U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: L[redacted], J[redacted] W[redacted] A[redacted] **A [redacted]-848**

Date of this notice: 4/26/2019

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

Userteam: Docket

File: A[redacted]-848 – Eloy, AZ

Date: APR 26 2019

In re: J[redacted] W[redacted] A[redacted] L[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kari Elisabeth Hong, Esquire

ON BEHALF OF DHS: Theresa M. Sullivan
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent is a native and citizen of Haiti. This matter was last before us on December 29, 2017, when we dismissed the respondent's appeal of the Immigration Judge's August 3, 2017, decision denying his application for protection under the Convention Against Torture. The respondent subsequently filed a petition for review with the United States Court of Appeals for the Ninth Circuit, the controlling federal jurisdiction in this matter. On August 31, 2018, the Ninth Circuit granted the Government's unopposed motion to remand and remanded the case to this Board. The respondent's appeal will be dismissed in part and the record will be remanded.

For clarity, we provide a brief recitation of the undisputed facts and procedural history. The respondent testified that he fears harm in Haiti because he was involved in a dispute with his stepbrothers, who are members of a criminal gang, regarding the proceeds from the sale of land given to him by his stepfather (IJ at 4; Tr. at 32-34). The respondent further testified that on March 23, 2013, he was attacked by criminals, who kidnapped him and stabbed him with a knife in his right shoulder (IJ at 4; Tr. at 34-35). The respondent stated that while he was married to his wife, he began a relationship with a man named [redacted] in 2009 (IJ at 3-4; Tr. at 30-32). He further stated that after the 2013 attack, the same criminals approached [redacted] at the market and when they learned of his relationship with the respondent, they killed him (IJ at 5; Tr. at 39-40, 43). Therefore, the respondent also fears harm in Haiti based on his sexual orientation because he currently identifies as a homosexual (IJ at 5; Tr. at 66; *see* Exh. 2).

The Board previously affirmed the Immigration Judge's determination that the respondent did not establish his eligibility for protection under the Convention Against Torture for the reasons provided by the Immigration Judge. We did not address the Immigration Judge's denial of his application for asylum and withholding of removal because we did not view the respondent as raising a meaningful challenge to those issues. The Ninth Circuit remanded the record for us to consider whether the respondent adequately put the Board on notice that he was contesting the denial of his application for asylum and withholding of removal on appeal. If so, the Ninth Circuit has also requested that we determine whether remand is necessary for the Immigration Judge to

consider the respondent's asylum eligibility from Brazil. The Ninth Circuit also directed that we address the respondent's request for protection under the Convention Against Torture with regard to Brazil.

Upon review, we conclude that the respondent's Notice of Appeal and attachment sufficiently apprised the Board that he was contesting the denial of his asylum and withholding of removal application. Thus, we will review the Immigration Judge's determination that the respondent has not established his eligibility for asylum, and withholding of removal from Haiti and Brazil, in addition to his requests for protection under the Convention Against Torture. We will dismiss the appeal in part and remand the record for the Immigration Judge to consider the respondent's eligibility for asylum. Specifically, as will be further discussed herein, we will remand the record for the Immigration Judge to determine whether the respondent has established a well-founded fear of persecution in Brazil, where he was resettled, that would overcome the firm resettlement bar, and therefore allow the Immigration Judge to consider the respondent's asylum claim from Haiti.

I. FIRM RESETTLEMENT

In *Matter of A-G-G-*, 25 I&N Dec. 486, 501-03 (BIA 2011), we held that the following criteria apply in making a firm resettlement determination: (1) the Department of Homeland Security (DHS) bears the burden of presenting prima facie evidence of an offer of firm resettlement; (2) the alien can rebut the DHS's prima facie evidence of an offer of firm resettlement by showing that such an offer has not, in fact, been made or that he or she would not qualify for it; (3) the Immigration Judge must consider the totality of the evidence presented by the parties to determine whether an alien has rebutted the DHS's evidence of an offer of firm resettlement; and (4) if the Immigration Judge finds the alien firmly resettled, the burden then shifts to the alien to establish that an exception to firm resettlement applies by a preponderance of the evidence. *See* 8 C.F.R. § 1208.15(a), (b); *see also Ali v. Ashcroft*, 394 F.3d 780, 789–90 (9th Cir. 2005); *Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998).

