U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: G[redacted]-O[redacted], M[redacted] **A[redacted]611**

Date of this notice: 2/4/2014

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:
Pauley, Roger
Wendtland, Linda S.
Donovan, Teresa L.

lulseges
Userteam: Docket

File: [redacted] 611 - Memphis, TN

Date: FEB - 4 2014

In re: M[redacted] G[redacted]-O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Andrew Free, Esquire

ON BEHALF OF DHS: Rook Moore
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's decision dated June 21, 2012. The Immigration Judge denied the respondent's applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3), respectively, and her request for protection under the Convention Against Torture. The respondent's appeal is sustained in part. The record will be remanded for further proceedings consistent with this decision.[1]

The respondent contends that the Immigration Judge's decision should be reversed as she credibly established past persecution on account of a protected ground. First, we agree with the respondent that the Immigration Judge's decision that she is time-barred from asylum (i.e., due to her untimely application and failure to present a valid justification thereto) was made without first affording the respondent an opportunity to present testimony to explain the reasons for her delay in seeking asylum (I.J. at 2; Tr. at 28-29, 120; Group Exh. 2; Respondent's Notice of Appeal, Attachment at 1). As such, we find that the Immigration Judge should consider on remand whether the respondent's untimely filed asylum application is excused under section 208(a)(2)(D) of the Act.

Next, as the issue of credibility has not been raised on appeal, we see no clear error in the Immigration Judge's positive credibility finding (I.J. at 8). *See* 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii) (the Board reviews an Immigration Judge's factual and credibility findings for clear error and reviews de novo questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges). However, we conclude that the Immigration Judge erred, as a matter of law, in holding that the respondent did not meet her burden for withholding of removal.

[1] As recognized by the Immigration Judge, the respondent is a transgendered person but preferred to be identified as a female (I.J. at 1-2; Tr. at 31; Respondent's Br. at 2).

On appeal, the respondent asserts that the Immigration Judge mischaracterized her proffered social group, which consists of effeminate gay males with female gender identities (I.J. at 12; Respondent's Br. at 4-9). We agree that the Immigration Judge provided an unclear analysis on the issue of nexus given his conflicting findings and references to non-binding case law as to whether the respondent demonstrated membership in a particular social group pursuant to the above designation, as well as on account of being a homosexual (I.J. at 12, 14-15, 18). Specifically, while the Immigration Judge held that the respondent's proffered group "would possibly qualify for asylum," he found that respondent was not included in this group because she admitted that she would "change the way she lives" and hide her sexual orientation out of fear if returned to Mexico (I.J. at 12-14). However, we find that the respondent established the validity of the aforementioned social group, as well as her membership therein, and the fact that she would hide her female identity or sexual orientation due to fear for her safety does not negate the immutability of such characteristics (Respondent's Br. at 8-9).

Furthermore, it is well-established that sexual orientation can form the basis of a valid social group under the Act (Tr. at 25). *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1994). To the extent that the Immigration Judge held that the respondent's father—who was the main source of harm for the respondent—also abused other members of the family "for reasons unassociated with their sexuality," an applicant need not prove that a protected ground was the only basis for the harm in question so long as a protected ground was or will be at least one central reason for the claimed persecution (I.J. at 10; Respondent's Br. at 12). *See Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011); *see also Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 213-15 (BIA 2007) (*citing* section 208(b)(1)(B)(i) of the Act).[2]

In addition, we find that the Immigration Judge erred in holding that the harm experienced by the respondent did not rise to the level of persecution as contemplated by the Act. In this regard, we see no clear error in the Immigration Judge's decision to not consider the respondent's sexual assault from her father's coworker due to inconsistencies in the record (I.J. at 8, 10). However, the Immigration Judge appeared to credit the respondent's claim of suffering a homophobic attack by an unknown assailant in public and, most significantly, the Immigration Judge accepted her account of enduring near-daily abuse—as a child and adolescent—for many years at the hands of her father (i.e., consisting of pistol whippings, lashings from a belt, beatings from a machete handle and, on one occasion, a stabbing from a machete) for her effeminate behavior (I.J. at 3-5, 8, 10; Tr. at 32-38, 52-56, 61, 65, 70-71; Group Exh. 2). The respondent also suffered verbal abuse from her father in the form of homophobic slurs and threats of death due to the respondent's sexuality and her father also directed his violence at the respondent's mother

[2] For purposes of clarity, we note that the United States Court of Appeals for the Sixth Circuit, in whose jurisdiction this matter arose, has analyzed a factually similar claim for relief in an unpublished decision. *See Grijalva v. Gonzales*, 212 Fed. Appx. 541, 543 (6th Cir. 2007) (discussing the applicant's membership in a particular social group consisting of "obviously effeminate homosexual men"). Similar to the respondent here, Grijalva "claim[ed] that he has been very effeminate from the time he was a small boy and, as a result, has been abused for most of his life." *See id.* Although the Immigration Judge in that case "was convinced that Grijalva [was] an effeminate homosexual and observed that homosexuality had been recognized as a 'particular social group'" by the Board, he found that Grijalva's claim of past persecution lacked credibility. *See id.* at 545-46.

