

We now turn to the respondent's claim for withholding of removal based on childhood abuse by his father, and his concomitant contention that he was persecuted on account of membership in a particular social group of "Honduran children unable to leave their relationship with their parent." We observe that while this matter was pending before the Board, the U.S. Attorney General issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which overruled the Board's precedent decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (holding that "married women in Guatemala who are unable to leave their relationship" may constitute a cognizable social group for purposes of asylum and withholding of removal). In addition, *Matter of A-B-* observed that claims by aliens pertaining to domestic violence perpetrated by nongovernmental actors generally will not qualify the applicant for asylum or withholding of removal. *Matter of A-B-*, 27 I&N Dec. at 320. In light of the overruling of *Matter of A-R-C-G-* and the reasoning contained in *Matter of A-B-*, we determine that the respondent's claim for withholding of removal based on domestic abuse is

without legal merit and must be denied, and affirm the Immigration Judge's denial of withholding of removal on that basis (IJ at 3-4).

As to the respondent's claim for withholding of removal based on fear of retaliation by MS-13 gang members because he left the gang, we agree with the respondent that a remand is required for the Immigration Judge to provide additional analysis. In considering this claim, the Immigration Judge stated, in summary form, that the respondent's proposed particular social group based on his status as a former gang member must "fail for lack of particularity and specificity as to the definition of the particular social group" (IJ at 4).[2] We find that a remand is required for the Immigration Judge to consider the respondent's proposed particular social group under the standards set forth by the United States Court of Appeals for the Fourth Circuit for particular social groups based on former gang membership. *See, e.g., Oliva v. Lynch*, 807 F.3d 53 (4th Cir. 2015) (holding that the applicant was persecuted on account of his membership in the proposed particular social group of former gang members, who left the gang without its permission for moral and religious reasons, and remanding for further analysis concerning the cognizability of the respondent's proposed particular social group); *Martinez v. Holder*, 740 F.3d 902, 913 (4th Cir. 2014), as revised (Jan. 27, 2014) (holding that former gang membership is an immutable characteristic of a particular social group for purposes of withholding of removal).

We also observe that the respondent indicated in his asylum application that he was seeking relief based on an anti-gang political opinion, which the respondent correctly observes the Immigration Judge did not specifically address below (I-589 at 5; Respondent's Br. at 22). Therefore, on remand, the Immigration Judge should address this political opinion claim.

Also, during proceedings before the Immigration Judge, the respondent reasonably raised the issue of persecution due to his membership in a particular social group based on his familial relationship to his father (Respondent's Prehearing Brief at 6; Tr. at 20-24). On remand, the Immigration Judge should address this claim as well.

In addition, the respondent argues that the Immigration Judge should have addressed the respondent's fear that he would be targeted for harm by rival gang members and/or the police because he still bears MS-13 tattoos, and thus faces harm as a member of the particular social group of "suspected gang members" (Respondent's Br. at 18-19). It appears that this claim was raised by the respondent in his pre-hearing brief before the Immigration Judge, but not testified to by the respondent himself (Respondent's Pre-Hearing Br. at 8-9). On remand the Immigration Judge should assess whether the respondent has adequately set forth such a claim before him.

In addition, if the Immigration Judge should find on remand that the respondent suffered past persecution on account of a protected ground under the Act, he should then consider whether the

[2] We note that the Immigration Judge described this claim as being based on the respondent's membership in the particular social group of persons who have "former membership in the gang known as MS-13" and the respondent described it as a particular social group of "former gang member[s]" (IJ at 4; Respondent's Prehearing Brief at 8).

presumption that the respondent's life or freedom would be threatened in the future has been rebutted. *See* 8 C.F.R. § 1208.16(b)(1).

On remand, the parties should be afforded an opportunity to update the record, and to make any additional legal and factual arguments desired regarding the respondent's eligibility for relief from removal. The Board expresses no opinion regarding the ultimate outcome of these proceedings. Given our instant remand, we do not reach the additional issues of protection under the Convention Against Torture or voluntary departure, or the respondent's other arguments on appeal.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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.

Linda S. Wendtland

FOR THE BOARD