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

cohen, marshall I
Antonini & Cohen Immigration Law Group
2751 Buford Hwy, NE
8th Floor
Atlanta, GA 30324

DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW, Ste 332
Atlanta, GA 30303

Name: R[redacted]-P[redacted], L[redacted]

A [redacted]-863

Date of this notice: 10/3/2019

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:
Kendall Clark, Molly

Userteam: Docket

File: A[redacted]-863 – Atlanta, GA Date: OCT - 3 2019

In re: L[redacted] R[redacted]-P[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marshall L. Cohen, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Brazil, appeals an Immigration Judge's May 1, 2019, amended decision denying him asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), as well as protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-1208.18. The record will be remanded.

We review Immigration Judges' findings of fact for clear error. Questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3).

Throughout these proceedings, the respondent has claimed that he will suffer persecution and torture in Brazil because he is a homosexual. The respondent believes that his risk of future harm in Brazil has been increased by the 2018 election of President Jair Bolsonaro, who is openly against homosexuality and has used anti-gay rhetoric before and during his presidency.

The Immigration Judge deemed the respondent's asylum application time-barred because he first entered the United States in 2005, adjusted his status in 2015, last entered the United States in 2016, and did not apply for asylum until February 25, 2019 (IJ at 3). The Immigration Judge found that the respondent did not fall under the "changed circumstances" exception to the general 1-year time deadline for seeking asylum because he outed himself as a homosexual in 2010 and was living openly as a homosexual since his last entry into the United States in 2016 (*Id.* at 4). The Immigration Judge further reasoned that President Bolsonaro was elected in 2018, and summarily stated that [w]hile [he] found "Bolsonaro's homophobic statements and rhetoric despicable, there have been no overall dramatic changes to Brazil regarding homosexuality." (*Id.*).

In the alternative, the Immigration Judge found that, even if timely filed, the respondent failed to demonstrate a well-founded fear of future persecution upon his repatriation (IJ at 4-5). The Immigration Judge stated that the respondent failed to show a pattern or practice of persecution of homosexuals in Brazil. He reasoned that, while he was "troubled by the increasing and growing trend" of violence against homosexuals, there was conflicting evidence in the record regarding the pervasiveness of persecution against homosexuals (*Id.* at 5). The Immigration Judge also determined that the respondent failed to establish that he could not safely relocate to avoid future persecution (*Id.*).

Having found the respondent ineligible for asylum, the Immigration Judge deemed the respondent ineligible for withholding of removal (IJ at 5). The Immigration Judge also found that the respondent failed to demonstrate his eligibility for relief under the Convention Against Torture. *(Id.* at 5-6).

We deem the record inadequate for meaningful appellate review at this time. *Matter of S-H-*, 23 I&N Dec. 462, 463-65 (BIA 2002) (instructing Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and comply with controlling law); *Matter of A-P-*, 22 I&N Dec. 468, 473-75 (BIA 1999) (holding that an Immigration Judge's decision must contain the reasons underlying his or her determinations, reflect the analysis of the applicable statutes, regulations, and legal precedents, and clearly set forth his or her legal conclusions).

In finding that the respondent did not fall within the changed circumstances exception to the 1-year time limitation for seeking asylum, the Immigration Judge conducted no meaningful analysis for the basis of his conclusion that conditions in Brazil had not changed for homosexuals since President Bolsonaro's election. This is particularly so in view of the evidence presented regarding the election of Bolsonaro and the effects on the LBTG community.

Moreover, the Immigration Judge did not address evidence to the contrary that was presented in an affidavit by Dr. Gregory Mitchell (Exh. 4, Tab J). This is particularly concerning given the Immigration Judge's qualification of Dr. Mitchell as an expert before then ruling that conditions for homosexuals in Brazil had not "dramatically changed" (Exh. 4, Tab J; Tr. at 38-39).[1] As the respondent points out on appeal, the Immigration Judge's classification of the level of Dr. Mitchell's expertise is unclear on the record, and the respondent requests that Dr. Mitchell be qualified as an expert on the treatment of gay men in Brazil (Respondent's Br. at 5-9; Tr. at 38-39). Further factual findings on these issues are needed before we are able to meaningfully review the Immigration Judge's decision.

