U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Miami, FL 33194

Name: B[redacted], M[redacted] A[redacted]

A [redacted]533

Date of this notice: 6/30/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

Userteam: Docket

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Name: B[redacted], M[redacted] A[redacted]

A [redacted]533

Date of this notice: 6/30/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Cynthia L. Crosby

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

Userteam:

File: A208 287 533 – Miami, FL Date: **JUN 30 2017**

In re: [redacted] A[redacted] B[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mary N. Morrison, Esquire

ON BEHALF OF DHS: Andrew Brown
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

On September 21, 2015, an Immigration Judge denied the respondent's application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and granted the respondent's request for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). The Immigration Judge declined to address the respondent's request for protection pursuant to the regulations implementing the United States' obligations under the Convention Against Torture ("CAT"). The respondent, a native and citizen of Eritrea, now appeals. The appeal will be sustained.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see also Zhu v. United States Attorney General*, 703 F.3d 1303 (11th Cir. 2013); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge denied asylum based on a finding that the respondent had a "safe haven" in Israel. He based this finding on the respondent's testimony that he entered Israel and remained there for 5 years.[1] The Immigration Judge specified that he was not making a finding of

[1] The respondent testified that Sudanese kidnapers brought him to the Sinai Peninsula through Egypt, and released him near the Israeli border after his family members paid a ransom for his release. He came into the custody of the kidnapers after he escaped an Eritrean military camp, where he had been beaten and held in detention for 11 months for questioning the purpose of the military training (I.J. at 2-3; Tr. at 10-12, 14-18, 27-29, 31-32, 33, 37-38).

firm resettlement because the respondent "was not given permanent residence [in Israel] or any rights such as purchasing property or voting, but again he was allowed to stay there" (I.J. at 6). Nonetheless, the Immigration Judge found that the respondent's 5-year stay in Israel, during which time he renewed every 2 months a temporary license to stay in that country, constituted an adverse factor that warranted denial of asylum in the exercise of discretion (I.J. at 5-6; Tr. at 18-19, 41-42, 43, 44-45).

We will reverse the Immigration Judge's decision to deny asylum based on a finding that the respondent found a "safe haven" in Israel. As the respondent points out on appeal, the regulation giving an Immigration Judge the discretion to deny asylum to an applicant who stayed in a "safe third country" before arriving in the United States was repealed on January 5, 2001 (Respondent's Br. at 15). *See, e.g., Tandia v. Gonzales*, 437 F.3d 245, 248 (2d Cir. 2006) (citing 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000)); *see also Shantu v. Lynch*, No. 15-1175, 2016 WL 3743184, at *7 (4th Cir. July 13, 2016) (unpublished); *Prus v. Mukasey*, 289 F. App'x 973 (9th Cir. 2008).

Moreover, although section 208(a)(2)(A) provides that an alien is ineligible for asylum if the Attorney General determines that the alien may be removed to a country other than his or her country of nationality, application of that section is limited to cases in which there is a bilateral or multilateral agreement between the United States and that other country. Section 208(a)(2)(A) of the Act. *See e.g.*, *Matter of R-D-*, 24 I&N Dec. 221, 226 (BIA 2007) (referencing 8 C.F.R. § 208.30(e)(6) and noting the existence of a bilateral agreement between the United States and Canada). There has been no claim that any agreement exists to trigger application of section 208(a)(2)(A) of the Act in this case.

Pursuant to the regulations an alien can be denied asylum if the respondent received an offer of firm resettlement from another country. *See* section 208(b)(2)(A)(vi) of the Act (barring an alien who has firmly resettled from receiving asylum); 8 C.F.R. §§ 208.15, 1208.15 (defining "firm resettlement"). *See Tandia v. Gonzales*, *supra*, at 249. Inasmuch as the Immigration Judge explicitly found that the respondent was not firmly resettled in Israel, we conclude that the Immigration Judge incorrectly denied the respondent's asylum claim based on his stay in Israel as a matter of discretion.[2]

