U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: F[redacted]-G[redacted], F[redacted]

A 0[redacted]-910

Date of this notice: 6/25/2018

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

Userteam: Docket

File: [redacted] 910 – Florence, AZ

Date: JUN 25 2018

In re: F[redacted] F[redacted]-G[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Mac Nayeri, Esquire

ON BEHALF OF DHS: Marni F. Guerrero
Assistant Chief Counsel

APPLICATION: Convention Against Torture

The Department of Homeland Security ("DHS") timely appeals the Immigration Judge's January 12, 2018, decision granting the applicant's application for withholding of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17 (2017).[1] The appeal will be dismissed, and the record will be remanded to the Immigration Court for required background checks.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that the applicant, who is in withholding-only proceedings, had established that it is more likely than not he would be subject to torture that is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if returned to Mexico. 8 C.F.R. §§ 1208.17, 1208.18(a)(1)-(5). We will affirm the Immigration Judge's determination on this issue as not being clearly erroneous, for the detailed reasons he provided in his decision (IJ at 8-12). *See Ridore v. Holder,* 696 F.3d 907, 918-19 (9th Cir. 2012) (holding that an Immigration Judge's predictions as to what is likely to happen to the petitioner if removed are "facts," so that the BIA's role on review is limited to identifying clear error by the Immigration Judge); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015) (holding that an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a "clearly erroneous" standard of review).

[1] The applicant has not appealed the Immigration Judge's denial of his application for withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3) (2012).

On appeal, the DHS argues that the Immigration Judge erred in finding the applicant to be credible (IJ at 7-8). This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (stating that the Board must defer to the factual determinations of an Immigration Judge in the absence of clear error); *Matter of A-S-*, 21 I&N Dec. 1106, 1109-12 (BIA 1998) (noting that because an Immigration Judge has the ability to see and hear witnesses, he or she is in the best position to determine the credibility of such witnesses). We find no clear error in the Immigration Judge's favorable credibility finding. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

On appeal, the DHS argues that there are numerous factual inconsistencies in the applicant's story, which it calls "alterations of facts," that render the applicant's account not credible. However, while the Immigration Judge recognized that there were some inconsistencies, he did not fault the applicant "for forgetting sporadic details when recounting the traumatic event numerous times to different people, as he has had to do in the course of his application" (IJ at 7). Moreover, he rendered a favorable demeanor finding, finding the applicant to be both responsive and quite candid with the Court, even concerning details about his past crimes and drug use, which did not directly relate to his claim, further bolstering his credibility. Credibility findings based on demeanor will normally be given a high degree of deference (*Id.*). *See, e.g., Paredes- Urrestarazu v. INS*, 36 F.3d 801, 818-21 (9th Cir. 1994) (holding that credibility findings based on demeanor findings deserve "special deference" when compared with those based on testimonial analysis); *Matter of A-S-*, 21 I&N Dec. at 1111 (indicating that the Immigration Judge is in a unique position to observe the testimony and demeanor of the witness; thus, a credibility finding which is supported by a reasonable adverse inference drawn from an alien's demeanor "generally should be accorded a high degree of deference"). He also found that the applicant had "provided significant corroborative evidence," in the form of testimony and declarations by several witnesses, as well as a forensic examination report (*Id.*). While we might reach a different conclusion on *de novo* review, we find no clear error in the Immigration Judge's finding that, based on the totality of the circumstances, the respondent is credible.

There appears to be no dispute that, if credible, the applicant has established that the mistreatment he suffered in 2012, when he was kidnapped, blindfolded, and repeatedly kicked, beaten, tased, burned over sensitive parts of his body with the use of accelerants, whipped, and beaten with the butt of a gun over a nearly 2-week period constitutes past torture (IJ at 8-9). However, the DHS contests the Immigration Judge's findings that the applicant has established a likelihood of future torture, and that any such torture would be with the consent or acquiescence of a public official in Mexico. The Immigration Judge observed that, while evidence of past torture does not create a presumption that an applicant will be tortured in the future (unlike asylum and withholding of removal), the U.S. Court of Appeals for the Ninth Circuit has stated that where past torture causes "permanent and continuing harm," such continuing harm, without more, may be sufficient to establish automatic entitlement to protection under the Convention Against Torture. *Mohammed v Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (observing that "Moreover, as in the case of persecution, Mohamed may be entitled to protection under CAT on the ground that genital mutilation is a permanent and continuing harm. That is, to the extent that Mohamed's past genital mutilation constitutes torture, her ongoing experience may be enough to establish that she is

automatically entitled, without more, to protection under CAT"). The Immigration Judge found that this was the case in the applicant's situation, as he credited the report from the forensic examiner indicated that, as a result of his past torture, the applicant continues to suffer from significant harm, including physical pain from a fractured rib, headaches, transient intense testicular pain, anxiety resulting in sleeplessness, poor focus and memory problems, mood swings and irritability, and social withdrawal (IJ at 9; Exh. 3, Tab C). The Immigration Judge also observed that the report noted a scar along the applicant's penis that was consistent with burning or repeated tasing, and the comment that it was unusual for torture to the genitalia to result in permanent marks unless it was particularly severe (IJ at 9; Exh. 3, Tab C). We find no clear error in these findings, or the Immigration Judge finding that the respondent suffers from "permanent and continuing harm," as a result of his past torture that is sufficient under Ninth Circuit case law to establish automatic entitlement to protection under the Convention Against Torture (IJ at 9).

Alternatively, even apart from the "permanent and continuing harm" basis for a grant of protection under the Convention Against Torture, and again even though we would have reached a different conclusion on *de novo* review, we find no clear error in the Immigration Judge's finding of a likelihood of torture, given that the Immigration Judge credited the applicant's account of near-constant surveillance after his release, and his finding that this "persistent surveillance, spanning years and distance, is a strong indicator of future torture" (IJ at 10-11).[2]

To the extent that the DHS argues that the applicant has not established that the applicant was tortured "by or at the instigation of or with the consent or acquiescense of a public official or other person acting in an official capacity," the Immigration Judge found that the applicant had credibly testified that when he and his uncle were kidnapped, they were taken by an assortment of men, some with their faces covered and some with police badges and police vehicles, which was a strong indication that the police and mafia were working together (IJ at 11). In addition, he credited the applicant's recollection that several vehicles marked "state police," "federal police," and "DEI" [narcotics enforcement] were part of the kidnapping, that he was placed in one of the police vehicles, and that both the driver and passenger in the vehicle wore police uniforms (IJ at 11; Tr. at 186-97). He thus concluded that "public officials were clearly involved in his capture," and found that, even if public officials did not carry out the actual torture, it "must at least have been carried out with police consent or acquiescence as police participated in his capture and in driving him to the location where he was tortured" (*Id.*). In light of these finding, which we do not find to be clearly erroneous, we agree with the Immigration Judge that any future torture would likely be carried out "by or at the instigation of or with the consent or acquiescense of a public official or other person acting in an official capacity."

[2] We recognize that the Board has generally rejected the concept of continuing persecution. *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007); *see also Matter of A-T-*, 24 I&N Dec. 617, 620 n.3 (A.G. 2008), vacating *Matter of A-T-* but declining to address the Board's rejection of the continuing persecution concept. We need not reach the question whether the Board's or the Ninth Circuit's precedents control on this question, in light of our affirmance of the Immigration Judge's alternative basis for granting Convention Against Torture protection.

Based on the Immigration Judge's factual findings, we conclude that he properly concluded that the applicant met the ultimate statutory standard of showing that it is more likely than not that he would be tortured with the consent or acquiescence of government public officials if removed to Mexico.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

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