We further note that the Immigration Judge's decision that the respondent lacks a well-founded fear of persecution is conclusory in nature. The decision points to no facts explaining how he made that determination. The Immigration Judge provides a citation to Dr. Mitchell's affidavit and the 2018 State Department Country Report to support his determination that the evidence was conflicting with respect to the persecution of homosexuals. However, the Immigration Judge did not make any factual findings regarding any conflicts in the evidence. He also did not explain the weight he afforded to that evidence in reaching his decision.

We further note that the Immigration Judge did not address Dr. Mitchell's opinion that the respondent could not safely relocate within Brazil to avoid future harm (Exh. 4, Tab J).

[1] We note that to qualify for the "changed circumstances" exception to the 1-year bar, the respondent is only required to show a change that "materially affect[s]" his eligibility for asylum. *See* section 208(a)(2)(D) of the Act. Given the language used in the Immigration Judge's order, it is unclear whether he employed that standard.

For the foregoing reasons, we deem it appropriate to remand this matter for the issuance of a new decision on the respondent's applications for relief. On remand, the parties may also provide additional evidence and argument with respect to the relevant issues in this case. Given our disposition of this matter, we need not address the remaining arguments raised by the respondent on appeal

Accordingly, the following order will be entered.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

IN THE MATTER OF:	**IN REMOVAL PROCEEDINGS**
Luciano Rodrigues Pereria	**File No. A# 207 588 863**
	Amended Order and Decision.
Respondent	

CHARGE: **Section 237(a)(1)(E)(i)** of the Act, in that Respondent knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter the United States in violation of law.

Section 237(a)(2)(A)(iii) of the Act, in that Respondent was convicted of an aggravated felony as defined in Section 101(a)(43)(N) of the Ac, a law relating to an offense described in Paragraph (1)(A) or (2) of section 274(a) of the Act (relating to alien smuggling).

APPLICATIONS: Asylum, pursuant to section 208 of the Act; Withholding of Removal pursuant to section 241(b)(3) of the Act; Withholding of Removal, under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruei, Inhuman or Degrading Treatment or Punishment, pursuant to 8 C.F.R. § 1208.16; Voluntary Departure pursuant to section 240B(b) of the Act, in the alternative.

APPEARANCES

ON BEHALF OF RESPONDENT:
Marshall L. Cohen, Esq.
2751 Buford Highway NE, 8th Floor
Atlanta, GA 30324

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
Department of Homeland Security
180 Ted Turner Dr. SW, Suite 332
Atlanta, Georgia 30303

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Luciano Rodrigues-Pereira ("Respondent") is an adult male native and citizen of Brazil. He entered the United States initially in 2005, without inspection. He adjusted hi status to a lawful permanent resident (LPR) in 2015. He last entered the United State in 2016 as a returned LPR..

On April 6, 2018, the Department of Homeland Security ("Department") issued Respondent a Notice to Appear ("NTA") charging Respondent as removable under section 237(a)(1)(E) and

237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act").

On February 19, 2019, Respondent, through counsel, admitted the allegations and conceded the charge of removability. The charge was sustained. Brazil was designated as the country of removal.

On February 25, 2019, Respondent filed an I-589 application for asylum and withholding under the Act and relief under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

On April 24, 2018, Respondent had a hearing to address his eligibility for relief. At the end of the hearing, the Court reserved its decision in Respondent's case.

The Court has considered the entire record carefully. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court denies Respondent's applications for asylum, withholding of removal under the Act, protection under CAT and voluntary departure.

