



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

**Silbiger, Gary
Silbiger & Honig
11100 Washington Boulevard
Culver City, CA 90232**

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

Name: M [REDACTED]-R [REDACTED], R [REDACTED] A [REDACTED] A [REDACTED]-851

Date of this notice: 12/17/2018

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:
Cole, Patricia A.
Greer, Anne J.
Donovan, Teresa L.

Userteam: Docket

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Falls Church, Virginia 20530

File: A-851 – Los Angeles, CA

Date:

In re: R- A- M- -R-

DEC 17 2018

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary Silbiger, Esquire

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The respondent, a native and citizen of Nicaragua, appeals from an Immigration Judge's August 28, 2017, decision denying his motion to reopen his removal proceedings in which, on March 7, 2017, the Immigration Judge denied his applications for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and for withholding of removal under section 241(b)(3) of the Act and pursuant to the Convention Against Torture.¹ The appeal will be sustained, proceedings will be reopened, and the record will be remanded for further proceedings consistent with this order.

We review an Immigration Judge's findings of fact, including credibility findings, to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). *See also Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012). We review de novo all questions of law, discretion, and judgment and any other issues in appeals from decisions of Immigration Judges. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's removability is not at issue on appeal. As relief from removal, the respondent filed an application for asylum (IJ at 4). The respondent claims to fear returning to Nicaragua on the basis of his political opinion—i.e., he was a member of the PLI party, which opposed the Sandinista or FSLN party. *See* IJ at 2-4. He claimed that the Sandinistas beat him to the point of unconsciousness in November 2013, and that they asked him information about other PLI activists (IJ at 3). Several days after the beating, two calls were made to the respondent's home in which the callers sought information about other PLI activists and threatened to kill the respondent if he did not provide this information (IJ at 4).

To establish asylum eligibility, the respondent must prove that his race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for the harm and threats suffered in the past or feared in the future. *See Matter of J-B-N- & S-M*, 24 I&N Dec. 208 (BIA 2007). For withholding of removal, the respondent must prove that a protected ground is "a reason" for the harm or fear of future harm. *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017).

¹ The August 28, 2017, decision denying the motion to reopen will be referred to as "IJ MTR at ____." The March 7, 2017, decision denying the applications on the merits will be referred to as "IJ at ____."

At the close of the March 7, 2017, hearing, the Immigration Judge entered an adverse credibility determination. This finding was based on three main areas of the respondent's testimony – i.e., the length of time that he was unconscious after the 2013 beating, an inconsistency as to the date of this beating, and the amount of time it took for the respondent to walk home after this beating. *See* IJ at 6-8. Specifically, the Immigration Judge noted that the respondent did not mention a loss of consciousness in his credible fear interview, and then varyingly described the length of time that he was unconscious as “a moment,” “a short while,” and “20-30 minutes.” *See* IJ at 6. The date of the attack was identified as November 9 or November 28, 2013 (IJ at 7). The respondent testified that he was so badly injured that it took him an hour to walk home from the site of the attack (IJ at 8). The Immigration Judge found this testimony to be in conflict with the respondent's estimate that it normally took him 45 to 50 minutes to walk home (*Id.*). Finally, the Immigration Judge found that the respondent's mother's and sister's affidavits describing his injured state when he arrived home on the night of the beating contradicted the respondent's testimony about that night (IJ at 10).² The Immigration Judge also rejected the affidavit from a PLI activist because the certification of translation of her affidavit was signed and dated in Los Angeles a week before the affidavit was allegedly executed in Nicaragua (IJ at 11; Exh. 4).

The Immigration Judge stated that the respondent's case appeared “tailored so that persuasive documentation of what he alleges is not available.” *See* IJ at 8. Specifically, the Immigration Judge noted that the respondent had no PLI membership card to submit to the court, he had no contemporaneous medical report documenting his injuries from the beating,³ and he did not seek a medical evaluation once he was in the United States that could support his account (IJ at 8). In this regard, the Immigration Judge stated that often “old injuries are still visible to a trained medical eye” and that the respondent could have sought a medical evaluation from a doctor who specializes in “evaluating victims of torture.” *See id.* The Immigration Judge stated that he would consider a motion to reopen submitting a medical report prepared by “an independent and reliable non-profit organization” that addressed the respondent's “physical symptoms” and analyzed his “objective physical characteristics” that support a conclusion that the respondent “was the victim of the abuse which he described in his testimony” (IJ at 9-10).

The Immigration Judge denied the respondent's applications for relief based on the adverse credibility determination, and also concluded that even if the respondent had been credible, he did not merit a grant of asylum because the attack on him should be considered an isolated incident absent corroborating objective evidence “to evaluate the context of the case.” *See* IJ at 12.

² The Immigration Judge found that the respondent's statement that he rebuffed his mother's efforts to take him to seek medical attention was contradicted by his mother's written statement that she did not want him to go to the hospital because of threats from the Sandinistas (IJ at 10; Tr. at 40). The Immigration Judge also found that the respondent's sister's affidavit describing his injuries when he came home the night of the beating contradicted his testimony that only his mother was at home that night (IJ at 10; Tr. at 39). *See also* Exh. 4.

