



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

Singh, Jaspreet
244 Fifth Ave., Suite # J256
New York, NY 10001

DHS/ICE Office of Chief Counsel - SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: VELIAMMA, VELIAMMA

A095-402-533

Date of this notice: 3/29/2011

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:

Guendelsberger, John
Kendall-Clark, Molly
Liebowitz, Ellen C

Falls Church, Virginia 22041

File: A095 402 533 - San Francisco, CA

Date: MAR 29 2011

In re: VELIAMMA VELIAMMA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Jaspreet K. Singh, Esquire

ON BEHALF OF DHS: Angela Fiorentino-Rios
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal

On December 10, 2008, an Immigration Judge denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture.¹ The respondent has filed this appeal and a motion to remand. The Department of Homeland Security (DHS) opposes a remand. The Board will remand the record for further proceedings.

The respondent is an ethnic Indian who is a native and citizen of Fiji. She came to the United States as a non-immigrant visitor in September 2000 and her status expired in March 2001. She was placed in removal proceedings, and sought asylum and related relief. On March 19, 2004, the Immigration Judge found the asylum application to be untimely, and that the respondent otherwise did not meet her burden of proof for relief and protection. On May 16, 2005, the Board dismissed the respondent's appeal of this decision. On December 17, 2007, we granted the respondent's motion to reopen based on ineffective assistance of counsel, including counsel's actions related to the respondent's appeal. On remand, the respondent submitted additional evidence. The Immigration Judge denied asylum and related relief and protection. In doing so, he incorporated by reference his earlier decision of March 19, 2004. The respondent's appeal of this decision is currently before us.

We review findings of fact made by the Immigration Judge, including credibility findings, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burdens of proof, under a de novo standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). The respondent's asylum application (Form I-589) filed before May 11, 2005, and is not governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge determined that the respondent was credible, but that she did not present adequate detail or other evidence to meet her burden of proof for withholding of removal. *See* section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). On appeal, the

¹ On appeal, the respondent has not contested the denial of protection under the Convention Against Torture, and therefore we will not further address it.

respondent challenges the application of the time-bar for asylum and argues that she met her burden of proof for asylum and withholding of removal. She also requests that the record be remanded for updated evidence of country conditions in Fiji. We find the following.

We uphold the Immigration Judge's decision that the respondent is barred from asylum due to her untimely filed application.² See section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 1208.4(a). The respondent did not submit sufficient evidence to establish that medical issues had in fact caused her to be unable to file in a timely manner. The respondent provided a letter from a doctor stating that he started treating her in 2003, but this is after she had already submitted her asylum application. It alone does not establish a "serious illness or mental or physical disability" such as to constitute "extraordinary circumstances" to excuse the late filing (2008 I.J. Dec. at 8-9; Exh. 9). The testimony of the respondent's son and other relatives did not sufficiently fill the evidentiary gap regarding the nature of the respondent's medical problems, and even if such illness had been established, that her delay in filing was otherwise "reasonable under the circumstances." See 8 C.F.R. § 1208.4(a)(5); see also Exh. 11A.

We next address the respondent's claim for withholding of removal. Contrary to the finding of the Immigration Judge, we determine that the respondent's credible testimony and other evidence establishes that she was subject to harm rising to the level of past persecution. The respondent, of a more advanced age, suffered verbal and physical abuse. This includes abuse in response to her encouraging neighbors to vote for the Federation Party, a party the Immigration Judge took notice represented the interests of Indo-Fijians (see 2004 I.J. Dec. at 3). The respondent was the victim of a home invasion wherein she and her son were assaulted by native Fijians, and she was robbed and hit on at least one other occasion, which required her to seek medical treatment. She was also assaulted while teaching at a Hindu temple, told to leave the country or she would be killed, and a group of native Fijians demanded that she give them her house keys (see 2004 I.J. Dec. at 3-5; 2004 Tr. at 55).

Under the circumstances of this case, and considering these past events cumulatively, we find that the respondent has established that she was subject to past persecution within the meaning of the Act. See e.g., *Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005) (finding that beatings and sustained economic deprivation constituted persecution, especially where petitioner and her daughter were individually targeted and petitioner's ability to practice her religion was affected); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1994).

The Immigration Judge found that even if past persecution had been established, the record indicated that these were criminal activities rather than activities motivated by a protected ground (2004 I.J. Dec. at 10). However, the respondent's testimony provided some indication that the threats and physical abuse were linked to ethnicity, religion, or political opinion (see e.g., 2004 Tr. at 32-37). On remand, the Immigration Judge should readdress the nexus issue in light of all the evidence and under the Ninth Circuit jurisprudence addressing "mixed motive" analysis, which extends to applications filed before the REAL ID Act. See e.g., *Borja v. INS*, 175 F.3d 932 (9th Cir. 1999) (en banc); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996). If nexus is established, the respondent shall benefit from a presumption of future persecution, and the DHS shall be given the

² The application was filed in April 2002 (see Exh. 2).

opportunity to rebut this presumption. *See Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008); *see also Ali v. Holder*, 2011 WL 923412 (9th Cir., March 18, 2011).

On remand, the respondent and the DHS may submit any new evidence which is relevant to these proceedings, including the respondent's claim based on individualized persecution and, if necessary, under a "disfavored group" or "pattern and practice" analysis. *See Sinha v. Holder*, 564 F.3d 1015 (9th Cir. 2009); 8 C.F.R. § 1208.16(b)(2)(i). We accordingly need not further address the respondent's motion to remand. The following order will be entered.

ORDER: The record is remanded to the Immigration Judge for the entry of a new decision consistent with the foregoing opinion.

Ellen Rubowitz
FOR THE BOARD