With respect to the discretionary aspect, the DHS argues that a safe haven is a proper discretionary factor to consider pursuant to *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987) (DHS Br. at 2). Even assuming that an alien's having a "safe haven" may be a relevant factor, we hold that, in light of the 2001 repeal of the safe haven regulation, having a "safe haven" is not a sufficient adverse factor by itself to support a discretionary denial of asylum. In this case no other adverse factors were present. The Immigration Judge found that the respondent did not establish past persecution but did demonstrate that he would more likely than not be persecuted on account of his political opinion if returned to Eritrea because he departed that country illegally and persons who do so are regarded as anti-government (I.J. at 6-7; Tr. at 21-22, 46-47, 51). We discern no clear error in the Immigration Judge's clear probability determination, and the DHS has not

[2] The Department of Homeland Security (DHS) made no argument that the respondent had firmly resettled in Israel (Tr. at 52).

appealed the grant of withholding of removal. Given that the standard for withholding of removal is higher than the standard for asylum, and we discern no clear error in the Immigration Judge's ruling, the Immigration Judge's finding of future persecution is sufficient for purposes of establishing a well-founded fear of persecution under section 208 of the Act.[3] *See INS v. Stevic*, 467 U.S. 407 (1984); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

The respondent argues that the Immigration Judge's "summary" refusal to grant his asylum claim violated his due process rights (Respondent's Br. at 23-27). Although we conclude that the Immigration Judge improperly denied the respondent's asylum application, the record does not reflect that the Immigration Judge acted in a capricious or arbitrary manner. Based on the record before us, we conclude that the Immigration Judge did not violate the respondent's due process rights, and in any event, in light of our holding that the respondent is eligible for and deserving of asylum, no prejudice has been demonstrated.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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

[3] Having reached this conclusion we need not address the respondent's remaining arguments, including his request that we remand the record for the Immigration Judge to address the respondent's request for protection under the CAT (Respondent's Br. at 22-23).

File: A[redacted] 533 – Miami, FL Date: JUN 30 2017

In re: M[redacted] A[redacted] B[redacted]

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent.

I would remand the record to the Immigration Judge because the decision is not sufficient for our adjudication of the appeal.

First, the Immigration Judge did not conduct a proper firm resettlement analysis pursuant to *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011). In *Matter of A-G-G-*, we set forth a four-part framework for determinations involving firm resettlement as a mandatory bar to asylum. The Immigration Judge in this case did not provide any meaningful analysis on the issue of firm resettlement.

Second, the Immigration Judge jumped to the issue of discretion without first fully examining the respondent's general statutory eligibility for relief based on past or future persecution. The Immigration Judge did not assess whether there was past persecution based on the respondent's political opinion, and made only a conclusory statement regarding future persecution (Respondent's Br. at 5, 11-14, 20-21). In the absence of any individualized and meaningful assessment of past and future persecution, I disagree with the majority's decision to grant asylum based on the Immigration Judge's determination that the respondent has a clear probability of future persecution for purposes of withholding of removal.

Finally, the Immigration did not provide a complete discretionary analysis. For example, in *Matter of H-*, 21 I&N Dec. 337 (BIA 1996), we discussed various factors that should be considered in making a discretionary finding in asylum cases. We stated that careful attention should be paid "to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past." *Id.* at 347. We explained that "general humanitarian reasons, independent of the circumstances that led to the applicant's refugee status, such as his or her age, health, or family ties, should also be considered in the exercise of discretion." *Id.* at 347-48 (citing *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987)). In *Matter of H-*, *supra*, we also reiterated that even if the totality of the circumstances and the alien's actions "may weigh against a favorable exercise of discretion, 'the danger of persecution should generally outweigh all but the most egregious of adverse factors.'" *Id.* at 238 (citing *Matter of Pula*, *supra*, at 474). The only factor that the Immigration Judge identified as a basis for the discretionary denial was that the respondent found a safe haven in Israel before coming to the United States. Although I see no reason why we should preclude consideration of a safe haven as a discretionary factor in the asylum context,[1] the Immigration Judge did not consider the totality

[1] In this regard, I agree with the Department of Homeland Security that whether the respondent found a safe haven in Israel is a factor that the Immigration Judge may consider in a discretionary analysis (DHS Br. at 2).

of the circumstances by weighing the adverse factor of a safe haven against the respondent's positive equities (Respondent's Br at 16).

For these reasons I would remand the record to the Immigration Judge for further proceedings.

