U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Newman, Etan
Pangea Legal Services
350 Sansome St. Suite 650
San Francisco, CA 94104

DHS/ICE Office of Chief Counsel - SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: T[redacted] R[redacted], G[redacted] **A [redacted]-284**

Date of this notice: 2/22/2019

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
Kelly, Edward F.
Adkins-Blanch, Charles K.

Userteam: Docket

File: A[redacted]-284 – San Francisco, CA[1] Date: FEB 22 2019

In re: G[redacted] T[redacted] R[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Etan Z. Newman, Esquire

ON BEHALF OF DHS: Justin Price
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture; termination of proceedings; remand

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated September 5, 2018, which denied her application 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 protection under the Convention Against Torture, 8 C.F.R. § 1208.16(c). The parties have provided arguments on appeal. While the appeal was pending, the respondent filed a motion to terminate proceedings pursuant to *Pereira v. Sessions*, 138 S. Ct. 2015 (2018), with an alternate motion to remand. The Department of Homeland Security (DHS) opposed the motion to terminate proceedings but did not address the specifics of the motion to remand. The motion to terminate proceedings will be denied, and the record will be remanded.

In the motion to terminate proceedings, the respondent argues that jurisdiction did not vest with the Immigration Court because the Notice to Appear (NTA) did not designate the specific time and date of the respondent's removal proceedings. Respondent's Br. in Support of Motion to Terminate at 11. In *Pereira v. Sessions*, 138 S. Ct. at 2108, the Supreme Court held that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under [section 239(a) of the Act] section 1229(a),' and does not trigger the stop-time rule" for purposes of cancellation of removal under sections 240A(a), (b) of the Immigration and Nationality Act. In *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), we denied the alien's motion to terminate his removal proceedings based on *Pereira v. Sessions*, holding that a notice to appear that does not specify the time and place of an alien's initial hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the alien.

[1] Proceedings before the Immigration Judge in this matter were completed in this location with the respondent appearing through video conference. *See* section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii).

As in *Matter of Bermudez-Cota*, the respondent here was personally served a notice to appear on April 25, 2018 (Exh. 1). Although the notice to appear did not specify the time and date of the respondent's initial hearing, she was later sent a notice of hearing indicating that she should appear before the Immigration Judge on May 3, 2018, at 1:00 p.m. The respondent, in turn, appeared before the Immigration Judge as scheduled (Tr. at 1-9).[2] Notwithstanding the respondent's argument that *Matter of Bermudez-Cota* was wrongly decided (Respondent's Br. in Support of Motion to Terminate at 12), it is binding precedent in this matter. *Matter of E-L-H-*, 23 I&N Dec. 814, 817 (BIA 2005). Therefore, the NTA here is not defective, and the motion to terminate proceedings will be denied.

However, we will grant the respondent's motion to remand. The record shows that during proceedings before the Immigration Judge the respondent was unrepresented and detained.[3] During proceedings, she mentioned depression and anxiety, but there was no particular evidence that the respondent was not competent to represent herself to warrant a full inquiry into her competency. *See Matter of M-A-M-*, 25 I&N Dec. 474, 477, 479 (BIA 2011).

The respondent, now represented by counsel, argues that she is a likely class member under the *Franco-Gonzalez* class action settlement and requests a remand for a competency determination. Respondent's Br. in Support of Motion to Terminate at 12-16. Under *Franco-Gonzalez v. Holder*, No. CV-10-02211, 2014 WL 5475097 (C.D. Cal. 2014), Main Class Members are all individuals who, among other requirements, meet at least one of the following criteria:

a. A Qualified Mental Health Provider (QMHP) determines that the respondent:
   i. Has a mental disorder that is causing serious limitations in communication, memory, or general mental and/or intellectual functioning; or
   ii. Has a severe medical condition (e.g., traumatic brain injury or dementia) that is significantly impairing mental function; or
   iii. Is exhibiting one or more of the following active psychiatric symptoms or behaviors: severe disorganization, active hallucinations or delusions, mania, catatonia, severe depressive symptoms, suicidal ideation and/or behavior, marked anxiety or impulsivity; OR

b. A QMHP otherwise diagnoses the respondent as demonstrating significant symptoms of:
   i. Psychosis or Psychotic Disorder;
   ii. Bipolar Disorder;
   iii. Schizophrenia or Schizoaffective Disorder;
   iv. Major Depressive Disorder with Psychotic Features;
   v. Dementia and/or a Neurocognitive Disorder; or
   vi. Intellectual Development Disorder (moderate, severe, or profound); OR

[2] The respondent appeared through videoconference (Tr. at 1).

[3] We acknowledge that an attorney entered an appearance on the respondent's behalf on August 20, 2018. However, on August 29, 2018, the attorney filed a motion to withdraw, which the Immigration Judge granted on August 30, 2018.

c. An Immigration Judge has a bona fide doubt about the respondent's competence to represent him- or herself based upon the evidence of record.

In support of the motion, the respondent cited testimony and her sworn statement to DHS in which she related she had a mental illness (Tr. at 12, 58; Exh. 4 at 18). Respondent's Br. in Support of Motion to Terminate at 15-16. She also submitted medical records dated in April 2018 and May 2018 that reflect symptoms of depression, anxiety, and insomnia; diagnoses of major depressive disorder, moderate, and unspecified anxiety disorder; and prescriptions for two different medications. Respondent's Br. in Support of Motion to Terminate, Exh. B. Her personal statement recounts a history of multiple abusive or traumatic situations and ill effects of her medications. Respondent's Br. in Support of Motion to Terminate. Exh. A. Although the respondent does not have one of the precise diagnoses listed above, the reported symptoms and limitations on functioning may satisfy *Franco-Gonzalez* Main Class requirements.

Although the respondent was detained and unrepresented, the record shows that the Immigration Judge conducted a fair hearing and made a reasonable decision based on the evidence before her at the time. However, under the current circumstances, where the respondent is now represented and counsel has submitted new evidence of possible *Franco-Gonzalez* class membership, we find it prudent to afford the respondent the opportunity to present her case. We are thus required to remand the case to the Immigration Judge for all necessary factfinding and analysis. *See* 8 C.F.R. § 1003.1(d)(3)(iv). Accordingly, the following orders will be entered.

ORDER: The respondent's motion to terminate proceedings is denied.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD