U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: S[redacted] S[redacted], J[redacted] **A [redacted]-471**

Date of this notice: 3/30/2020

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.
O'Connor, Blair
Donovan, Teresa L.

Userteam: Docket

File: A[redacted]-471 – Miami, FL

Date: MAR 30 2020

In re: J[redacted] S[redacted] S[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sandra Echevarria, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge, dated March 13, 2018, denying his applications for asylum and withholding of removal pursuant to 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.[1] *See* 8 C.F.R. §§ 1208.16-.18. The appeal will be sustained and the record will be remanded for additional consideration.

We review the findings of fact made by the Immigration Judge, including determinations as to credibility and the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

As a threshold matter, we are unpersuaded by the respondent's reliance on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), to argue the Immigration Judge lacked jurisdiction in this matter (Respondent's Br. at 31-38). We have held that a Notice to Appear (NTA) that does not specify the time and place of an alien's initial removal hearing vests 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, as occurred in this case. *See Matter of Pena-Mejia,* 27 I&N Dec. 546, 547-48 (BIA 2019); *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018).[2]

The respondent does not dispute that on October 28, 2015, the Immigration Court mailed him a notice of hearing, which properly advised him of the time and place of his hearing, and the respondent appeared at that scheduled hearing. Accordingly, the respondent's NTA, coupled with his subsequent notice of hearing, satisfied the requirements of section 239(a) of the Act.

[1] The respondent has not challenged the denial of voluntary departure and we consider the issue waived (IJ at 25-26). *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (when a respondent fails to substantively appeal an issue addressed in an Immigration Judge decision, that issue is waived before the Board); *Matter of Edwards*, 20 I&N Dec. 191, 196-97 n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived).

[2] We decline the respondent's invitation to reconsider our decision in *Matter of Bermudez-Cota* (Respondent's Br. at 37-38).

Under the circumstances, we conclude that the Immigration Judge had jurisdiction over these proceedings; thus, termination is unwarranted.

We also affirm, as not clearly erroneous, the Immigration Judge's finding that the respondent is mentally competent for purposes of these proceedings (IJ at 5-8). *See Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015) (holding that an Immigration Judge's finding of competency is a finding of fact reviewed by the Board for clear error). The record indicates that the respondent has a below average intelligent quotient ("IQ") and that he has anxiety, depression, and suffers from post-traumatic distress disorder ("PTSD") (IJ at 6-7; Exh. 18). The Immigration Judge appropriately assessed the respondent's mental competency and determined that he was competent to proceed. The Immigration Judge queried the respondent at length to assess his cognitive functioning (IJ at 5-7, 15-16; Tr. at 26-88). The respondent answered the questions posed to him responsively and his conduct demonstrates that he understood the nature and purpose of these proceedings. *See Matter of M-A-M-*, 25 I&N Dec. 474, 479-480 (BIA 2011). Thus, we do not perceive clear error in the Immigration Judge's competency finding or find that remanding this case for additional consideration of the respondent's mental competency is warranted.

The respondent's removability is undisputed (IJ at 2; Tr. at 15-17). Thus, the only issue on appeal is whether the Immigration Judge properly adjudicated his applications for relief. As relief from removal, the respondent sought asylum, withholding of removal under the Act, and protection under the Convention Against Torture (IJ at 2; Exh. 7). The respondent contends in this regard that he has been harmed in Mexico, and will be subjected to additional harm if he returns to that country, in relation to a land dispute between the inhabitants of his town and those of a neighboring town (IJ at 8-11, 16).

The Immigration Judge concluded that the respondent was ineligible for asylum because he did not file his application for that relief within 1 year of arriving in the United States or that an exception to the filing deadline applied (IJ at 22-23). The Immigration Judge alternatively found that the respondent is not credible and that he therefore did not meet his burden of proof (IJ at 16-23). The Immigration Judge also concluded that the respondent did not establish a nexus between the harm he experienced and fears and a ground protected under the Act (IJ at 16-17, 21-22). Furthermore, the Immigration Judge found that the respondent could internally relocate to avoid future harm (IJ at 24). The Immigration Judge determined that, because the respondent did not meet the lower burden of proof applicable to his application for asylum, he necessarily did not meet the higher burden of proof applicable to his application for withholding of removal under the Act (IJ at 24). The Immigration Judge further found that the respondent did not meet his burden of proof to establish eligibility for protection under the Convention Against Torture (IJ at 24-25). Finally, the Immigration Judge concluded that the respondent is ineligible for voluntary departure (IJ at 25-26).