EVIDENCE PRESENTED

A. Documentary Evidence

Exhibit 1: Notice to Appear, dated April 6, 2018;

Exhibit 1a: Respondent's conviction record, filed April 24, 2019;

Exhibit 2: DHS's Record of Deportable/Inadmissible Alien (Form I-213);

Exhibit 3: Respondent's Form I-589 Application for Asylum and Withholding of Removal and Supporting Documents, filed Feb. 25, 2019;

Exhibit 4: Respondent's Submission of Evidence, Tabs A-GG, pgs. 1-213, filed April 9, 2019.

II. STATEMENTS OF LAW AND FINDINGS OF THE COURT

Assuming all the facts in his application and statements made to the Court are true, the Court finds that Respondent's application fails to establish that he is eligible for asylum and withholding under the Act and relief under CAT.

A. Asylum under section 208 of the Act

In an asylum adjudication, the applicant bears the burden of establishing statutory eligibility by showing that they meet the definition of a refugee found in section 101(a)(42)(A) of the Act. INA § 208(b)(1)(B)(i). An asylum applicant may demonstrate that she is a refugee in either of two ways. First, she may demonstrate that she has suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 C.F.R. § 1208.13(b). If an applicant demonstrates that she has suffered past persecution, a rebuttable presumption of a well-founded fear of future persecution will be triggered. 8 CFR § 1208.13(b)(1); see also Matter of Chen, 20 I&N Dec. 16, 18 (BIA 1989).

Second, the applicant may demonstrate a well-founded fear of future persecution on account of a protected ground through credible testimony that she subjectively fears persecution, and that this fear is objectively reasonable. See id.; INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987); Al Najjar v. Ashcroft, 257 F.3d 1262, 1289 (11th Cir. 2001). In addition to showing that the persecution is or will be on account of a protected ground, an applicant must show that the persecution was carried out by government actors, or by individuals or groups government is unable or unwilling to control. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985) (modified on other grounds). The alien's fear of future persecution must also be country-wide. See Matter of C-A-L-, 21 I&N Dec. 754, 757 (BIA 1997); Matter of R-, 20 I&N Dec. 621, 625-26 (BIA 1992); Matter of Acosta, 19 I&N Dec. at 235 (modified on other grounds). If eligibility is established, asylum may be granted in the exercise of discretion. INA § 208(b)(1); see also INS v. Cardoza-Fonseca, 480 U.S. at 428 n.5.

1. Respondent is statutorily ineligible for asylum as he filed more than a year after he entered the United States and does not demonstrate he is entitled to an exception.

Pursuant to section 208(a)(2)(B) of the Act, an applicant must file his application for asylum within one (1) year of the date of their arrival in the United States. INA § 208(a)(2)(B); see also 8 C.F.R. § 208.4(a)(2)(ii) (stating that the one year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later). For the purposes of this section, the applicant has the burden of proving by clear and convincing evidence that the application was filed within one year, or that he qualifies for an exception to the deadline. See 8 C.F.R. §§ 1208.4(a)(2)(i)(A) & (B).

An application for asylum may be considered if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the one-year time period. 8 C.F.R. section 1208.4(a)(4) provides that the term "changed circumstances" shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include: changes in conditions in the applicant's country of nationality or, if the person is stateless, country of last habitual residence or changes in objective circumstances relating to the applicant in the U.S., including changes in applicable U.S. law, that create a reasonable possibility that the applicant may qualify for asylum. 8 C.F.R. § 1208.4(a)(4)(ii) provides that the applicant shall apply for asylum within a reasonable period given those "changed circumstances." An alien does not receive an automatic one-year extension in which to file an asylum application following "changed circumstances." Matter of T-M-H- & S-W-C-, 25 I&N Dec. 193 (BIA 2010). The particular circumstances related to delays in filing the application must be evaluated to determine whether the application was filed within a reasonable time. Id.

Respondent entered the United States in 2005. He adjusted his status to a LPR in 2015. He last entered the United States in 2016. Respondent's application states that he did not apply for asylum until February 25, 2019. It is clear on its face that Respondent's application is late and filed after the one year deadline.

