



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: H [REDACTED], M [REDACTED]

A [REDACTED]-674

Date of this notice: 6/16/2020

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:
Pepper, S. Kathleen

Userteam: Docket

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Falls Church, Virginia 22041

File: [REDACTED]-674 – Pearsall, TX

Date:

JUN 16 2020

In re: M [REDACTED] H [REDACTED] a.k.a. [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ishrat Sami, Esquire

ON BEHALF OF DHS: Veronica M. Segovia
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Bangladesh, has appealed from the Immigration Judge's January 27, 2020, decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208(b)(1)(A), 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c), 1208.18. The Department of Homeland Security argues that the Immigration Judge's decision is correct and should be affirmed. The record will be remanded for further proceedings.

The respondent argues on appeal, *inter alia*, that the record should be remanded because he received ineffective assistance of counsel (Respondent's Br. at 4-9). The respondent asserts that his counsel, *inter alia*, did not properly recognize his mental health issues or request further evaluation of his mental health and competence. Though the respondent argues that his counsel was ineffective, the respondent has not met the *Matter of Lozada* requirements for an ineffective assistance of counsel claim to warrant reopening proceedings. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *see also Rodriguez-Manzano v. Holder*, 666 F.3d 948,950 (5th Cir. 2012) (applying *Matter of Lozada* procedural requirements). The respondent claims that he complied with the requisite procedural requirements, but has not provided this Board with copies of any of the necessary documents (Respondent's Br. at 8).

In regard to the respondent's argument that he suffers from mental health issues, which prevented him from presenting his claim accurately, we will consider whether the record contains indicia of incompetency. *Matter of M-A-M-*, 25 I&N Dec. 474, 477, 480-81 (BIA 2011) (finding that although aliens in immigration proceedings are presumed to be competent, when indicia of incompetency are present, an Immigration Judge must make a competency determination). The respondent has argued that several issues below were related to his mental health and ability to participate in proceedings.

First, the respondent had difficulty communicating with his attorney (Tr. at 36-37, 52-55; Respondent's Br. at 5). Second, the transcript reveals that the respondent had difficulty making eye contact and communicating with the Immigration Judge (Tr. at 68-83; Respondent's Br. at 11). Third, the respondent's attorney noted difficulty in representing the respondent and drafted three

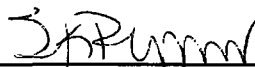
motions to withdraw (Tr. at 52-53; Respondent's Br. at 5). Fourth, the respondent's attorneys stated at various points in the proceedings that the respondent may not have been "in the right state of mind," noted that he was "highly tense, and nervous" during private meetings, speculated that the respondent may be suffering from PTSD, and claimed that his mental health issues may cause "him to not comprehend what is being asked of him at the time" (Tr. at 36, 82). Despite recognizing the respondent's inability to comprehend questions and speculating mental health issues, the respondent's counsel stated that she did not believe that there were any *Matter of M-A-M*- issues present (Tr. at 80).

The Immigration Judge also asked the respondent if he had "ever been hit on the head," if he had "sufficient cognition to move forward," and whether he had ever been diagnosed with mental health issues (IJ at 17, 38, 80). We note that the respondent's indication that he was ok to continue the hearing runs contrary to his repeated claim below that he makes factual mistakes because his "brain is not working" (Tr. at 145, 155, 167, 177, 181). The Immigration Judge did not make further inquiry to determine whether the respondent was competent for purposes of immigration proceedings and concluded that the court did not observe any "cognitive barrier or hindrance during the respondent's testimony" (IJ at 16). The Immigration Judge's decision, however, does not specifically address the respondent's mental competency under *Matter of M-A-M*.

Considering the totality of the circumstances, we will remand the record to the Immigration Judge for further proceedings. *See generally* 8 C.F.R. § 1003.1(d)(3)(iv). At the remanded proceedings, the Immigration Judge should conduct a competency hearing in accordance with *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011), considering the evidence presented below and that submitted in support of the appeal, as well as the arguments raised by counsel. *See also*, *Matter of J-S-S*, 26 I&N Dec. 679 (BIA 2015) (Neither party bears a formal burden of proof in immigration proceedings to establish whether or not the respondent is mentally competent, but where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent). The respondent should additionally present any medical documents available regarding his mental health and capacity.

The Immigration Judge should then conduct further removal hearings, allowing the respondent to testify if appropriate (with safeguards if necessary) and present additional evidence. The Immigration Judge should thereafter issue a new decision in the respondent's case, in conformity with controlling precedent. In view of the foregoing, the following order will be entered.

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



FOR THE BOARD