



U.S. Department of Justice

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*Board of Immigration Appeals
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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**Henry, Michael S.
SALAMAN/HENRY PC
100 SOUTH BROAD STREET
SUITE 650
PHILADELPHIA, PA 19110**

**DHS/ICE - Office of Chief Counsel - YOR
2350 Freedom Way, Suite 254
York, PA 17402**

Name: L ■, H ■ D ■

A ■-563

Date of this notice: 9/3/2020

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:
Wilson, Earle B.
Goodwin, Deborah K.
Donovan, Teresa L.

Userteam: Docket

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Falls Church, Virginia 22041

File: A [REDACTED]-563 – York, PA

Date: SEP - 3 2020

In re: H [REDACTED] D [REDACTED] L [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael S. Henry, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

APPLICATION: Convention Against Torture

The respondent appeals from an Immigration Judge's August 22, 2019, decision ordering him removed from the United States to his native Vietnam. 8 C.F.R. § 1003.1(b)(3) (2019). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained.

The respondent was admitted to the United States as a lawful permanent resident in 1980. In 1999, he was convicted of attempted murder in Pennsylvania and sentenced to an indeterminate term of imprisonment of from 20 to 40 years. There is no dispute that this conviction renders him removable and ineligible for asylum and withholding of removal. Thus, the only issue on appeal is whether the Immigration Judge properly denied the respondent's application for deferral of removal to Vietnam under the Convention Against Torture, *see* 8 C.F.R. § 1208.17.

To qualify for deferral of removal, the respondent must prove that he will "more likely than not" suffer "torture" if returned to Vietnam. 8 C.F.R. § 1208.16(c)(2). In this context, "torture" means "an extreme form of cruel and inhuman treatment" by which "severe pain or suffering, whether physical or mental," is intentionally inflicted upon a person "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)-(2). What will happen to the respondent if removed to Vietnam is a question of predictive fact for the Immigration Judge to decide and for this Board to review for clear error; however, whether what will happen to the respondent qualifies as "torture" is a legal question that we review *de novo*. *Kaplun v. Att'y Gen. of U.S.*, 602 F.3d 260, 271 (3d Cir. 2010).

In support of his claim, the respondent credibly testified that he participated in anti-government resistance activities in Vietnam during the late 1970s, when he was a teenager.¹ In 1978, while engaging in those activities, the respondent was arrested by government forces and imprisoned for about a month and half, during which he was systematically tortured, including through the application of electric shocks, beatings through books (to prevent bruising), water torture, and involuntary administration of drugs. Eventually the respondent was hospitalized, but with the help of a nurse he escaped from the hospital, eluded pursuit, and managed to exit Vietnam unlawfully

¹ The credibility of the respondent's testimony is undisputed (IJ at 7).

in 1979, coming shortly thereafter to the United States, where he has lived ever since as a lawful permanent resident (IJ at 4-5; Tr. at 41, 45-46, 50-51, 59, 69-72, 74-78). During the late 1990s, the respondent became an active supporter of the Government for Free Vietnam (“GFVN”), an anti-communist “government-in-exile” based in the United States (IJ at 5-6; Tr. at 80-85).

In light of his past torture, his unlawful escape from Vietnam, his refugee status in the United States, his GFVN affiliation, and his very serious criminal record, the respondent fears that he will be subjected to intense scrutiny by security forces upon his return to Vietnam, and that he will be interrogated, imprisoned, and tortured as a suspected opponent of the regime.

In support of his claim, the respondent submitted country conditions evidence, including the 2018 State Department *Human Rights Report* for Vietnam, which indicates that “mistreatment and torture by police” is “commonly reported” by detainees in Vietnam, that “[p]olice and plainclothes authorities routinely mistreated, harassed, and assaulted activists,” that “[p]rison officials singled out political prisoners for harsher treatment ... and subjected them to extreme harassment from both prison authorities and other inmates,” that “[f]ormer political prisoners reported that police beat individuals in custody with books to prevent visible bruising,” deprived political prisoners of adequate food, and “subjected political prisoners to ... extended periods of solitary confinement” (Exh. 10, at 2-4).

