U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: K [redacted] P [redacted]

A [redacted]

Date of this notice: 12/10/2014

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.
Cole, Patricia A.

TranC
Userteam: Docket

File: A [redacted] - Bloomington, MN Date: DEC 10 2014

In re: P [redacted] K [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alexander J. Segal, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent is a native of the USSR and citizen of Belarus. He claims that he was persecuted and that he fears future persecution in Belarus. In a decision dated March 7, 2013, an Immigration Judge denied the respondent's application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection pursuant to the Convention Against Torture, but granted him voluntary departure. The respondent has appealed. The Board has not received a response from the Department of Homeland Security. The record will be remanded. The Immigration Judge's decision also concerned the respondent's wife, [redacted] During the pendency of their appeal, the respondent's wife moved to sever proceedings based on their divorce on October 25, 2013. Ms. M[redacted] appeal will be the subject of a separate decision.

The respondent claims that he was persecuted and that he fears future persecution in Belarus on account of his political opinion, advocating the removal of President Lukashenko, and membership in a particular social group, opposition group members who engage in opposition activities and protests. The respondent testified that in May of 2001, he became a member of a youth movement opposed to the ruling regime in Belarus (Tr. at 45). He testified that he was detained several times in the summer of 2001, for distributing opposition papers and he was threatened and once hit on his legs (Tr. at 47-49). On May 17, 2006, the respondent joined the Youth Front, a large unregistered youth organization advocating the removal of President Lukashenko (Tr. at 39, 44). The respondent handed out stickers and attended rallies. He protested with the Youth Front and he was arrested and convicted on March 21, 2006, and he spent 15 days in jail (Tr. at 55-60). On May 30, 2007, a KGB agent questioned the respondent about his involvement in the Youth Front and beat the respondent, repeatedly punched him in the stomach and kicked him in the kidney area, and threatened to handicap him if he continued his opposition work (Tr. at 65; Exh. 10 at 13). Further, in June of 2007, the dean of the respondent's school said that the respondent was not allowed to take tests and he was expelled from school in

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September of 2007 (Tr. at 34, 67). The respondent left Belarus in June of 2007, and the dean told his mother in August of 2007, that the respondent would not be allowed to take exams (Tr. at 69). After he arrived in the United States, the respondent was told that on August 31, 2008, his friend was beaten by a stranger, who was prosecuted and convicted (Tr. at 73, 74, 102, 103). President Lukashenko was reelected in December of 2010, and the respondent's mother received anonymous calls from people asking about the respondent's whereabouts.

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 application for relief (Form I-589) was filed on March 10, 2010, it is subject to the provisions of the REAL ID Act of 2005.

The Immigration Judge determined that the respondent is not eligible for asylum, insofar as he failed to establish that he filed his asylum application within 1 year of his arrival in the United States. *See* section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B). We too find that the respondent did not establish any changed circumstance justifying an almost 3 year delay in filing his asylum application (I.J. at 8-10; Respondent's Brief at 6-27; Tr. at 36, 37, 69-79). In this regard, the Immigration Judge found that an attack on the respondent's friend in Belarus increased the respondent's level of fear, but does not constitute a change in the respondent's personal circumstances that materially affects his eligibility for asylum (I.J. at 9). In addition, President Lukashenko has been in power since 1994 and Belarus's human rights record has been and continues to be poor under his regime and the Immigration Judge found that the circumstances have not materially changed in Belarus (I.J. at 9; Tr. at 80; section 208(a)(2)(D) of the Act, 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. §§ 1208.4(a)(2), (4)).

Notwithstanding the respondent's statutory ineligibility for asylum, the Immigration Judge considered the respondent's eligibility for withholding of removal and protection under the Convention Against Torture. In denying the respondent's application for relief, the Immigration Judge determined that he failed to satisfy his burden of proof for withholding of removal and protection under the Convention Against Torture (I.J. at 10-14). This matter arises in the jurisdiction of the Eighth Circuit, which has held that persecution is an extreme concept and that low-level intimidation and harassment alone are not sufficient. *Malonga v. Mukasey*, 546 F.3d 546, 552 (8th Cir. 2008). It is also important to consider whether an act of violence is an isolated occurrence or part of a continuing effort to persecute. *See Ngure v. Ashcroft*, 367 F.3d 975, 990 (8th Cir. 2004). The Immigration Judge found that the violence and intimidation that the respondent faced did not meet the extreme level required to constitute persecution (I.J. at 11).