Patrica A. Cole

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MIAMI, FLORIDA

File: [redacted]533 September 21, 2015

In the Matter of

M[redacted] A[redacted] B[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act) -- no valid entry document.

APPLICATIONS: Asylum; withholding of removal; Convention Against Torture.

ON BEHALF OF RESPONDENT: SIMON WELDEHAIMANOT, ESQUIRE

ON BEHALF OF DHS: ANDREW BROWN, ESQUIRE

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department of Homeland Security (Department) issued a Notice to Appear dated July 30, 2015, which was personally served on the respondent on the 31st of July and then filed with the Immigration Court on or about August 3 of 2015, thereby placing the respondent in removal proceedings. This document alleges that the respondent is not a citizen or national of the United States, and that he is a native and citizen of Eritrea. It further alleges that he applied for admission to the United States at or near Hidalgo, Texas on or about July 20, 2015. It further alleges that at the time of

his application he was not in possession of a valid immigrant visa or non-immigrant visa as required by Immigration law. It charges the respondent with being removable pursuant to the aforementioned section of law.

The respondent, through counsel, admitted the truth of the allegations. This was pursuant to written pleadings. Based upon those statements and based upon a review of the entire file, the Court finds the respondent is removable as charged for not having the appropriate document with which to lawfully enter the United States. As to relief from removal, the respondent submitted an application for asylum as well as withholding of removal under the Act and under Convention Against Torture.

SUMMARY OF FACTS

The respondent testified in support of this application indicating that he was born in Eritrea in 1989 and that he is a citizen of Eritrea. He has never used any aliases. He also indicated he never received any permanent residence other than in his home country. He indicated that his parents are native Eritreans and that he lived in Eritrea from the time of his birth to when he turned 19 years of age, and after that then fled to the Sudan.

He then testified about the problems that he had in his country that forced him flee his country. He indicated that as part of his education he was taken to a training facility. He was under the impression that this was primarily going to be for his education, the last year of high school, but instead turned out to be much more than that. It also turned out to be for military training as well. He indicated that during this training they would have these meetings with the students and the people from the Department of Education and Department of Defense. On one of these meetings the respondent questioned why all of this training was taking place. He was one of other people who made comments. The respondent indicated that this was not taken kindly

by the people there, and he was then arrested and taken to a prison, where he was detained for 11 months. He indicated that he was physically mistreated during his detention by the military in that they perceived his question as being against the government and was attempting to incite the other students against the government.

The respondent testified that he was able to escape from detention. He stated that he was let out with others to procure wood for fuel outside of the military camp and prison, and a storm developed which gave him the means in which to flee detention. He indicated that he went to the Sudan on foot, but while there was kidnapped for ransom. He indicated that he was taken with other individuals in empty gas truck and taken to the Sinai Desert in Egypt bordering Israel, and there was threatened to be killed unless he paid money to his kidnappers. He indicated he did provide a telephone number for his mother and that she was asked to pay $5,000 U.S. dollars for his release, but she was unable to do so. She was able to get the funds from her brother, respondent's uncle.

And after paying the ransom, he was released and directed into Israel, where he was very shortly encountered by Israeli security officials and then placed into a camp for about a month, and then after that was released. He was given permission to stay for two months, which could be renewed after that period of time. And he stayed in Israel for approximately 5 years and one month. He indicated that it was known that after a five-year period that he would be deported from Israel, and he did not wish to return back to his country. And so he met up with a Nigerian individual who was able to procure a fake Eritrean passport and make the arrangements to travel through numerous countries on his way to the United States.

I believe he indicated he went to Russia, from Russia to Cuba, Colombia, Bolivia, Panama, Nicaragua, Guatemala, Honduras, Mexico and the United States. He

indicated that he attempted to apply for asylum in these countries or ask for some type of relief, but was told that in many of these countries, especially in Central American countries, that they simply told him he had 15 days to stay and then after that you have to get out.

He also indicated he did attempt to apply for asylum in Israel, but was not granted that status. He did indicate though that after the month of being in this camp that he was released and he was able to join up with other Eritreans. And they rented a place to live in Israel and worked illegally in Israel. And after the five years he was able to make enough money to get out of Israel.

He is fearful of returning to his country indicating that because he left the country illegally that this would be perceived as an act against the government. If he is returned there he would be imprisoned and brutally treated, perhaps even killed.

