



U.S. Department of Justice

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Name: E [REDACTED], J [REDACTED] M [REDACTED]

A [REDACTED]-197

Date of this notice: 2/28/2019

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.
Cole, Patricia A.
Wendtland, Linda S.

1. .
User team: Docket

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Falls Church, Virginia 22041

File: A █████ -197 – San Diego, CA

Date: **FEB 28 2019**

In re: J █████ M █████ B █████

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Matthew G. Holt, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's September 20, 2018, decision, denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c). The respondent has also filed a motion to remand. The appeal will be sustained in part, the motion to remand will be granted, and the record of proceedings will be remanded.¹

We review the findings of fact, including the determination of credibility, made by the Immigration Judge for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of law, judgment, and issues of discretion, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, pro se before the Immigration Judge, testified that he feared harm from criminals that assaulted him when he refused to participate in their criminal enterprise, and on account of his being imputed as gay or transgendered (IJ at 2-3; Tr. at 36-37, 41-46; Exhs. 1, 3). The Immigration Judge found him credible but denied asylum and withholding of removal for lack of nexus to a protected ground, alternatively denied asylum in the exercise of discretion, and denied relief under the Convention Against Torture (IJ at 3-5).²

The Immigration Judge found that the respondent had not articulated a cognizable particular social group (IJ at 3). We disagree. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) (“[W]e review the ultimate determination whether a proposed group is cognizable de novo”). The respondent testified that he feels different from other men, that others perceive him differently and as effeminate, and he has received threats because of this; however, he does not consider himself gay or bisexual due to his Mormon religion (Tr. at 41-45).

¹ The request for oral argument is denied.

² The Immigration Judge found, among other things, that the respondent had not established that the government would acquiesce or be willfully blind to his torture (IJ at 5). On appeal, the respondent has not meaningfully challenged this finding, which was dispositive. Thus, we find the argument waived. See *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

The asylum officer found that the respondent's particular social group was "sexual minorities in Mexico" (Exh. 1). The Immigration Judge did not consider this construction, but required that the unrepresented respondent articulate it for him. As the respondent argues in his motion to remand, the Immigration Judge did not mention any of the threats the respondent received because of being perceived as gay, or the fear he has of returning to Mexico because of being perceived as gay. Nor did the Immigration Judge consider the respondent's assertion in his Form I-589, Supplement B, that he was raped by his grandfather when he was a child in Mexico (Exh. 3).³ Under these circumstances, we will remand for the Immigration Judge to consider whether the respondent has met his burden of establishing past persecution or a well-founded fear of persecution on account of his membership in the particular social group of "sexual minorities or imputed sexual minorities in Mexico." See *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc) ("[S]exual orientation and sexual identity can be the basis for establishing a particular social group").

If the respondent establishes that he suffered past persecution or has a well-founded fear of future persecution in Mexico because of his perceived sexual orientation, the Immigration Judge should evaluate whether the Mexican government was or is unable or unwilling to protect him. *Matter of A-B-*, 27 I&N Dec. 316, 337-38 (A.G. 2018). The Immigration Judge also may need to reevaluate his ruling on internal relocation, because if the respondent establishes cognizable past persecution, the burden of proof as to internal relocation will shift to the Department of Homeland Security. See 8 C.F.R. § 1208.13(b)(3)(ii).

The Immigration Judge also denied the respondent's asylum application in the exercise of discretion (IJ at 3-4). Discretionary denials of asylum are disfavored, except in the most egregious circumstances. *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) ("[T]he danger of persecution should generally outweigh all but the most egregious of adverse factors."). The Immigration Judge found that the respondent's decades in the United States, his United States citizen father, and his eight United States citizen children were outweighed by years-old convictions for forgery for writing a "bad check" and false statement to an officer, and for unlawfully bringing his 8-month pregnant wife to join him in the United States (IJ at 3-4). While the respondent's criminal history is certainly relevant, we disagree that it outweighs the positives and will reverse the determination. See *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007) (requiring Immigration Judges to balance and weigh "all relevant favorable and adverse factors" before denying asylum in discretion, and favorably citing *Pula*'s standard that asylum should be discretionarily denied for only egregious crimes).

Accordingly, we will remand for the Immigration Judge to determine in the first instance whether the respondent has met his burden for asylum or withholding of removal.

³ Although the respondent further asserted in his Form I-589, Supplement B, that he was drugged and raped by a friend in 2014, he states in his brief on appeal that this incident occurred while he was living in the United States (Respondent's Br. at 2). Therefore, while the incident may be relevant to the respondent's self-identification with a particular social group, it cannot qualify as past persecution.

See *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590-91 (BIA 2015). The parties should be permitted on remand to submit additional evidence pertinent to any outstanding issue.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained as to asylum and withholding of removal, and his motion to remand is granted.

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

Board Member Patricia A. Cole respectfully dissents. Even if the respondent establishes a cognizable particular social group, the respondent has not proffered any new evidence and the record does not support finding past persecution or a clear probability of future persecution. Further, I would affirm the Immigration Judge's discretionary denial of asylum for reasons he articulated.