



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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**Name: J [REDACTED], F [REDACTED]**

**A [REDACTED]-616**

**Date of this notice: 1/13/2020**

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:  
Malphrus, Garry D.  
Hunsucker, Keith  
Creppy, Michael J.

Humanity  
Userteam: Docket

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Falls Church, Virginia 22041

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File: A-616 – Farmville, VA

Date: **JAN 13 2020**

In re: F- J-

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: James A. Feroli, Esquire

ON BEHALF OF DHS: Nicole Schroeder  
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

This case is before the Board pursuant to a June 18, 2019, order of the Court of Appeals for the Fourth Circuit. The Fourth Circuit granted the Government's motion to remand in light of the intervening decision in *Rodriguez-Arias v. Whitaker*, 915 F.3d 968 (4th Cir. 2019). On remand from the Fourth Circuit, the respondent filed a motion to remand the record to the Immigration Judge. The Department of Homeland Security ("DHS") opposed the respondent's motion to remand with respect to his withholding of removal claim, but requests that the Board remand the record to the Immigration Judge to reconsider the respondent's application for protection under the Convention Against Torture. The respondent's motion will be granted and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Fourth Circuit held in *Rodriguez-Arias v. Whitaker* that when determining whether an applicant for protection under the Convention Against Torture is more likely than not to be tortured in a particular country, the risks of torture from all sources should be combined to assess whether the probability of torture exceeds 50%. *Rodriguez-Arias v. Whitaker*, 915 F.3d at 973. The likelihood that an event will occur in the future is a factual finding that must be determined by the Immigration Judge. See *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015). Thus, we will remand the record for the Immigration Judge to make additional factual findings regarding the likelihood that the respondent will suffer harm constituting torture in Iraq. See *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (noting that the Board has limited fact-finding authority and must rely on Immigration Judges to make clear and complete findings of fact). On remand, the parties may submit any additional evidence relevant to whether the respondent will be harmed upon return to Iraq.

In his brief and motion following remand, the respondent alleges that his mental illness will contribute to the likelihood that he will be harmed upon return to Iraq. To the extent the respondent claims that the Immigration Judge erred in not implementing sufficient safeguards under

*Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), and in not considering whether the respondent's mental illness rendered him a member of a particular social group (Respondent's Br. at 10-22), these arguments are unsupported by the record. After finding the respondent not competent to participate in his removal proceedings, the Immigration Judge implemented various safeguards to ensure due process (IJ at 4-5). See *Matter of M-A-M-*, 25 I&N Dec. at 481-83. The respondent, who was represented by counsel before the Immigration Judge and on appeal, did not request any additional safeguards and did not challenge the adequacy of those safeguards on appeal (IJ at 4; Respondent's Br., Oct. 16, 2018). See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (noting the general rule that "issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts"); *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (noting that issues not raised on appeal are deemed waived). The respondent also did not claim before the Immigration Judge or on appeal that he was a member of a particular social group based on his mental illness or that he feared harm in Iraq based on his mental illness. See *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (noting that the alien must clearly indicated on the record before the Immigration Judge the exact delineation of his or her proposed particular social group). The respondent cannot now argue that the Immigration Judge erred in not addressing a claim he did not raise.<sup>1</sup>

Mental competency, however, is not a static condition. See *Matter of M-A-M-*, 25 I&N Dec. at 480. Thus, if the parties have additional evidence bearing upon the respondent's competency and the necessity of additional procedural safeguards, this evidence should be submitted on remand. See *Matter of J-S-S-*, 26 I&N Dec. 679, 682 (BIA 2015) (discussing the collaborative approach to ensuring that the record is fully developed regarding a respondent's competency). Additionally, although we agree with the DHS that the respondent has not established prima facie eligibility for withholding of removal based on his mental illness (DHS's Br. at 8-9), the respondent may submit additional evidence on remand. Thus, on remand the Immigration Judge should reassess the respondent's eligibility for protection under the Convention Against Torture based on *Rodriguez-Arias v. Whitaker*. She may also consider any other issues she deems appropriate, including the respondent's claim that he is eligible for withholding of removal based on his mental illness. Accordingly, the following orders will be entered.

ORDER: The respondent's motion to remand is granted.

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

  
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FOR THE BOARD

<sup>1</sup> To the extent the respondent's prior counsel erred in not raising these claims, the respondent has not satisfied the requirements for an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).