U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: D[redacted], A[redacted] S[redacted]... **A [redacted]-901**

Date of this notice: 2/21/2020

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:
Creppy, Michael J.

Userteam: Docket

File: A[redacted]-901 – New York, NY Date: FEB 2 1 2020

In re: A[redacted] S[redacted] D[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hassan M. Ahmad, Esquire

ON BEHALF OF DHS: Anne Gannon
Senior Attorney

APPLICATION: Deferral of removal under the Convention Against Torture

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's August 30, 2019, decision granting the respondent's application for deferral of removal to Russia under the Convention Against Torture.[1] *See* 8 C.F.R. §§ 1208.16(c)-1208.18. The respondent, a native of the Soviet Union and citizen of Russia, opposes the appeal.[2] The appeal will be dismissed, and the record will be remanded for updated background checks.

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 the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent requested protection from removal based on his fear that he will be tortured by Russian authorities for suspected terrorist activities in Russia. The respondent is the subject of an Interpol Red Notice from Russia implicating that the respondent is wanted for the participation of terrorist-related activities and for being in an "organized criminal group" (IJ at 10; Exh. 5). The Immigration Judge expressed concern over the respondent's lack of forthrightness in his initial 2010 asylum application ("Form I-589") filed with the United States Citizenship and Immigration Services and in his application to register permanent residence or adjust status ("Form I-485") (IJ at 9). The Immigration Judge did not find the omissions significant enough to warrant an adverse credibility finding, but did not make an explicit credibility finding (IJ at 10). The Immigration Judge also concluded that the respondent met his burden to demonstrate his eligibility for deferral of removal under the Convention Against Torture (IJ at 10-13).

[1] The DHS requests to exceed page limits due to the voluminous record and in order to adequately present its appellate arguments. The DHS's motion to increase the brief's page limits is granted.

[2] We will grant the respondent's motion to accept his reply brief as a matter of discretion. *See* 8 C.F.R. § 1003.3(c).

On appeal, the DHS challenges the Immigration Judge's findings in this case. Specifically, the DHS argues that the Immigration Judge erred in finding the respondent credible based on the totality of circumstances (DHS's Br. at 19). The DHS also argues that the Immigration Judge erred in finding that the respondent met his burden to establish his eligibility for deferral of removal under the Convention Against Torture (DHS's Br. at 26). The DHS further contends that the Immigration Judge impermissibly shifted the burden of proof from the respondent to the DHS and set forth standards of proof not supported by the law (DHS's Br. at 34).

We must affirm the Immigration Judge's findings if they are based on a permissible view of the evidence, even if we would have made different findings had we been the Immigration Judge. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). As the Immigration Judge did not make an explicit credibility determination, the respondent has a rebuttable presumption of credibility on appeal (IJ at 9-10). *See generally* section 240(c)(4)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(4)(C) (stating in the relief context that if no adverse credibility finding is explicitly made, there shall be a rebuttable presumption of credibility on appeal). The DHS has attempted to rebut the presumption of credibility on appeal.

Despite the DHS's appellate arguments, and given the totality of the circumstances presented, we discern no clear error in the Immigration Judge's factual findings (DHS's Br. at 19-26). *See* section 208(b)(1)(B)(iii) of the Act; 8 C.F.R. § 1003.1(d)(3)(i). While the Immigration Judge was concerned about the respondent's lack of forthrightness about his prior activities in Russia in his initial asylum application and Form I-485, the Immigration Judge found that the respondent's testimony regarding his fear of return to Russia and torture was largely consistent (IJ at 9; Exhs. 5, 19). In addition, the Immigration Judge noted the respondent's explanation that he disclosed all of the information regarding his activities to the Federal Bureau of Investigation during his interviews, the statements of which have been incorporated by reference into the record (IJ at 10; Tr. at 191-92; Exhs. 5, 19). Further, while the Immigration Judge found that the respondent has not sufficiently corroborated his claim that the twenty-nine individuals who were arrested by the Russian Federal Security Service were, in fact, tortured during their detention, the Immigration Judge found that independent evidence in the record establishes that the respondent is more likely than not to be tortured in Russia upon his return (IJ at 10; Tr. at 157-58, 205-06). *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 184-85 (2d Cir. 2004) (holding that an alien's claim for protection under the Convention Against Torture may not be denied solely on the basis of a determination that the alien's testimony is not credible and that an alien need only proffer objective evidence that he or she is likely to be tortured in the future to prevail on such a claim).

Upon review of the record and the parties' appellate arguments, we conclude there is not a sufficient basis to disturb the Immigration Judge's ultimate determination that the respondent has met his burden to demonstrate his eligibility for deferral of removal under the Convention Against Torture. We cannot conclude that the Immigration Judge clearly erred when she found it is more likely than not that the respondent will be tortured in Russia in connection with the Russian authorities' investigation of his suspected activities. *See Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (reviewing an Immigration Judge's predictive findings for clear error). The Russian government has issued an Interpol Red Notice requesting the respondent's arrest and extradition,

and the country conditions reports reflect that the authorities' use of torture is widespread and systemic throughout the Russian criminal justice system (IJ at 10-13; Exhs. 19, 29, 32). *See* 8 C.F.R. § 1208.16(c)(3)(iii)-(iv). Given the Immigration Judge's factual findings in this case, we do not disturb the Immigration Judge's determination that the respondent has met his burden to establish that it is more likely than not he will be tortured by or at the instigation of or with the consent or acquiescence (to include the concept of willful blindness) of a public official or other person acting in an official capacity upon removal to Russia, and that he could not relocate to a part of Russia where he is not likely to be tortured (IJ at 13). 8 C.F.R. §§ 1208.16(c)(2); 1208.18(a)(1); *Khouzam v. Ashcroft*, 361 F.3d 161, 170 (2d Cir. 2004). Consequently, we will remand the record solely to complete or update necessary security or background checks.

Accordingly, the following orders will be entered.

ORDER: The Department of Homeland Security's appeal is dismissed.

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