**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*

**McKinney, Jeremy L.**
**McKinney Perry & Coalter**
**P.O. Box 1800**
**Greensboro, NC 27402**

**DHS/ICE Office of Chief Counsel - CHL**
**5701 Executive Ctr Dr., Ste 300**
**Charlotte, NC 28212**

**Name: R[redacted], E[redacted]** **A [redacted]-907**

**Date of this notice: 6/17/2016**

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:
Holiona, Hope Malia
Kendall-Clark, Molly
Guendelsberger, John

EllisM
Userteam: Docket

File: A[redacted] 907 – Charlotte, NC Date: JUN 17 2016

In re: E[redacted] D[redacted] R[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jeremy L. McKinney, Esquire

ON BEHALF OF DHS: Susan Lecker
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's October 8, 2014, decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c). The appeal will be sustained and the record will be remanded for further proceedings consistent with this decision.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent applied for asylum and related relief based on his claim that four men who appeared to be Guatemalan police officers shot at him and threatened him because he had witnessed them throwing the bodies of two children into a landfill off the side of the road (I.J. at 2-3). The respondent testified that at about two o'clock in the morning on January 6, 2012, while driving with a friend Daniel [redacted], he witnessed four police officers toss the bodies of two children over the edge of the road (I.J. at 2; Tr. at 20-22). The police chased the respondent and Daniel and shot at them (I.J. at 2-3; Tr. at 23). Later he received an anonymous text telling him to keep his mouth closed (I.J. at 3; Tr. at 28). In August 2012, he was in a car accident and

[1] During the course of these proceedings, the respondent submitted a motion to amend his name in the court records. [redacted] *See* Respondent's Motion filed October 18, 2013.

learned that the brake lines on his car had been cut (I.J. at 3; Tr. at 31-32). He was certain the police were behind the text threat and the cut brake lines (I.J. at 3; Tr. at 28-33). In September 2012, the police again shot at him as he was loading coffee beans onto a truck (I.J. at 3; Tr. at 33-34). The respondent testified that Daniel [redacted] committed suicide because the police were threatening him and his family (I.J. at 3; Tr. at 24-25).

The Immigration Judge denied the respondent's applications, concluding that the respondent's testimony was not credible (I.J. at 6-8). He also found that even if the respondent was credible, he did not provide sufficient corroboration to meet his burden of proof for relief (I.J. at 8-11). Next, the Immigration Judge determined that the respondent's proposed social group – witnesses of criminal conduct committed by Guatemalan police – is not a cognizable particular social group (I.J. at 11-14). He found alternatively that even if the respondent's group constituted a particular social group, the respondent did not establish that his membership in that group was at least one central reason for the persecution (I.J. at 14-15). Because the respondent did not establish his eligibility for asylum he could not meet the higher standard of proof for withholding of removal under section 241(b)(3) of the Act. Finally, the Immigration Judge denied the respondent's CAT claim because it was based on speculative suppositions rather than evidence (I.J. at 15-16).

First, we find the Immigration Judge's adverse credibility finding is clearly erroneous. Under section 208(b)(1)(B)(iii) of the Act, an Immigration Judge may base a credibility determination on any inaccuracies or falsehoods in the applicant's statements without regard to whether they go to the heart of the applicant's claim. The Immigration Judge found the respondent's testimony inconsistent with his credible fear interview regarding whether he saw the officers actually kill the children (I.J. at 7; Tr. at 21-23; Exh. 1, notes at 3 and 5). He also found the respondent's testimony inconsistent with his affidavit regarding whether he could determine if the bodies were those of girls or boys (Tr. at 50-52; Exh. 2, tab A at 5). The respondent explained to the Immigration Judge, as he does on appeal, that these inconsistencies were due to translation errors (I.J. at 7; Tr. at 50-52, 53-54). *See* Respondent's Brief at 8-12. We find his explanation sufficient especially where his removal hearing testimony was internally consistent and the underlying claim at the hearing is consistent with the claim at the credible fear interview. Also, the record reflects that there is no verbatim transcript of the credible fear interview and the interview was translated telephonically.