The respondent testified that prior to coming to the United States, he lived in Brazil for 3 years as a permanent resident where he was free to travel and work (IJ at 11; Tr. at 29, 46). The Immigration Judge noted that the respondent worked lawfully at a garment factory in Sao Paulo, Brazil, and rented a home with a 2-year lease (IJ at 11-12). Furthermore, the DHS presented evidence from the Brazilian government showing that the respondent was a permanent resident (IJ at 11-12; *see* Exh. 6). Based on the evidence and testimony presented, the Immigration Judge properly determined that the DHS met its burden of presenting prima face evidence of the respondent's firm resettlement in Brazil, and the respondent had not demonstrated that any of the exceptions to firm resettlement apply (IJ at 12). *See Matter of A-G-G-*, 25 I&N Dec. at 501-03; *see also* 8 C.F.R. § 1208.15(a), (b). Moreover, on appeal, the respondent does not point to any record evidence establishing that an exception to the firm resettlement bar is applicable to his case.

We note that the firm resettlement bar does not operate, however, if the respondent has a well-founded fear of persecution in the country of resettlement, Brazil. *See Sung Kil Jang v. Lynch*, 812 F.3d 1187, 1191-92 (9th Cir. 2015) (discussing the consideration of asylum eligibility for applicants who have firmly resettled in a country other than their native country); *cf. Nahrvani v. Gonzales*, 399 F.3d 1148, 1152 n.1 (9th Cir. 2005) (discussing applicant's asylum

claim in the context of both his native country and country of resettlement, but declining to affirmatively decide whether an alien may request asylum from a country of which he is not a citizen, and noting that at least one court has ruled that an alien may seek asylum from the country of resettlement) (citing *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004)). As the Immigration Judge did not previously address this issue (IJ at 12), we will remand the record for further consideration of whether the respondent has a well-founded fear of persecution in Brazil, so as to preclude a finding of firm resettlement in that country for purposes of his asylum claim from Haiti.

II. WITHHOLDING OF REMOVAL

We will affirm the Immigration Judge's determination that the respondent did not establish his eligibility for withholding of removal from Haiti. *See* section 241(b)(3)(A) of the Act; 8 C.F.R. §§ 1208.16(b)(1), (2) (providing that to qualify for withholding of removal, an alien must demonstrate that it is more likely than not that his life would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion); *see also Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006). Specifically, we agree with the Immigration Judge that the respondent did not demonstrate that he suffered harm rising to the level of persecution in Haiti (IJ at 14). *See Gormley v. Ashcroft*, 364 F.3d 1172, 1176 (9th Cir. 2004) (stating that persecution is "an extreme concept that does not include every sort of treatment that our society regards as offensive") (internal citation and quotations omitted); *see also* 8 C.F.R. §§ 1208.16(b)(1), (2) (explaining that where an applicant does not establish past persecution, he is not entitled to a presumption of a clear probability of future persecution).

The Immigration Judge also found without clear error that the respondent did not establish that the harm he suffered or fears is based on a protected ground under the Act (IJ at 14-15). Specifically, the Immigration Judge noted that based on the testimony presented, the respondent was harmed in Haiti not because of his sexual orientation, but because his attackers, who were unaware of his sexual orientation, were seeking money from him (IJ at 14-15; Tr. at 64). *See Barajas-Romero v. Lynch*, 846 F.3d 351, 357 (9th Cir. 2017) (explaining that a "person seeking withholding of removal must prove not only that his life or freedom will be threatened in his home country, but also that the threat is 'because of' one of the five listed reasons" under the Act).