³ The Immigration Judge found that the respondent's explanations for why he did not seek medical attention after being hit some 40 times all over his body were inconsistent, in that he wrote in his declaration that he did not do so because it would take too long to receive care, whereas he testified that he didn't seek medical attention because he feared he would be further harmed (IJ at 8).

On June 7, 2017, the respondent filed a motion to reopen, and attached several documents including an affidavit by Sural Shah, M.D., in which she described her clinical examination of the respondent and concluded that his symptoms of headaches, blurry vision, and sensitivity to light and sound were consistent with a concussion, and consistent with his statement that he was beaten to the point of unconsciousness. *See* Motion to Reopen, Exh. B at 9-10. Dr. Shah also stated that such an injury could cause problems in memory and could affect the respondent's perception of time passage. Dr. Shah opined that the respondent's symptoms are consistent with post-concussion syndrome and that her physical examination reflected a scar that is "consistent with a laceration caused by blunt trauma to the head with subsequent repair with sutures (stitches)." *See id.* The respondent also submitted a report by a physician, Gilmore Chung, M.D., who conducted a psychological evaluation of him and concluded that he suffered from post-traumatic stress disorder. *See* Motion to Reopen, Exh. D at 19.

The Immigration Judge denied the motion to reopen, finding that the submission did not comport with his instructions outlining the type of evidence he would consider in a motion to reopen (IJ MTR at 2-3). Specifically, the Immigration Judge stated that Dr. Shah did not indicate that she examined the respondent "for free or for minimal cost after determining that he was a victim of human rights abuse" (IJ MTR at 2). The Immigration Judge stated that Dr. Shah did not disclose whether she has previously declined to provide statements for individuals alleging injuries (*Id.* at 2-3). The Immigration Judge also stated that Dr. Shah's report further undermined the respondent's testimony, in that her description of a scar on his forehead consistent with a wound that had been sutured contradicted the respondent's testimony that his mother treated his wounds with home remedies and his mother's statement that she cleaned his wound (Tr. at 30; Exh. 4). *See* IJ MTR at 3. In addition, the Immigration Judge did not credit the psychological evaluation of the respondent because Dr. Chung did not "provide a medical evaluation of the respondent" and, therefore, this report was outside of the scope of the motion that was invited by the Immigration Judge and that would not be subject to the "previously undiscoverable" limit on evidence typically offered in motions to reopen. *See* IJ at MTR at 2, n. 1.

The respondent appeals from the denial of the motion to reopen. The respondent argues that his concussion affected his ability to judge and estimate the passage of time, which can explain his changing testimony about the length of time that he was unconscious and the time it took to walk home from the attack. *See* Respondent's Brief at 8-11, 14-15. The respondent argues that the difference in the date of the attack (November 28 in the credible fear interview or November 9 in testimony) is an inconsequential minor discrepancy. *See* Respondent's Brief at 11-12. The respondent also challenges the Immigration Judge's rejection of the medical reports and his decision to adhere to the adverse credibility determination. *See id.* at 5-6, 8-11. The respondent argues that the Immigration Judge should have afforded more weight to the affidavits from his mother, sister and the PLI activist.⁴

⁴ In a motion for an emergency stay of removal, the respondent argued that the Immigration Judge exhibited bias. *See* Motion for Stay at 11. The respondent also argued that he was denied a full and fair hearing. Respondent's Br. at 43. Our review of the record does not reflect statements by the Immigration Judge reflecting bias, and the respondent's merits hearing and the opportunity to

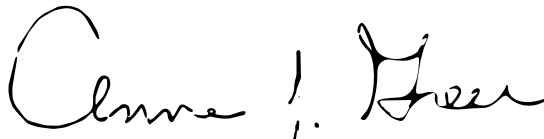
For the following reasons, we will sustain the appeal from the denial of the motion to reopen. The Immigration Judge's reasons for denying the motion are not supported by the record, the regulations, or his own previous instructions to the respondent. The respondent correctly notes on appeal that Dr. Shah represents herself to be acting as a volunteer for Physicians for Human Rights; the Immigration Judge never explicitly required, nor would such a requirement be a prerequisite to the submission of medical evidence, that the doctor examining the respondent provide services at no cost. Similarly, there is no specific requirement, either in the regulations or in the Immigration Judge's March 17, 2017, decision, indicating that the physician examining the respondent should state whether or not she ever refused to provide a statement in support of another person's claim. The psychological exam was conducted by a medical doctor and we therefore find the Immigration Judge's reasons for rejecting this examination to be unsupported by the record. Both medical evaluations of the respondent discuss "symptoms" and/or "objective physical characteristics," as the Immigration Judge requested, and as such satisfy his conditions for considering evidence regardless of whether it was previously unavailable. We therefore find that the Immigration Judge erred in denying the motion to reopen, and we will sustain the respondent's appeal from that decision.

In reopened proceedings on remand, the Immigration Judge should consider and analyze the newly submitted evidence and the effect of this evidence, if any, on the respondent's credibility and his eligibility for relief. We express no opinion as to the ultimate outcome of the respondent's claim to relief.

The appeal will therefore be sustained and the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: Proceedings are reopened and the record is remanded for further proceedings consistent with this order.



FOR THE BOARD

submit additional evidence in his motion does not support his claim that he was denied a full and fair opportunity to submit his claim.