



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name:



Date of this notice: 10/21/2011

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:

Creppy, Michael J.
Grant, Edward R.
Liebowitz, Ellen C

Falls Church, Virginia 22041

File: [REDACTED] - Los Angeles, CA

Date:

OCT 21 2011

In re: [REDACTED]

IN RE: [REDACTED]

APPEAL

ON BEHALF OF RESPONDENT: Edgardo Quintanilla, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, timely appeals an Immigration Judge's decision dated May 3, 2011, which found him removable as charged, and denied his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture (CAT) pursuant to 8 C.F.R. § 1208.16(c)(2). The appeal will be sustained in part and the record remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "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); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). Since 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). Hence, the amendments made by the REAL ID Act to section 208(b)(1)(B) of the Act apply to this case.

The Immigration Judge found that the respondent was statutorily ineligible for asylum because he failed to file his asylum application within 1 year of his arrival in the United States and failed to establish either changed or extraordinary circumstances sufficient to excuse the untimely filing of his asylum application (I.J. at 12). *See* section 208(a)(2)(B) of the Act; 8 C.F.R. § 1208.4(a). The respondent did not appeal this issue and it is deemed waived.

The Immigration Judge alternatively denied the respondent's asylum application, as well as his application for withholding of removal under section 241(b)(3) of the Act, on the basis that the respondent was not credible (I.J. at 7-9). However, the adverse credibility finding is clearly erroneous inasmuch as it based on minor inconsistencies and improper speculation (Resp. Br. at 15).¹ *See Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011) (trivial inconsistencies that under total

¹ The respondent raises a due process argument regarding the manner in which the Immigration Judge questioned him on details that formed the basis of the adverse credibility finding (Resp. Br. at 13). However, in light of the present determination reversing the adverse credibility finding, there is no prejudice to the respondent.

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circumstances have no bearing on petitioner's veracity should not form basis of adverse credibility determination); *see also Cosa v. Mukasey*, 543 F.3d 1066, 1068 (9th Cir. 2008) (speculation and conjecture cannot form basis of adverse credibility finding). The inconsistencies regarding the incident which formed the basis for his past persecution claim were not significant in light of the totality of the record. Whether the respondent went to the club with three friends or four, and whether he left the club at 1:30 or 4:00 in the morning, are not significant discrepancies given the remainder of the respondent's account. Likewise, the alleged implausibilities regarding his HIV medication are based on speculation. Accordingly, the adverse credibility determination cannot be affirmed.

We disagree with the Immigration Judge's determination that the respondent did not suffer past persecution (I.J. at 11-12). The beatings and rape inflicted on the respondent while in detention clearly rise to the level of persecution (Tr. at 125-31). He testified that while he was detained and assaulted, the police officers alluded to his homosexuality, telling him that they were teaching him a lesson so that he would act like a man outside of jail (Tr. at 129; Resp. Br. at 24). This is sufficient evidence to demonstrate that a central reason for the respondent's persecution was his membership in a particular social group, *i.e.*, homosexuals. *See Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) (sexual assault of respondent by police officer on account of respondent's homosexuality sufficient to constitute past persecution). Accordingly, the respondent's mistreatment constitutes past persecution on account of a protected ground.

Since the respondent suffered past persecution on account of a protected ground, he is entitled to the presumption his life or freedom would be threatened. 8 C.F.R. § 1208.16(b)(1)(i). The burden shifts to DHS to rebut the presumption that his life or freedom would be threatened by demonstrating a fundamental change in circumstances or the respondent's ability to internally relocate. 8 C.F.R. § 1208.16(b)(1)(ii). We will remand this matter to provide the parties the opportunity to supplement the record with evidence relating to current conditions in Mexico, and the Immigration Judge should assess current conditions there in evaluating whether the respondent's life or freedom would be threatened upon his return to Mexico. The respondent may update the record as to his claim of future harm, independent of past persecution, and the Immigration Judge should consider the testimony of the respondent's expert in assessing this claim (Tr. at 72-113). She should also consider the respondent's voluntary return to Mexico in 2008. *See Boer-Sedano v. Gonzales, supra*, at 1091-92 (homosexual Mexican national's return trips may be a factor in determining eligibility for relief). Furthermore, inasmuch as the Department of Homeland Security did not contest the respondent's HIV status, the Immigration Judge should accept that fact as established (Tr. at 69; I.J. at 13).

Because the Immigration Judge's denial of protection under the CAT was based on the clearly erroneous adverse credibility finding (I.J. at 13), the Immigration Judge should also reconsider the respondent's application for protection under the CAT. *See* 8 C.F.R. § 1208.16(c)(2).

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained as to the respondent's application for withholding of removal under the Act and the CAT.

[REDACTED]

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

SRG

FOR THE BOARD