when she tried to protect the respondent (I.J. at 3; Tr. at 41-42; Respondent's Br. at 2, 8, 10). On this record, we agree with the respondent that such cumulative harm amounts to persecution (Respondent's Br. at 12-14). *See Mece v. Gonzales*, 415 F.3d 562, 573 (6th Cir. 2005); *Vincent v. Holder*, 632 F.3d 351, 356 (6th Cir. 2011) (an Immigration Judge should consider the cumulative effect of the incidents of harm in assessing whether past persecution was established). We also note that despite the Immigration Judge's suggestion to the contrary, there is no requirement that applicants seek medical treatment for their claimed abuse (I.J. at 11). Further, the Immigration Judge did not dispute the respondent's testimony that she did not report her mistreatment to the police out of fear that her father—a former policeman—would find out and punish her and because her friend, [redacted], did not receive police assistance after reporting a homophobic beating (I.J. at 4; Tr. at 38; Respondent's Br. at 3).

Also, while recognizing the credible testimony provided by the respondent and her sister, [redacted], the Immigration Judge determined that the respondent did not present adequate corroboration to support her claim of persecution. Specifically, the Immigration Judge expressed concern due to the absence of testimony or a letter from the respondent's mother and because the respondent's sister—despite being deemed credible and corroborating the respondent's abuse from their father due to the respondent's sexual orientation—was unable to verify the entirety of the respondent's abuse (I.J. at 5-6, 8-9, 11). However, while the respondent argues on appeal that the Immigration Judge erred by not providing her notice of the need to corroborate her claim in the form of supporting evidence from her mother, we need not address this precise issue as we find that the respondent's sister adequately corroborated her claim. In particular, the Immigration Judge fully credited the testimony provided by the respondent's sister, particularly relating to the physical beatings (i.e., "with household objects and eventually a machete") and death threats (i.e., with a pistol and a machete) the respondent suffered from her father during childhood (I.J. at 5, 8-9; Tr. at 82-89). *See* section 208(b)(1)(B)(ii) of the Act; *see also Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010).

Further, we find that the respondent has met her burden for withholding of removal under section 241(b)(3) of the Act. Specifically, the Department of Homeland Security has not rebutted the respondent's presumption of future persecution by showing a fundamental change in circumstances such that the respondent's life or freedom would not be threatened on account of her sexual orientation or that she could avoid a future threat to her life or freedom by relocating elsewhere in Mexico and that it would be reasonable, under all the circumstances, to expect her to do so (Respondent's Br. at 14, 17). *See* 8 C.F.R. § 1208.16(b)(1)(i); *see also Mece v. Gonzales, supra*, at 573. Additionally, as noted by the respondent, the Immigration Judge did not acknowledge certain incidents noted in the 2011 State Department Human Rights Report which were helpful to her claim (Exh. 3-GG) and did not consider the declaration submitted by the respondent's expert witness, Dr. James Wilets, beyond Dr. Wilets's assessment of the State Department Report (I.J. at 16; Exh. 3-EE; Respondent's Br. at 15-17). Also, the Immigration Judge, while relying on the country reports in the record, observed that "violence against homosexuals, mostly effeminate gay men, is described as 'frequent'" (I.J. at 15). The Immigration Judge's fact-finding in this regard has not been shown to be clearly erroneous.

In sum, given the respondent's credible testimony and corroborating evidence, we find that she established eligibility for withholding of removal. However, given that the Immigration Judge did not sufficiently examine the basis for the respondent's untimely application (as noted

above), we conclude that he should provide the respondent an opportunity to present testimony and other evidence on remand on the issue of her statutory eligibility for asylum. Upon remand, if determining that the respondent has met her burden in demonstrating a valid exception to the 1-year filing requirement, the Immigration Judge should find that she qualifies for asylum as a matter of law. *See Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (recognizing the Board's authority to qualify or limit a remand for a specific purpose). Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, in part, and the respondent is determined, on this record, to be eligible for withholding of removal under section 241(b)(3) of the Act.

FURTHER 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.

Teresa L Donovan

FOR THE BOARD

Board Member Roger A. Pauley concurs in the order except for the portion remanding for reconsideration of the Immigration Judge's finding that the asylum application was time barred. While mentioned in the respondent's Notice to Appeal, this issue was not pursued in the 18-page brief filed by his counsel, which challenges only the denial of withholding of removal, and CAT, and accordingly is waived. See Ramani v. Ashcroft, 378 F.3d 554 (6th Cir. 2004); Hassan v. Gonzales, 403 F.3d 429, 433 n.5 (6th Cir. 2005).