U.S. Department of Justice

Executive Office for Immigration Review

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Name: F[redacted]-F[redacted], J[redacted] R[redacted] **A [redacted]-634**

Date of this notice: 7/9/2019

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:
O'Connor, Blair
Rosen, Scott
Donovan, Teresa L.

Userteam: Docket

File: A[redacted]-634 – Arlington, VA Date: JUL - 9 2019

In re: J[redacted] R[redacted] F[redacted]-F[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ellis C. Baggs, Esquire

ON BEHALF OF DHS: Nicole I. Schroeder
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal

The respondent is a native and citizen of Honduras. On September 27, 2018, the Immigration Judge denied the respondent's application for asylum under section 208(b) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b), but granted his application for withholding of removal under section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A).[1] The respondent appeals from the Immigration Judge's denial of asylum, and the Department of Homeland Security (DHS) appeals from the Immigration Judge's grant of withholding of removal. The respondent's request for oral argument is denied. The record will be remanded.

We review findings of fact, including credibility findings, for clear error. *See* 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 questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge erred in determining that he did not establish changed circumstances excusing the untimely filing of his asylum application. On cross-appeal, the DHS argues that the Immigration Judge erred in determining that the respondent established his eligibility for withholding of removal. Specifically, the DHS argues that the Immigration Judge exceeded her authority by redefining the respondent's particular social group. The DHS also argues that the Immigration Judge erred in determining that the respondent established past persecution and a clear probability of persecution on account of his membership in the particular social group consisting of "property owners who refuse to cooperate with gangs."

Turning first to the respondent's appeal, we disagree with the Immigration Judge's determination that the respondent did not establish changed circumstances excusing the untimely filing of his asylum application (IJ at 6-7). 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

[1] The Immigration Judge determined that it was unnecessary to address whether the respondent established eligibility for protection under the Convention Against Torture or voluntary departure (IJ 13).

alien's arrival in the United States," or April 1, 1997, whichever is later. *See* section 208(a)(2)(B) of the Act; 8 C.F.R. § 1208.4(a)(2). An application for asylum may be considered even if it is filed more than 1 year after the date of the alien's arrival in the United States, if the alien demonstrates "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing" the application. *See* section 208(a)(2)(D) of the Act. The applicant shall file an asylum application within a reasonable period given those "changed circumstances." 8 C.F.R. § 1208.4(a)(4)(ii).

In this case, the respondent was admitted to the United States on June 19, 2011, but did not file his asylum application until March 8, 2016 (IJ at 6). The respondent contends that recent threats to his family, worsening conditions in Honduras, and the deaths of two of his family members constitute changed circumstances excusing the untimely filing of his asylum application. In her September 27, 2018, decision, the Immigration Judge determined that these circumstances do not constitute changed circumstances for purposes of excusing the respondent's untimely filing because they arose after the respondent filed his application for relief (IJ at 6-7). *Cf. Zambrano v. Sessions*, 878 F.3d 84 (4th Cir. 2017) (holding that the intensification of circumstances arising before the filing of an untimely asylum application can constitute changed circumstances). However, we agree with the respondent's argument on appeal that changed circumstances need not occur before the asylum application is filed. Indeed, legislative history demonstrates that Congress' intent in creating the changed circumstances exception was to "ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies." 142 Cong. Rec. S11838-40 (statement of Sen. Hatch). Here, the Immigration Judge granted the respondent's application for withholding of removal in part due to the evidence of changed circumstances, and the Immigration Judge assumed that this evidence materially affects the respondent's eligibility for relief. *See* Respondent's Br. at 2 (citing IJ at 6-7).

Moreover, neither the statute nor the regulation mandates that the changed circumstances must occur before the application is filed. Indeed, as argued by the respondent on appeal, the regulation states that the applicant shall file "within a reasonable period *given* those 'changed circumstances,'" not that the applicant shall file the application *after* the changed circumstances (Respondent's Br. at 5). *See* 8 C.F.R. § 1208.04(a)(4)(ii). We note that a finding that changed circumstances can only occur before an untimely asylum application is filed would predicate an alien's asylum eligibility on the mere fortuitousness of when the changed circumstances occur. In this respect, if the changed circumstances occurred after an Immigration Judge's final order, an alien would be eligible for asylum through a motion to reopen, but if they occurred before the Immigration Judge's final order, as is the case here, then the alien would be ineligible for asylum. We conclude that such a ruling would be arbitrary and random, as well as difficult to reconcile with the congressional intent behind the 1-year exception, as aforementioned. We also agree with the respondent's contention on appeal that such a ruling would have the practical effect of encouraging asylum applicants who have filed an untimely application to file another application in proceedings each and every time a possible change in circumstances has occurred, given that the Immigration Judge could find the previous changed circumstance not to be material, which is an illogical result.

