U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

08-245 (GR
Attached
WJ

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Theodore N. Cox, Esquire
Law Office of Theodore N. Cox
401 Broadway, Suite 701
New York , NY 10013

DHS/ICE Office of Chief Counsel - NYC
26 Federal Plaza, Room 1130
New York, NY 10278

Name: L A Z

A

Date of this notice: 9/24/2012

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

lucasd
Userteam: Docket

File: A[redacted]- New York, NY

Date: SEP 24 2012

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Theodore N. Cox, Esquire

ON BEHALF OF DHS: Genevieve N. Kim
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

This case has a lengthy procedural history. On September 11, 2003, the Immigration Judge denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture, a decision which we affirmed on October 15, 2004. Pursuant to a stipulated agreement between the parties, the United States Court of Appeals for the Second Circuit remanded the record to us on February 13, 2007, pending the publication of our precedential decision in *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007). On September 28, 2007, we remanded the record to the Immigration Judge. The Immigration Judge ordered the respondent removed in absentia following her failure to appear on February 13, 2008, but on January 28, 2010, we sustained the respondent's appeal of the Immigration Judge's denial of the respondent's motion to reopen and rescind the in absentia removal order, and we remanded the case back to the Immigration Judge. Following remand, the Immigration Judge received additional evidence and took additional testimony, and on October 27, 2010, the Immigration Judge again denied the respondent's applications for relief. The respondent appeals from this decision. In addition, the respondent has filed a motion to remand. The record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and (under the law of the Circuit with jurisdiction over this case) the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). We review all other issues, including questions of law, judgment, and discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application was filed before May 11, 2005, and therefore is not governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

We find that the respondent qualifies for an exception to the 1-year bar to asylum based on changed circumstances stemming from her pregnancy with her second child, who was born in the United States on May 9, 2003 (Exh. 3, Tab 5). *See* section 208(a)(2)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(D). Despite the fact that there appears to be no disagreement that the respondent was indeed pregnant with her second child when she filed her initial application for asylum on November 12, 2002, the Immigration Judge found on October 27, 2010, without further analysis or discussion, that "[t]he respondent provided very little and insufficient evidence that would indicate that she had met any of the exceptions set forth in the regulatory [sic] for a late-filed I-589 application" (I.J. Dec. of Oct. 27, 2010, at 7). This finding is clearly erroneous, as the respondent not only provided her second child's birth certificate to the Immigration Court on June 6, 2003 (Exh. 3, Tab 5), she mentioned her pregnancy in the statement filed with her initial asylum application on November 12, 2002 (Exh. 2, Attach.), and through counsel she made a thorough and persuasive argument in favor of the "changed circumstances" exception to the 1-year filing deadline in a memorandum filed with the Immigration Court on July 24, 2003 (Exh. 5). Accordingly, the respondent's asylum claim relating to the birth of her second child is not barred as untimely, and we need not decide whether the respondent established by clear and convincing evidence that her application was filed within 1 year of her entry (I.J. Dec. of Oct. 27, 2010, at 7).

In addition, we need not address whether the respondent's claim for asylum based on the forcible insertion of an IUD is otherwise timely, as we find that it is sufficiently related to her claim based on the birth of her second child in the United States, especially given that the respondent claims to fear being treated as a recidivist violator of the family planning laws based on her claimed resistance to the IUD insertion (*see* Respondent's Br. at 35-36). Thus on remand the Immigration Judge should consider both claims as qualifying for an exception to the 1-year bar.

On remand, the Immigration Judge shall engage in a new analysis concerning whether the forcible IUD insertion constituted past persecution. In this new analysis, the Immigration Judge should address whether the respondent's claimed forcible seizure by family planning authorities, her restraint and struggle during the procedure, the prolonged nature of the procedure, and any other relevant factors constitute "aggravating conditions" which make the officials' actions rise to the level of harm necessary to constitute persecution. *Wong v. Holder*, 633 F.3d 64, 73-74 (2d Cir. 2011) (deferring to BIA's conclusion, in *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 642 (BIA 2008), that, "to rise to the level of harm necessary to constitute 'persecution,' the insertion of an IUD must involve aggravating circumstances"). As part of this new analysis, the Immigration Judge should also determine whether the respondent has established that the procedure was carried out "for . . . or because of" her opposition or resistance to China's family planning policy. *See Wong, supra*, at 79-80. If the Immigration Judge determines that the respondent has established that she suffered past persecution, he should apply the presumption of a well-founded fear of persecution and give the Department of Homeland Security ("DHS") an opportunity to rebut the presumption. *See* 8 C.F.R. §§ 1208.13(b)(1), (b)(1)(i).

In addition, the Immigration Judge shall engage in a new analysis of the respondent's claimed fear of future persecution based on the birth of her second child in the United States. Although the

Immigration Judge initially denied this claim on the merits, it is unclear whether he applied the well-founded fear standard applicable to asylum rather than the more stringent "clear probability" standard applicable to withholding of removal (*see* I.J. Dec. of Oct. 27, 2010, at 10, 14). Further, we note that the burden for establishing eligibility for asylum will depend in part on whether the Immigration Judge finds that the respondent has established that she suffered past persecution arising out of her IUD insertion. As noted above, if the Immigration Judge finds past persecution, the burden will shift to the DHS to rebut the presumption of a well-founded fear of future persecution. However, if the Immigration Judge finds no past persecution, the respondent should be given an opportunity to demonstrate a well-founded fear arising out of the birth of her second child in the United States. In adjudicating this claim, the Immigration Judge should also consider the documents submitted in support of the respondent's motion to remand.

Finally, we note our concern with the Immigration Judge's comments indicating that documents that are submitted into evidence without relevant portions being highlighted may be subject to exclusion from the evidentiary record (I.J. Dec. of Oct. 27, 2010, at 13-14). Although the Immigration Court Practice Manual states that relevant portions of background evidence "should" be highlighted, and the respondent would be well-advised to call the Immigration Judge's attention to the specific portions of her documents that provide support for her overall claim, we do not agree with the Immigration Judge's apparent conclusion that non-highlighted documents are subject to not being considered at all. *See* Immigration Court Practice Manual, section 3.3(e)(iv).

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