We reverse the Immigration Judge's determination that the respondent is not eligible for asylum because he did not file his asylum application within 1 year of arrival in the United States or establish that an exception to that filing deadline applied (IJ at 22-23). An alien applying for asylum must demonstrate by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States. Section 208(a)(2)(B) of the Act; 8 C.F.R. § 1208.4(a)(2). An applicant for asylum who does not file within 1 year of arrival

must demonstrate either changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application, and must file the application "within a reasonable period given those" changed or extraordinary circumstances. Section 208(a)(2)(D) of the Act, 8 C.F.R. § 1208.4(a)(2), (4), (5).

We conclude that, while the Immigration Judge's competency finding is not clearly erroneous, the respondent's cognitive impairment and mental health issues collectively constitute extraordinary circumstances and that the respondent filed his application within a reasonable period given those circumstances. The psychologist report of record indicates that the respondent "is suffering from major mental health problems, he has serious cognitive impairment, and he is of [b]orderline intelligence" (Exh. 18. Tab A). The report also indicates that the respondent's "serious mental health problems [and his] cognitive impairments…affect his memory, attention, and concentration" (*Id.*). Given these factors and the timeline from when the respondent arrived in the United States, obtained an attorney, and filed his application, we conclude that the respondent established that he is eligible to apply for asylum pursuant to 8 C.F.R. § 1208.4(a)(5).

We also conclude that Immigration Judge's adverse credibility finding is clearly erroneous. Under the REAL ID Act, an Immigration Judge may base a credibility determination on any inaccuracies or falsehoods in the applicant's statements without regard to whether they go to the heart of the applicant's claim. *See* section 208(b)(1)(B)(iii) of the Act. The Immigration Judge may consider any relevant factor that, when evaluated in light of the totality of the circumstances, can reasonably be said to have a bearing on the witness's veracity. *Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1233 (11th Cir. 2006).

The Immigration Judge found that the respondent's credibility is undermined by several factors: (1) the respondent's testimony that he was shot at on one occasion is inconsistent with his written statement that indicates he was shot at on two occasions (IJ at 14, 18-19); (2) inconsistencies in his testimony and asylum application regarding when he was arrested at a protest and how long he was detained following the arrest (IJ at 18-19); and (3) an inconsistency in his testimony regarding whether his mother lost her property in the dispute (IJ at 23).

In concluding that the respondent lacked credibility, the Immigration Judge did not adequately consider the respondent's cognitive disability or mental health issues. While we affirm the Immigration Judge's finding that the respondent does not lack mental competency for purposes of these proceedings as not clearly erroneous, the respondent's cognitive disability and mental health issues likely could have affected his ability to provide testimony in support of his applications for relief. *See Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015) (providing that if an asylum applicant has competency issues that affect the reliability of his testimony, the Immigration Judge should, as a safeguard, generally accept his fear of harm as subjectively genuine based on the applicant's perception of events). Rather than finding the respondent not credible based on inconsistencies in his testimony, in light of the particular circumstances present in this case, the Immigration Judge should have applied *Matter of J-R-R-A-* as a safeguard, accepted his subjective fear as genuine, and considered whether the corroborating evidence in the record is sufficient to meet his burden of proof.

In light of our determination that the respondent is eligible to apply for asylum and that the Immigration Judge's adverse credibility finding is clearly erroneous, we conclude that a remand is warranted for additional consideration of the respondent's eligibility for relief. On remand, the Immigration Judge should specifically consider whether the respondent's proffered particular social groups are cognizable and whether he is a member of such a group. *Matter of E-R-A-L-*, 27 I&N Dec. 767 (BIA 2020); *Matter of L-E-A-*, 27 I&N Dec. 581, 582, 586 (A.G. 2019); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *vacated in part and remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom., Reyes v. Sessions*, 138 S. Ct. 736 (2018).

The Immigration Judge also should consider whether the respondent has established that he experienced persecution in the past or has a well-founded fear of future persecution on account of any group membership or any other ground protected under the Act. *See* section 208(b)(1)(B)(i) of the Act; *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (holding that, absent a showing that a protected ground would be a "central reason" for the claimed past or future harm, the respondent cannot establish eligibility for either asylum or withholding of removal). As well, the Immigration Judge should consider whether any past or feared persecution was or would be inflicted by an individual or entity that was or is associated with the Mexican government or that the government was or is unwilling or unable to control. The Immigration Judge should also determine if the respondent could reasonably and safely relocate within Mexico to avoid future harm.[3]

The Immigration Judge also should apply the pertinent legal standards for assessing the merits of the respondent's application for withholding of removal under section 241(b)(3) of the Act and for protection under the Convention Against Torture. The parties should be permitted to supplement the record with additional evidence in the remanded proceedings. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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

[3] We recognize that some of these issues were touched upon by the Immigration Judge in the decision. However, we perceive the Immigration Judge's analysis as inadequate, particularly in light of our decision regarding eligibility for asylum and credibility.