We find that the incidents described above (and summarized at page 11 of the Immigration Judge's decision) rise to the level of past persecution. The violence and intimidation that the respondent faced, including being convicted and detained for 15 days, and having been kicked and punched by the police, when considered in the aggregate, rise to the level of past persecution. *See Matter of O-Z-& I-Z-*, 22 I&N Dec. 23 (BIA 1998). We note that in finding that the incidents did not rise to the level of past persecution, the Immigration Judge compared the respondent's situation to that of the

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applicant in *Eusebio v. Ashcroft*, 361 F.3d 1088 (8th Cir. 2004); I.J. at 11 . However, in *Eusebio v. Ashcroft, supra*, the applicant was detained for only 48 hours, whereas in the present case, the respondent was convicted and detained for 15 days. Having demonstrated past persecution, the respondent benefits from the presumption that his life or freedom would be threatened in the future. *See* 8 C.F.R. § 1208.16(b)(1).

As determined by the Immigration Judge, the poor human rights conditions in Belarus have not changed (I.J. at 8). We therefore find that the respondent demonstrated that he is eligible for withholding of removal on account of his political opinion. Section 241(b)(3) of the Act; 8 C.F.R. § 1208.16; *see generally INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Accordingly, the following orders shall be issued.

ORDER: The respondent's appeal is dismissed with respect to his application for asylum under section 208 of the Act.

FURTHER ORDER: The respondent's appeal from the denial of withholding of removal under section 241(b)(3) of the Act is sustained.

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

File: A[redacted] - Bloomington, MN

Date: DEC 10 2014

In re: [redacted]

CONCURRING AND DISSENTING OPINION: Linda S. Wendtland, Board Member

I concur with the majority opinion to the extent that it sustains the respondent's appeal from the denial of his application for withholding of removal under the Act, but I respectfully dissent from the majority opinion to the extent it concludes that the Immigration Judge correctly determined that the respondent is time-barred from asylum eligibility. I conclude that the respondent established materially changed circumstances and that he sought asylum within a reasonable period thereafter, and I would reverse the Immigration Judge's untimeliness ruling.

The respondent's close friend and fellow opposition member, A[redacted] U[redacted] (or Y[redacted]) was severely assaulted in late August of 2008. It took him nearly 1 year to recover (he lost his memory for a time), and when the respondent phoned him in August of 2009, Mr. U[redacted] stated (with difficulty) that he believed the assault was related to his political activities, and that a week before the assault, someone had contacted him inquiring about the respondent's whereabouts. This materially strengthened the respondent's asylum claim. But Mr. U[redacted] declined, at that time, to provide the respondent with a written statement, and did not agree to do so until January of 2010. The respondent filed his application less than 2 months after Mr. U[redacted] agreement to provide the statement, and about 7 months after the August 2009 phone conversation. *See* evidence discussed in Respondents' Brief at 10-16. Additionally, the evidence appears to indicate that conditions for political opponents in Belarus have materially worsened in recent years. *See* evidence discussed in Respondents' Brief at 22-27. A change in circumstances that materially strengthens the respondent's asylum claim, as has occurred here, justifies an excusing of the 1-year deadline. The majority opinion notes that the Immigration Judge found that an attack on the respondent's friend in Belarus increased the respondent's level of fear, but does not constitute a change in the respondent's personal circumstances that materially affects his eligibility for asylum. I would note that the statute and regulations do not use the word "personal" in defining changed circumstances.

In view of all these factors, I would treat the respondent's application as timely and sustain his appeal from the denial of asylum and remand the record for background checks. I respectfully dissent from the majority's opinion to the extent it dismisses the respondent's appeal from the untimeliness finding.

Linda S. Wendtland
Board Member