File: [redacted] - Baltimore, MD

Date: SEP 14 2009

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Feroli, Esquire

ON BEHALF OF DHS: Brian M. Fish
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

In an October 31, 2007, decision, the Immigration Judge denied the respondent's asylum application, but granted him withholding of removal under section 241(b)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture ("CAT"). The respondent appealed the Immigration Judge's decision denying his asylum application. The Department of Homeland Security ("DHS") has opposed the respondent's appeal, and requested that we dismiss the appeal.[1] The appeal will be sustained, and the record remanded for further proceedings.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard, and review all other issues, including whether the parties have met their relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii); *see also Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). Because the asylum application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The record will be remanded to the Immigration Court for further fact finding and consideration of the respondent's eligibility for asylum. *See* 8 C.F.R. §§ 1003.1(d)(3)(i), (iv); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Immigration Judge erred in concluding that the respondent was statutorily ineligible for asylum because he had found in Belgium a "safe haven" or a "safe third country" (I.J. at 16-17). Section 208(a)(2)(A) of the Act provides, in relevant part, that an applicant

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[1] We note that in its "brief in opposition to the respondent's appeal," the DHS expressed that it "disagrees" with the Immigration Judge's decision to grant the respondent relief from removal. The DHS, however, did not file a timely and proper appeal or cross-appeal of the Immigration Judge's decision. As such, the Immigration Judge's decision to grant the respondent's applications for withholding of removal under the Act, and protection under the CAT, is not on appeal before us. We therefore decline to further address the DHS's arguments relating this aspect of the Immigration Judge's decision.

cannot be granted asylum if the Attorney General determines that the applicant may be removed, *pursuant to a bilateral or multilateral agreement*, to a safe third country in which the applicant's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion (emphasis added). *See* 8 C.F.R. § 1208.4(a)(6). However, the Immigration Judge did not find that Belgium is a party to a bilateral or multilateral agreement that would facilitate the respondent's removal to that country, nor is there record evidence that would support such a finding.

We note that although the Immigration Judge's decision included a passing reference to the firm resettlement provision in the Act and the regulations, it did not include clear factual findings and legal analysis relevant to determining whether the respondent can be considered to have been firmly resettled in Belgium, and, thus, ineligible for asylum under section 208(b)(2)(A)(vi) of the Act. *See, e.g., Mussie v. INS*, 172 F.3d 329, 331-32 (4th Cir. 1999) (discussing the firm resettlement bar). On remand, the Immigration Judge should clarify his findings and analysis on the issue of firm resettlement.

Finally, the Immigration Judge alternatively denied the respondent's asylum application as a matter of discretion because he had safe haven in Belgium and failed to avail himself of the protection of that country (I.J. at 16-17). We agree with the respondent that the Immigration Judge did not engage in the requisite balancing of factors before denying his asylum application as a matter of discretion. We have held in *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007), that when an Immigration Judge denies asylum in the exercise of discretion and then grants withholding of removal, 8 C.F.R. § 1208.16(e) requires the Immigration Judge to reconsider the denial of asylum and to take into account factors relevant to family unification. We note, moreover, that the United States Court of Appeals for the Fourth Circuit in its intervening decision in *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008), held that in denying asylum as a matter of discretion, the Immigration Judge must consider the "totality of the circumstances," "demonstrate that he or she reviewed the record and balanced the relevant factors," and "discuss the positive or adverse factors that support his or her decision." *Zuh v. Mukasey*, 547 F.3d at 510-12. On remand, the Immigration Judge should reconsider his discretionary determination in light of the regulations and Board and Fourth Circuit case precedent. Both parties may submit additional evidence and arguments relevant to the asylum application on remand. The following order shall be entered.

ORDER: The record is remanded to the Immigration Court for reconsideration of the respondent's statutory and discretionary eligibility for asylum.

FOR THE BOARD