Respondent argues that there are changed circumstances to excuse his late filing. Specifically, Respondent argues that his change circumstances are: (1) he is now living in the open as a

homosexual male and (2) the country conditions have changed in Brazil relating to homosexual policies after the election of Jair Bolsonaro. The Court is unpersuaded by either of Respondent arguments. First, Respondent has been living as a homosexual male since 2010 and married to his husband since 2011. Therefore, he was an openly homosexual married male when he left and returned to the United State in 2016. Second. Bolsonaro was elected in 2018. While the Court finds Bolsonaro's homophobic statements and rhetoric despicable, there have been no overall dramatic changes to Brazil regarding homosexuality. Therefore, the Court finds that Respondent failed to file for asylum by the one-year deadline and has failed to demonstrate changed circumstances.

2. Respondent has not demonstrated a well-founded fear of future persecution based on a protected ground.

Assuming *arguendo* that Respondent timely filed, he would still not be eligible for asylum. There is no dispute of the facts in this case. Respondent is not claiming past persecution. He claims to have a well-founded fear of future persecution because if he returns to Brazil he will be persecuted based on his sexuality.

1. Respondent has demonstrated a well-founded fear of future persecution.

Even though Respondent has failed to establish that he suffered past persecution, he may still qualify for asylum if he demonstrates that he has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(2)(i). To do so, he must demonstrate that (1) he fears persecution on account of a protected ground and (2) there is a reasonable possibility that he will suffer persecution if removed to his native country. See id. The applicant must also prove that her fear of persecution is "subjectively genuine and objectively reasonable." Matter of J-H-S-, 24 I&N Dec. 196, 198 (BIA 2007) (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)). The subjective component can be satisfied by the applicant's credible testimony regarding his fear, while the objective component can be established when the applicant demonstrates past persecution or a "good reason to fear future persecution." Al Najjar v. Ashcroft, 257 F.3d 1262, 1289 (11th Cir. 2001) (citation omitted). Respondent's fear is based on membership of a particular social group: sexual orientation. See Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

Specifically, the applicant must show either that he would be singled out for persecution upon returning to his country of nationality or that, within that country, there is a pattern or practice of persecution, on account of a protected ground, of those similarly-situated to the applicant himself, and that he identifies with the group such that his fear is reasonable. 8 C.F.R. § 1208.13(b)(2)(iii). Additionally, the applicant must also show that he could not avoid future persecution by relocating to another part of the country of removal or that, under all of the circumstances, it would be unreasonable to expect him to relocate. 8 C.F.R. § 1208.16(b)(2). The applicant bears the burden of establishing by a preponderance of the evidence that he would be unable to reasonably relocate within his country and avoid future persecution. See Matter of D-I-M-, 24 I&N Dec. 448, 450 (BIA 2008) (citing 8 C.F.R. § 1208.13(b)(3)). However, if the persecutor is the government or is government-sponsored, the Department bears the burden of establishing by a preponderance of the evidence that it would be reasonable for the applicant to relocate. See id.

The Court finds that Respondent's fear is subjectively genuine. However, Respondent's fear is not objectively reasonable. Respondent has not shown a pattern or practice of persecution of those

similarly situated to him and that he identifies with the group. A pattern or practice of persecution is persecution of a group that is systematic, pervasive, or organized. See Matter of A-M-, 23 I&N Dec. 737, 741 (BIA 2005). The Court may rely heavily on country condition reports when determining whether an alien has established a pattern or practice of persecution in his home country. The Court is troubled by the increasing and growing trend of this type of violence. The Court is presented with conflicting evidence regarding the pervasiveness of persecution against homosexuals in Brazil. Compare Exhibit 4, Tabs J and T. Moreover, Respondent has failed to establish that he could not safely relocate to a larger city in Brazil, such as Rio de Janeiro or Brasilia. Based on the evidence the respondent has failed to establish that his fear of return is objectionably reasonable. Therefore, the Court finds Respondent has failed to demonstrate a well-founded fear of future persecution.