A 2014 Report from the Campaign to Abolish Torture in Vietnam, which was based on interviews with 60 former political and religious prisoners in Vietnam, likewise described torture of detainees as “pervasive” and “systematic,” occurring most frequently when detainees are interrogated while incommunicado and before the attachment of legal protections or judicial supervision (Exh. 7, *passim*). Many of the methods of torture described in this report closely resemble those used against the respondent in the late 1970s, including isolation, water torture, the use of electric shocks, and the involuntary administration of mind-altering drugs (Exh. 7, at 12-13, 28-36, 41-43, 48-50). Other media reports indicate that the Vietnamese government interrogates and prosecutes Vietnamese nationals who are repatriated after applying unsuccessfully for asylum abroad (Exh. 6, at 74-78), and that dozens of GFVN activists have been tried and imprisoned in Vietnam on “terrorism” charges (Exh. 6, at 85-96).

The Immigration Judge acknowledged this evidence and the credibility of the respondent’s testimony, but nevertheless found it “insufficient to indicate that [torture is] systematic [in Vietnam] or used on every individual who has made a political asylum claim” (IJ at 9). Though the Immigration Judge recognized that “political prisoners are more likely than not to suffer some form of abuse,” he determined that he could not “find that such would necessarily amount to torture” (IJ at 9). Further, the Immigration Judge found that the respondent had not met his burden to prove that “he would more likely than not be detained and determined to be a political dissident upon removal to Vietnam” (IJ at 9). In support of this latter finding, the Immigration Judge noted that the respondent’s arrest and torture in Vietnam occurred long ago, that some of his sibling had returned to Vietnam for visits without being detained or harmed, and that the respondent’s GFVN activities were not “major” enough to attract the attention of Vietnamese authorities (IJ at 9-11).

We respectfully conclude that the Immigration Judge clearly erred when he found that the respondent does not face a probability of detention, interrogation, and abuse if removed to

Vietnam. 8 C.F.R. § 1003.1(d)(3)(i). The respondent is a victim of past torture in Vietnam who left the country illegally, was admitted to the United States as a refugee, openly joined a notorious organization of anti-communist Vietnamese expatriates in the United States, and then sustained a conviction for attempted murder for which he has spent decades in prison. Even if it is conceivable that a person with one or two of these unique characteristics might hope to escape the negative attention of the Vietnamese authorities upon removal, it is highly implausible that someone who combines *all* of them could hope to do so. The Immigration Judge's contrary finding was clearly erroneous because he did not examine the respondent's risk factors in the aggregate. *Kamara v. Att'y Gen. of U.S.*, 420 F.3d 202, 213-14 (3d Cir. 2005) (explaining that an applicant "is entitled to CAT protection if he is able to demonstrate that the cumulative probability of torture" from all sources or for all reasons exceeds 50%); *see also Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 973 (4th Cir. 2019); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1308 (9th Cir. 2015).

Though some of the respondent's siblings were able to return to Vietnam for visits without being harmed or interrogated, we agree with the respondent that these siblings are not similarly situated to him. When the respondent's siblings traveled to Vietnam, they were cloaked with the protection of United States citizenship and had obtained visas authorizing them to visit temporarily; they were not Vietnamese citizens being involuntarily repatriated for permanent resettlement due to serious criminal convictions. Furthermore, the siblings who have returned to Vietnam had never been tortured in the past by the Vietnamese regime,² nor did they escape from official custody, participate in GFVN activities, or spend decades in prison for attempted murder.

Upon de novo review, 8 C.F.R. § 1003.1(d)(3)(ii), we also conclude that the abuse the respondent is likely to receive from the Vietnamese authorities will more likely than not rise to the level of "torture" within the meaning of 8 C.F.R. § 1208.18(a)(1). All of the country conditions evidence of record—including the State Department's 2018 *Human Rights Report*—substantiates that the torture of detainees by Vietnam's security forces is routine, systematic and pervasive, especially when the detainees are suspected of holding subversive opinions. Given the respondent's very serious criminal record and his history of anti-communist activity in Vietnam and the United States, we have no reason to believe that he will be treated more gently.

In conclusion, the respondent qualifies for deferral of removal to Vietnam under 8 C.F.R. § 1208.17. We will therefore sustain the respondent's appeal, vacate the Immigration Judge's decision in part, and remand the record for the completion of background checks.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated in part, and the respondent's application for deferral of removal under 8 C.F.R. § 1208.17 is approved.

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

² The respondent's oldest brother was arrested and sent to a "re-education camp" in Vietnam during the late 1970s, where he claims to have suffered torture (Exh. 6, at 50-52). However, that brother is now a United States citizen and has not returned to Vietnam since his escape in 1978.

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

Temporary Appellate Immigration Judge Teresa L. Donovan respectfully dissents without opinion.