Turning next to the DHS's cross-appeal, we find no clear error in the Immigration Judge's finding that the government of Honduras is unable or unwilling to protect the respondent from

gang members (IJ at 8-9). *See* 8 C.F.R. § 1003.1(d)(3)(i) (clear error standard of review); *see also Matter of A-B-*, 27 I&N Dec. 316, 320, 337-38, 343-44 (A.G. 2018); *Matter of McMullen*, 17 I&N Dec. 542, 544-45 (BIA 1980); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975). As found by the Immigration Judge, the respondent testified that he attempted to report some of his harm to the police, but the police informed him that they could not do anything to help him (IJ at 8; Tr. at 35). Moreover, the background evidence reveals that Honduras suffered from significant human rights abuses during the time in which the respondent was harmed, as well as police corruption (IJ at 8; Exhs. 6R-X, 8). Although the DHS argues on appeal that there is evidence that the government of Honduras has made efforts to combat corruption and gang violence, this evidence is insufficient to find clear error in the Immigration Judge's finding that the government of Honduras is unable or unwilling to protect the respondent (Exhs. 5, 6, 7A, D-F).

We disagree, however, with the Immigration Judge's determination that the respondent established his eligibility for withholding of removal on the basis of his land ownership (IJ at 7-13). Specifically, even if the Immigration Judge was permitted to redefine the respondent's particular social group as "property owners who refuse to cooperate with gangs," rather than simply "property owners," we disagree with the Immigration Judge's determination that the respondent established that this proposed particular social group is cognizable. In this regard, contrary to the Immigration Judge, we conclude that this group fails the particularity test because many people own different types of property in Honduras, which they use for divergent purposes (IJ at 11). *See Matter of W-G-R-*, 26 I&N Dec. 208, 213-15 (BIA 2014), *remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239-40 (BIA 2014); *see also Pantoja-Medrano v. Holder*, 520 F. App'x 147 (4th Cir. 2013) (holding that the proposed social group of individuals believed to have acted as government informants against members of a drug distribution conspiracy lacked the requisite particularity). We also disagree with the Immigration Judge that the respondent identified sufficient evidence to satisfy the social distinction requirement (IJ at 11-12). *See Matter of W-G-R-*, 26 I&N Dec. at 215-18; *Matter of M-E-V-G-*, 26 I&N Dec. at 240-43. Instead, the respondent's fear appears to be based on general crime and conditions of violence, which does not constitute a basis for relief. *See Matter of Sanchez and Escobar*, 19 I&N Dec. 276, 284-86 (BIA 1985), *aff'd sub nom. Sanchez Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (holding that an alien's fear of general conditions of violence and civil unrest does not constitute a well-founded fear of persecution within the meaning of the Act); *see also Matter of A-B-*, 27 I&N Dec. at 335 (stating that social groups defined by their vulnerability to private criminal activity likely lack the requisite particularity).

Because the Immigration Judge determined that the respondent was eligible for withholding of removal based on the aforementioned reasons, she found it unnecessary to address whether the respondent established his eligibility for relief based on his family membership. We therefore conclude that remand of the record is warranted for the Immigration Judge to determine whether the respondent established his eligibility for asylum and withholding of removal on the basis of his family membership.[2] Upon remand, the Immigration Judge should also determine in the first

[2] Given our reversal of the Immigration Judge's finding that the respondent established past persecution on account of his membership in a particular social group of landowners who resist

instance whether the respondent established his eligibility for protection under the Convention Against Torture and voluntary departure.

Accordingly, the following order will be entered.

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.

FOR THE BOARD

Temporary Board Member Teresa L. Donovan respectfully dissents from the majority's determination that "changed circumstances" that trigger the exception to the 1-year time limit for filing an asylum application may *post-date* the asylum application. I interpret sections 208(a)(2)(B) and (D) of the Act as requiring that the "changed circumstances" *predate* the asylum application.

gangs, we decline to address the DHS's challenge to the Immigration Judge's internal relocation finding at this time (DHS Br. at 20-22; IJ at 13).