



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

Singh, Surjit
Law Office of Surjit Singh, APC
431 N Brookhurst St. # 130
Anaheim, CA 92801

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: C [REDACTED], P [REDACTED] S [REDACTED]

A [REDACTED]-778

Date of this notice: 3/13/2019

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:
Creppy, Michael J.
Malphrus, Garry D.
Mullane, Hugh G.

U.S. - I
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Falls Church, Virginia 22041

File: A-778 - Los Angeles, CA

Date: MAR 13 2019

In re: P-S-C

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Surjit Singh, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of India, appeals from the Immigration Judge's December 18, 2017, written decision which denied 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 ("DHS") has not responded to the appeal. The record will be remanded to the Immigration Judge for further proceedings and for the entry of a new decision.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in an appeal from the decision of an Immigration Judge, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that the respondent was a credible witness, and that he established past persecution by government actors on account of his political opinion (IJ at 4-6). However, the Immigration Judge further held that the DHS had rebutted the resulting presumption of future persecution based on a fundamental change in country conditions as well as the respondent's ability to relocate within India (IJ at 6-9).

The Immigration Judge's findings underlying the changed country conditions determination rely primarily on evidence of country conditions *preceding* the respondent's persecution (*see, e.g.*, IJ at 7-8). This evidence therefore cannot support a finding that there has been a fundamental change in country conditions since the respondent fled India. *See generally* 8 C.F.R. § 1208.13(b)(1)(i)(A). Moreover, with respect to the evidence cited by the Immigration Judge which addresses country conditions subsequent to the respondent's departure from India, it appears that the Immigration Judge misallocated the burden of proof to the respondent rather than the DHS (IJ at 8). Specifically, the Immigration Judge noted that the evidence indicates that it would be unlikely for someone in the respondent's position to succeed in establishing a well-founded fear (IJ at 8), whereas the respondent in the instant case benefits from a rebuttable presumption of a well-founded fear of persecution which the DHS bears the burden of rebutting by a preponderance of the evidence. *See* 8 C.F.R. §§ 1208.13(b)(1)(i)(A) & (ii). In view of the foregoing, we will remand the record for the Immigration Judge to further assess whether the DHS has established, by a preponderance of the evidence, that there has been a fundamental change in country conditions

since the respondent was persecuted in India which is material to the respondent's risk of future persecution. *See generally* 8 C.F.R. § 1003.1(d)(3)(iv); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

With respect to the issue of internal relocation, in light of the Immigration Judge's past persecution finding, the DHS also bears the burden of establishing by a preponderance of the evidence that the respondent could avoid future persecution by internally relocating, and that it would be reasonable for him to do so under all the circumstances. *See* 8 C.F.R. §§ 1208.13(b)(1)(i)(B) - (ii), 1208.13(b)(3)(ii); *see also Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012). Nevertheless, in the instant case, the Immigration Judge placed this burden on the respondent (IJ at 9). Moreover, the Immigration Judge did not make findings of fact concerning whether it would be reasonable for the respondent to relocate within India (*cf.* IJ at 8-9). Consequently, on remand, the Immigration Judge should also reassess whether the DHS has met its burden of demonstrating that the respondent could avoid future persecution by relocating within India, and that it would be reasonable to expect him to do so considering all relevant factors. *See generally Matter of M-Z-M-R-*, 26 I&N Dec. at 28.

In addition to the foregoing, the Immigration Judge denied the respondent's request for a humanitarian grant of asylum in light of her finding that the presumption of future persecution had been rebutted (IJ at 11). However, humanitarian asylum is explicitly available in the absence of a well-founded fear of future persecution, based on either the severity of past persecution, or the risk of other serious harm. 8 C.F.R. § 1208.13(b)(1)(iii). On remand, if the Immigration Judge again determines that the presumption of future persecution has been rebutted, the Immigration Judge should make findings of fact and provide legal analysis concerning whether the respondent merits a humanitarian grant of asylum based on either the severity of his past persecution or the risk of other serious harm. *Id.*

With respect to the respondent's claim under the Convention Against Torture, we observe that the existence of past torture is ordinarily the principal factor considered when assessing the risk of future torture. *See Edu v. Holder*, 624 F.3d 1137, 1146 (9th Cir. 2010). Despite finding that the respondent presented a credible claim which included allegations of "acute mental and physical torture" during one detention, and being "stripped and hung upside-down while two police officers beat him with leather belts and bamboo sticks until he became unconscious" during another (IJ at 3, 5), the Immigration Judge denied the respondent's Convention Against Torture claim based on general background evidence without discussing the relevance of this evidence of past torture (IJ at 9-10). At the remanded proceedings, the Immigration Judge should also reassess the respondent's Convention Against Torture claim, taking into account the relevance of the respondent's claim of past torture.

In view of the foregoing, we will remand the record for the Immigration Judge to further consider the respondent's applications for relief and protection from removal.¹ *See generally Matter of S-H-*, 23 I&N Dec. at 462. The Immigration Judge has the discretion to hold further

¹ The Immigration Judge should also clarify on remand her finding that the letters from the respondent's family members in India merit little weight (IJ at 10), in light of her finding that the respondent has presented a credible claim.

hearings as she deems appropriate. We express no opinion at this time on the merits of the respondent's claims.

Considering our decision to remand the record on the foregoing grounds, we need not presently address the respondent's remaining appellate arguments. *See generally Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013). Accordingly, the following order will be entered.

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



FOR THE BOARD