The Immigration Judge also found the respondent's testimony inconsistent with the statement from his brother-in-law, [redacted] regarding the death of Daniel [redacted]. The respondent testified that Daniel killed himself (I.J. at 3; Tr. at 24-25), whereas, Mr. [redacted] states that Daniel "died as a result of an attempt on his life" (Exh. 3, tab C at 57). However, these statements taken in context are not necessarily inconsistent because the respondent testified that Daniel killed himself because of the threats he was receiving.

The respondent's admittedly inconsistent statement made to immigration officers on his arrival in the United States and the Immigration Judge's demeanor finding are not sufficient to support an adverse credibility finding (I.J. at 8). *See Qing Hua Lin v. Holder*, 736 F.3d 343, 353 (4th Cir. 2013) (generally agreeing with concerns expressed by sister circuits "over the agency's unqualified reliance on statements made in airport interviews."). The Immigration Judge's

demeanor finding rested on his single observation that "the respondent testified with a flat affect and no emotion about shocking events involving the purported murders of two children by the police" (I.J. at 8). The Immigration Judge did not take into account cultural differences and the effects of trauma. *See Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015). Accordingly, we will presume the respondent's hearing testimony was credible.

Second, we reverse the Immigration Judge's corroboration ruling. The Immigration Judge concluded that even if the respondent was credible, he failed to meet his burden of proof for asylum under section 208(b)(1)(B)(ii) of the Act because he failed to provide sufficient corroborating evidence (I.J. at 11). Yet, the Immigration Judge gave less weight to the respondent's corroborating evidence, including a psychological report and the results of a polygraph, because he found that the respondent was not credible. For example, the Immigration Judge stated that "[G]iven the Court's determination that the respondent's testimony was not credible, the probative value of the clinician's assessment that the respondent suffers from post-traumatic stress syndrome (PTSD) as a result of his past experience in Guatemala is extremely low, if non-existent" (I.J. at 9).

Third, we find the Immigration Judge's particular-social-group determination requires further fact-finding. The respondent argues that his proposed group – witnesses of criminal conduct committed by Guatemalan police – is a cognizable particular social group. The Board recently clarified the elements required to establish a cognizable particular social group. *See Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *see also Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). An applicant for asylum or withholding of removal based on membership in a particular social group must establish that the group 1) is composed of members who share a common immutable characteristic, 2) is defined with particularity, and 3) is socially distinct within the society in question. *See Matter of W-G-R-*, *supra*, at 212-18; *Matter of M-E-V-G-, supra,* at 237. To satisfy the particularity requirement, a group must be discrete and have definable boundaries. *See Matter of W-G-R-, supra*, at 214. Social distinction (formerly known as social visibility) means that the group must be perceived as a group by society, regardless of whether society can identify the members of the group by sight. *Id.* at 216-17. To demonstrate social distinction, an applicant must provide evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. *Id.* at 217 ("Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.").

The Immigration Judge concluded that the characteristic that defines the respondent's proposed group is not immutable. He found that the shared experience "is not generally recognizable to the larger community unless the observer and his experience are made public to others" (I.J. at 13). The Immigration Judge appears to have conflated the immutable characteristic and social distinction requirements. An immutable characteristic is defined as a characteristic the members "either cannot change, or should not be required to change because it is so fundamental to their individual identities or consciences." *See Matter of W-G-R-*, *supra*, at 212 (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

We also disagree with the Immigration Judge's finding that the group lacks social distinction because there was insufficient evidence to conclude the "respondent's relationship to the

decedents was known to the public" (I.J. at 14). To demonstrate social distinction, an applicant must provide evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. *See Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014); ("Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group."). On remand, the Immigration Judge can further consider the evidence of record in making this determination.

Fourth, we find clear error in the Immigration Judge's determination that the respondent did not establish a nexus between the harm he suffers and fears and a protected ground. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007) (holding that a persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error). The Immigration Judge found that the respondent did not know the reasons for the police killing the children and disposing of their bodies (I.J. at 14-15). The respondent need not show why the police were engaged in criminal activity. Instead, the relevant inquiry is whether the respondent can establish, by direct or circumstantial evidence, that the police were motivated to harm him on account of a protected ground. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (finding that an asylum applicant must provide some evidence, direct or circumstantial, of his persecutor's motives).

In light of the foregoing, the Immigration Judge can reevaluate the respondent's eligibility for asylum, withholding of removal, and protection under the Convention Against Torture. The case will be remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

ORDER: The appeal is sustained and 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