STATEMENT OF THE LAW

For purposes of asylum the respondent can obtain this form of relief in one of two ways. He can show that in the past he suffered past persecution on account of a protected ground that would include race, religion, nationality, membership in a particular social group, or political opinion. If he shows that, then there is a statutory presumption of future persecution which can be rebutted by the U.S. Government. If he is unable to show past persecution then he can still get asylum by showing future persecution on account of a protected ground or well-founded fear of future persecution. This is a discretionary form of relief, while withholding under the Act is not.

For purposes of withholding under the Act, this requires a higher standard. It is very similar to asylum but requires a higher standard of more likely than not. He has to show that it would be more likely than not that he would be persecuted on account of a protected ground.

For protection under the Convention Against Torture, the standard is the same as in withholding but it need not be connected to a protected ground, and it need not be persecution. It has to deal with torture by the government or by some agent of the government or that the government would acquiesce them being tortured or that they would turn a blind eye to him being tortured.

FINDINGS OF FACT

Respondent's testimony was for the most part internally consistent and consistent with his statements to the Asylum Officer, with the exception of whether it was a sand storm, which he said to the Asylum Officer, or a rain storm which he said to this Court. The Court considers that to be a minor inconsistency. Again, I will find that for the most part he testified credibly. I am not saying he testified truthfully. I am saying he testified credibly. There is a distinct and significant difference between those two concepts.

As to the application for asylum, I think that there is a significant adverse factor here, and that adverse factor is safe haven. The respondent entered into Israel and stayed there for a five-year period, I believe five years and one month. And during that period of time was allowed to stay. He was briefly detained in a camp for one month and then released. He has indicated that he did not submit any identity documents to Israel to be released, which I find very hard to accept, given that Israel is a very security minded country. And I find it hard to believe that they would not further investigate him before releasing him into the general public. But he was in the general public. He was allowed to stay. He was able to renew these temporary permits every two months, which he did for over a five-year period. He did work illegally. The permit did say that it is not a work permit, but again they never stopped him from working and from collecting the funds. He rented an apartment while in Israel, and so the Court finds

that he did in fact have safe haven there. We are talking about a very strong democratic country in that part of the world, and he was safe there. It may not have been that comfortable for him, but he was safe from persecution, and that is the key.

He indicated that he had applied for asylum in Israel, but he never provided any proof whatsoever that it was filed or that it was denied by that government. So again, the Court does find that he received safe haven in the country of Israel. That is a very long period of time to stay, and again we are dealing with a very security minded country. Again, he was safe for that period of time. The Court is not saying that he received firm resettlement there. He was not given permanent residence or any rights such as purchasing property or voting, but again he was allowed to stay there. And the length of stay there and the ability to work, even though it was done illegally, these are factors that show that he in fact had safe haven in Israel. The document he submitted regarding his stay in Israel does not make reference to him having to leave. As a matter of fact, the document when it was issued in May indicates that he had the opportunity to further extend that if he so desired. He chose, after collecting enough money, to come to the United States of America.

As to withholding of removal under the Act, I do not believe that what he encountered in the aggregate in the past would rise to the level of persecution, but it is clear from the record and from his testimony that he left the country without permission. The backup material is very clear on the Eritrean government being a very strict government, that you do need permission in which to leave, and that those individuals who leave without permission are deemed to be anti-government. Those individuals, according to the articles in this material, that are returned back after having left illegally, more often than not disappear and are in fact persecuted because of that. And as a result, the Court would find that he would be entitled to withholding of removal under the

Act on account of political opinion for his illegal departure from his country. So that application will be granted by the Court. Again, there is no discretion involved in withholding of removal under the Act. In light of the fact that the Court has granted him withholding of removal under the Act, it need not address the issue of protection under the Convention Against Torture.

ORDERS

Therefore, the following order shall be entered:

IT IS HEREBY ORDERED the respondent's application for asylum be denied;

IT IS FURTHER ORDERED his application for withholding of removal under the Act be granted as to the country of Eritrea.

Please see the next page for electronic signature

ADAM OPACIUCH
Immigration Judge

//s//

Immigration Judge ADAM OPACIUCH

opaciuca on November 5, 2015 at 8:07 PM GMT