Furthermore, we agree with the Immigration Judge that the past harm the respondent suffered in Haiti was not shown to have been inflicted by the government or by individuals or groups that the government is unable or unwilling to control (IJ at 15). *See Ochoa v. Gonzales*, 406 F.3d 1166, 1170 (9th Cir. 2005) (explaining that asylum and withholding of removal require proof of persecution by a "government official or persons the government is unable or unwilling to control"). Specifically, as noted by the Immigration Judge, same-sex relationships are permitted in Haiti and the national police receives training specific to respecting the rights of members of the LGBTI community (IJ at 15). Contrary to the respondent's appellate arguments, record evidence of country conditions in Haiti does not show instances of the police directly participating in harming members of the LGBTI community (IJ at 15). Consequently, we will affirm the Immigration Judge's determination that the respondent has not established his eligibility for withholding of removal (IJ at 14-15). *See* 8 C.F.R. §§ 1208.16(b)(1), (2).

III. CONVENTION AGAINST TORTURE

A. Haiti

The record supports the Immigration Judge's determination that the respondent has not met his burden of establishing eligibility for protection under the Convention Against Torture by demonstrating that it is more likely than not that he will be tortured "by or at the instigation of or with the consent or acquiescence [to include willful blindness] of a public official or other person acting in an official capacity" in Haiti (IJ at 17-20). 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *see Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015) (explaining that an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are reviewed under the "clear error" standard); *see also Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003) (discussing Convention Against Torture standard). Specifically, the Immigration Judge noted that, as previously discussed herein, same-sex relationships are allowed in Haiti, the Haitian police receive specific training concerning the rights of members of the LGBTI community, and there are not reported incidents of the police directly participating in harming members of the LGBTI community (IJ at 19-20).

Furthermore, the Immigration Judge noted the respondent did not establish that his internal relocation within Haiti, particularly to an area where LGBTI advocacy groups report greater security, would not be reasonable (IJ at 19). *See Maldonado v. Holder*, 786 F.3d 1155, 1164 (9th Cir. 2015) (stating that "[i]n deciding whether the applicant has satisfied his or her burden [for protection under the Convention Against Torture], the [Immigration Judge] must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal"). Consequently, we discern no clear error in the Immigration Judge's ruling that the respondent has not proven that it is more likely than not that he will be tortured with the requisite official acquiescence if he returns to Haiti (IJ at 17-20). *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1).

B. Brazil

The record also supports the Immigration Judge's ruling that the respondent has not established eligibility for protection under the Convention Against Torture from Brazil (IJ at 17-20). *See id.*; *see also Zheng v. Ashcroft*, 332 F.3d at 1194-95. Specifically, the Immigration Judge noted that although the respondent was threatened on one occasion because of his Haitian nationality, he was never physically harmed, and he remained in Brazil for 7 months after being threatened without experiencing any other problems (IJ at 20; Tr. at 51-52). In addition, the Brazilian government has taken several steps to assist Haitian migrants, including permitting employment and providing other benefits (IJ at 21). Thus, the Immigration Judge's finding that the respondent has not established that it is more likely than not that he would be tortured with the requisite official acquiescence if he returns to Brazil is not clearly erroneous (IJ at 20-21). *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1).

IV. ASYLUM

Upon consideration of the Ninth Circuit's remand order, we conclude that remand is warranted for the Immigration Judge to determine whether the respondent has demonstrated a well-founded

fear of persecution on account of a protected ground under the Act in the country of resettlement, Brazil, and to determine if the respondent's well-founded fear overcomes the firm resettlement bar to asylum from Haiti. *See Sung Kil Jang v. Lynch*, 812 F.3d at 1191-92. The Immigration Judge should also determine whether the respondent has demonstrated a well-founded fear of persecution in Haiti. Accordingly, the record will be remanded for entry of a new decision adjudicating the respondent's asylum claims. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We express no opinion on the ultimate outcome of the respondent's case.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is dismissed in part.

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

FOR THE BOARD