B. Withholding of Removal under section 241(b)(3) of the Act

Withholding of removal, in contrast to asylum, confers only the right not to be deported to a particular country, rather than the right to remain in the United States. See INS v. Aguirre-Aguirre, 526 U.S. 415, 419 (1999). Section 241(b)(3) of the Act prohibits an Immigration Judge from removing an alien to a country "where her life or freedom would be threatened in that country." INA § 241(b)(3). An alien's life or freedom "would be threatened" where there is a clear probability of persecution in the country designated for her removal on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407, 430 (1984). A "clear probability" of persecution means that it is "more likely than not" that an alien would be subject to persecution in the country from which he seeks withholding of removal. Id. at 424. The "clear probability" standard for withholding is higher than the "reasonable possibility" standard for asylum. See INS v. Cardoza-Fonseca, 480 U.S. at 438-41; Sepulveda v. U.S. Atty. Gen., 401 F.3d 1226, 1232 (11th Cir. 2005). The alien bears the burden of demonstrating that it is "more likely than not" he will be persecuted on account of a protected ground upon being returned to her country. See INA § 241(b)(3)(C); Sepulveda, 401 F.3d at 1232.

Respondent "has not satisfied the lower burden of proof for asylum, it follows that he has not met the higher burden for withholding of removal." See Matter of H-L-H- & Z-Y-Z-, 25 I&N Dec. 209, 218 (BIA 2010). Therefore, the Court denies Respondent's claim for withholding of removal under the Act.

C. Relief under CAT

An applicant for withholding of removal under CAT bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2) (2012). "Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 1208.18(a)(1) (2012). "Torture" is an "extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 1208.18(a)(2). Additionally, to constitute "torture," the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 1208.16(a)(6). Further, the pain or suffering must be 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." 8 C.F.R. § 1208.18(a)(1). "Acquiescence of a public official" requires that the public official, "prior to the

activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7); see also Matter of S-V-, 22 I&N Dec. 1306 (BIA 2002); Reyes-Sanchez v. U.S. Atty. Gen., 369 F.3d 1239, 1242-43 (11th Cir. 2004). This standard differs substantially from the standard for government action in asylum and withholding under the Act.

Respondent has failed to establish a well-founded fear of persecution and therefore has failed to demonstrate he would more likely than not be tortured by, at the instigation of, or with the consent or acquiescence of, a public official. See Mehmeti v. U.S. Atty. Gen., 572 F.3d 1196, 1201 (11th Cir. 2009); Najjar v. Ashcroft, 257 F.3d 1262, 1303-04 (11th Cir. 2001); Matter of S-V-, 22 I&N Dec. 1306; Forgue, 401 F.3d at 1288 n.4.; 8 C.F.R. § 1208.18(a)(7). Likewise, Respondent has not established that any public official in Brazil would acquiescence to any torture of Respondent. To establish government "acquiescence," the Board requires that the public official "willfully accept" or approve of the torture that the alien would suffer. Matter of S-V-, 22 I&N 1306. Therefore, the Court will deny Respondent's application for protection under CAT.

IV. CONCLUSION

Respondent did not demonstrate past persecution or a well-founded fear of future persecution based on a protected ground. In addition, he has not established that it is more likely than not that he will be tortured upon return to Brasil. Therefore, the Court will deny Respondent's applications for relief. As there are no other applications, Respondent is ordered removed to Brazil. The Court enters the following orders:

ORDERS OF THE IMMIGRATION JUDGE

It is ordered that: Respondent's application for asylum under section 208 of the Act is **DENIED.**

It is further ordered that: Respondent's application for withholding of removal under section 241(b)(3) of the Act is **DENIED.**

It is further ordered that: Respondent's application for relief under the Convention Against Torture, pursuant to 8 C.F.R. § 1208.16 is **DENIED.**

It is further ordered that: Respondent shall be **REMOVED** to **BRAZIL.**

5/1/19
Date

Scott D. Criss
United States Immigration Judge
Atlanta, Georgia