File: [redacted] – Chicago, IL

Date: DEC 18 2012

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Keren Zwick, Esquire

ON BEHALF OF DHS: Daniel Rah
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

212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a 35-year-old native and citizen of Mexico, entered the United States in 1993 or 1994. He was convicted in the State of Illinois on February 7, 2012, of possession of cocaine (Exh. 2). On April 6, 2012, removal proceedings were initiated, and the respondent filed an asylum application on May 9, 2012 (Exhs. 2, 3). In a decision dated July 12, 2012, the Immigration Judge found the respondent removable as charged, and granted his application for asylum under section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a). The Department of Homeland Security (DHS) filed a motion to reconsider contending the Immigration Judge made a mistake in discussing the one-year bar. In a decision dated August 9, 2012, the Immigration Judge granted the motion to reconsider and again granted the respondent's application for asylum. The DHS appeals from the Immigration Judge's August 9, 2012, decision granting the respondent asylum. The DHS appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent's asylum application was filed on May 9, 2012, it is subject to the provisions of the REAL ID Act of 2005.

Initially, we note that the DHS contends that the Immigration Judge erred in finding respondent's witness, Dr. Davies, to be an expert on the treatment of homosexuals in Mexico. The DHS contends that Dr. Davies is merely an individual who has an interest in the subject matter

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(Respondent's Brief at 22-30). The Immigration Judge found Dr. Davies' extensive research, in-depth studies, and personal interviews to qualify him as an expert (I.J. at 5). We find no error in the Immigration Judge's decision qualifying Dr. Davies as an expert. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (holding that in order for testimony of an expert witness to meet the threshold requirement of relevancy, the expert must have scientific knowledge that will assist the trier of fact to understand or determine a fact in issue). In addition, we note that Dr. Davies testified that he has been recognized as an expert in about 280 LGBT cases since the early 1990s, and at least half of those cases have dealt with Mexicans (Tr. at 52).

With regard to the respondent's asylum application, there is no dispute that it was filed with the Immigration Court some 18 or 19 years after his entry into the United States, and was not filed within a year of his last arrival in the United States. *See* 8 C.F.R. § 1208.4(a)(2)(B)(ii). The respondent contends that there are extraordinary or changed circumstances to excuse the failure to meet the filing deadline. *See* 8 C.F.R. §§ 1208.4(a)(4) and (5).

The Immigration Judge found that the respondent's lifelong struggle to come to grips with his sexuality, compounded by abuse he endured as a child, and his HIV positive diagnosis in February of 2010, constituted extraordinary circumstances that excuse the delay in filing (I.J. at 11, 12; Tr. at 48; 8 C.F.R. § 1208.4(a)(5)). The respondent testified that he applied for asylum because he was put in proceedings and that being put in proceedings made him accept his sexuality (Tr. at 46, 48). The Immigration Judge also found that the respondent submitted his application within a reasonable period of time given the circumstances (I.J. at 12).

In addition, the Immigration Judge found that the respondent's HIV diagnosis constituted a changed circumstance that materially affects his eligibility for asylum because it increases his likelihood of sexual orientation-based persecution in Mexico (I.J. at 12). In *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010), the Board held an alien does not receive an automatic 1-year extension in which to file an asylum application following "changed circumstances" under section 208(a)(2)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(D). Instead under 8 C.F.R. § 1208.4(a)(4)(ii), the particular circumstances related to delays in filing an asylum application must be evaluated to determine whether the application was filed "within a reasonable period" given the changed circumstances. Given the circumstances, the Immigration Judge found that the respondent's filing his application approximately 27 months after being diagnosed with HIV, to be a reasonable period of time (I.J. at 12). The circumstances include that he was traumatized and depressed after his diagnosis, and that he turned to alcohol and drugs as a coping mechanism (I.J. at 12). We find the Immigration Judge correctly determined that the respondent applied for asylum within a reasonable period, given the totality of the circumstances, including the respondent's gradual coming-out process to accept his sexuality, together with the abuse he endured as a child, and his 2010 diagnosis with HIV.

The respondent claims to have been persecuted in the past and to have a well-founded fear of future persecution on account of his sexual orientation and HIV positive status. The respondent testified that beginning at age 12 or 13, he was repeatedly raped in the town where he lived, by three men who knew or suspected the respondent was gay due to his effeminate manner (Tr. at 26-29). He also testified that his father would beat him, due to his effeminate nature (Tr. at 25).

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The Immigration Judge found that the respondent belongs to the particular social group of gay men, and that the record demonstrates a nexus between the harm received and his effeminate appearance and identity as a gay individual (I.J. at 13). The Board has recognized sexual orientation as a basis for inclusion in a particular social group. See *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1994); *Sankoh v. Mukasey*, 539 F.3d 456, 471 (7th Cir. 2008) (rape can be an act of persecution if done on account of an enumerated ground). The Immigration Judge further found that the actions taken against the respondent rose to the level of past persecution on account of an enumerated ground, and that the resulting presumption that the respondent has a well-founded fear of future persecution on the same basis has not been rebutted by the DHS (I.J. at 13).

On appeal, the DHS contends the Immigration Judge erred in finding that the sexual abuse of the respondent was based on a protected ground, and in finding that the police would not have been willing and able to protect him. The DHS also contends the Immigration Judge erred in finding that the conditions in Mexico have fundamentally changed or that the respondent could not safely relocate to another part of Mexico.

We disagree and conclude that the Immigration Judge properly determined that the respondent met his burden of establishing that he was persecuted in the past on the basis of his membership in a particular social group, and that the DHS has not rebutted the resulting presumption that he has a well-founded fear of future persecution if he returns to Mexico (I.J. at 16, 17; section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1); *see also INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

Persecution perpetrated by private actors and not reported to government officials is sufficient to qualify the respondent for asylum when the Mexican government is unable or unwilling to protect him from the responsible parties (I.J. at 13; *Tarraf v. Gonzales*, 495 F.3d 525, 527 n.2 (7th Cir. 2007)). Despite political gains by the LGBT community in Mexico, homophobic murders are on the rise in Mexico (I.J. at 15; Exh. 5, Tab F at 95). As noted by the Immigration Judge, a recent study found that 76 percent of homosexuals in Mexico had been subject to violence, 53 percent of which had occurred in public places (I.J. at 15; Exh. 5, Tabs E and F). Moreover, a survey finds 11 percent of LGBT people in Mexico City have been a victim of threats, extortion, or detention by police because of their sexual orientation (Exh. 5, Tab E at 62). On this record, the Immigration Judge found that seeking protection from the Mexican government would have been fruitless, and that the government would have been unable or unwilling to control the past persecution (I.J. at 14, 15). The Immigration Judge also found that even if relocation were possible, other factors would make it unreasonable (I.J. at 17). Under these circumstances, the Immigration Judge correctly concluded that the respondent is eligible for asylum and is deserving of a favorable exercise of discretion. Accordingly, the DHS appeal will be dismissed.

ORDER: The DHS appeal is dismissed.

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FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD