U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Willis, Gracie
Southern Poverty Law Center
[redacted]

DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW, Ste 332
Atlanta, GA 30303

Name: DURAN-ORTEGA, MANUEL LEO... [redacted]

Date of this notice: 7/2/2019

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:
Wendtland, Linda S.
Donovan, Teresa L.
O'Connor, Blair

MalikAr
Userteam: Docket

File: [redacted] - Atlanta, GA

Date: JUL - 2 2019

In re: Manuel Leonidas DURAN-ORTEGA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Gracie H. Willis, Esquire

ON BEHALF OF DHS: Andrew J. Hewitt
Assistant Chief Counsel

APPLICATION: Reopening; asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of El Salvador, was ordered removed in absentia on January 31, 2007. An Immigration Judge denied the respondent's motion to reopen his removal proceedings on April 24, 2018, and we dismissed the respondent's appeal of this decision on October 17, 2018. This case is now before us pursuant to a March 26, 2019, order of the United States Court of Appeals for the Eleventh Circuit that granted the Government's opposed motion to remand. Upon further review, the appeal will be sustained and the record will be remanded for further proceedings.

This Board reviews the Immigration Judge's factual findings, including credibility findings and predictions as to the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Following the circuit court remand, we issued a briefing schedule on April 23, 2019, requiring the parties to file briefs with the Board on or before May 14, 2019. The respondent timely filed a brief on May 14, 2019. Also on that date, a group of journalist organizations filed a request to appear as amici curiae along with a brief in support of the respondent. We now grant the request of amici curiae and accept their brief for filing.

Subsequently, on June 6, 2019, the Department of Homeland Security ("DHS") filed a motion to accept a late-filed brief. The respondent opposes the DHS motion. Alternatively, he requests leave to file a reply brief should the DHS's brief be accepted. We agree with the respondent that the DHS has not provided good cause for filing its brief over 3 weeks after the deadline set by the Board. Therefore, we deny the DHS's motion to accept its late-filed brief. The respondent's request to file a reply brief is moot.

Turning to the arguments timely raised on remand, we reject the respondent's contention that rescission of his in absentia removal order or termination of these proceedings is required because

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his Notice to Appear, Form I-862, does not set forth the time and date of his hearing[1] (Respondent's Br. at 16-23). *See Pereira v. Sessions*, 138 S. Ct. 2105 (2018). In *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), we held that a Notice to Appear that does not specify the time and place of an alien's initial hearing vests an Immigration Judge with jurisdiction over removal proceedings so long as a Notice of Hearing specifying this information is later sent to the alien. *See also Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018).

The respondent asserts that jurisdiction never vested because his mailed Notice of Hearing was mailed, but returned as undeliverable. We reaffirm our prior conclusion that the Immigration Judge found without clear error that: (1) the contents of the respondent's Notice to Appear were explained to him in his native language of Spanish; and (2) the respondent was notified in Spanish that notices of hearing would be sent to the mailing address set forth in the Notice to Appear and warned of the consequences of failing to file a Form EOIR-33 should his address change (IJ at 3; Exh. 1). Likewise, we reaffirm our previous holding that the Immigration Judge did not clearly err in determining that the returned mail resulted from the respondent's providing an incomplete address upon his apprehension, contrary to his duty under section 239(a)(1)(F)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(1)(F)(i), and his not subsequently correcting this mistake (IJ at 4).

We therefore again conclude that the respondent has not established that he received improper service of his Notice of Hearing (IJ at 3-4). *See* section 240(b)(5)(B) of the Act, 8 U.S.C. § 1229a(b)(5)(B) (stating that no written notice of hearing shall be required in a removal proceeding if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act); *see also Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258, 1260 (11th Cir. 2002) (stating that "[f]ailing to provide the INS [the former Immigration and Naturalization Service] with a change of address will preclude the alien from claiming that the INS did not provide him or her with notice of a hearing"). Consequently, we hold that the mailing of the respondent's Notice of Hearing to the address he provided vested the Immigration Court with jurisdiction over his removal proceedings. *See Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019) (holding that neither rescission of an in absentia removal order nor termination of the proceedings is required where an alien who is served with a Notice to Appear that did not specify the time and place of the initial removal hearing failed to provide an address where a Notice of Hearing could be sent).

On the other hand, we are persuaded by the arguments of the respondent and amici curiae that the Immigration Judge erroneously ruled that the respondent did not demonstrate materially changed country conditions in El Salvador warranting reopening to permit him to apply for asylum and related relief (Respondent's Br. at 5-13; Amici Curiae's Br. at 3-10). *See* Section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii); C.F.R. § 1003.23(b)(4)(i). Taking administrative notice of the 2017 Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, El Salvador Country Reports on Human Rights Practices, the Immigration Judge found no

[1] The respondent's Notice to Appear does set forth the place of his hearing, although not the time or date.

[redacted]

material difference concerning violence against journalists when comparing the 2007 Country Report submitted by the respondent (IJ at 6-7; Respondent's Mot. to Reopen, Tab P). However, the 2007 Country Report's only mention of violence against journalists relates to complaints that the government did not adequately investigate a journalist's death in 1997. In contrast, the 2017 Country Report describes at least one occasion when journalist contacts reported experiencing threats from individuals believed to be government officials following reporting on violence in El Salvador. The 2017 Country Report further states that there have been continued allegations that the government retaliated against members of the press for criticizing its policies, whereas the 2007 Report mentions no such allegations. In addition, the respondent submitted other documents which describe increased aggression against journalists in recent years (Respondent's Motion to Reopen, Tabs J-O). Viewing this evidence in its entirety, we reverse the Immigration Judge's holding that the respondent did not demonstrate materially changed conditions in El Salvador pursuant to 8 C.F.R. § 1003.23(b)(4)(i) (IJ at 6-7). *See Zheng v. U.S. Att'y Gen.*, 549 F.3d 260, 268 (3d Cir. 2008).

We also find persuasive the respondent's argument that he has made the necessary prima facie showing of eligibility for relief to justify reopening (Respondent's Br. at 13-16). *See Matter of J-G-*, 26 I&N Dec. 161, 169 (BIA 2013); *Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992). In this regard, the respondent has articulated a reasonable likelihood that he may establish a well-founded fear of persecution on account of his anti-corruption political opinion and his membership in the proposed particular social group of "Salvadoran journalists," as necessary to qualify for asylum. *See* 8 C.F.R. § 1208.13(b)(2)(i). The respondent has further addressed the requirements for demonstrating that the particular social group he proposes is legally cognizable. *See Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018). We therefore conclude that the respondent has shown that it is worthwhile to develop these issues further during a hearing before the Immigration Judge. *See Matter of L-O-G-*, 21 I&N Dec. 413, 418-19 (BIA 1996).

Finally, the respondent has submitted the pertinent application for relief, as required under 8 C.F.R. § 1003.23(b)(3) (Respondent's Mot. to Reopen, Tab U).

For these reasons, we will sustain the respondent's appeal from the Immigration Judge's denial of his motion to reopen, and remand the record for further proceedings and the entry of a new decision regarding the respondent's application for asylum and related relief.[2]

Accordingly, the following orders are entered.

ORDER: The appeal is sustained, the prior decisions by the Immigration Judges and the Board are vacated, and the proceedings are reopened.

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[2] Consequently, we need not decide whether the Immigration Judge erred in declining to reopen these proceedings pursuant to his sua sponte authority (Respondent's Br. at 23-25; Amici Curiae's Br. at 10-21). *See* 8 C.F.R. § 1003.23(b)(1).

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FURTHER ORDER: The record is remanded for further proceedings and the entry of a new decision consistent with this opinion.

Teresa L Doran

FOR THE BOARD