



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**McClellan, Christine Danielle
Prisoners' Legal Services of New York
41 State Street
Suite M112
Albany, NY 12207**

**DHS/ICE Office of Chief Counsel - BTV
4250 Federal Dr.
Batavia, NY 14020**

Name: O [REDACTED], S [REDACTED]

A [REDACTED]-363

Date of this notice: 5/19/2020

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:
Wilson, Earle B.
Swanwick, Daniel L.
Goodwin, Deborah K.

Userteam: Docket

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Falls Church, Virginia 22041

File: [REDACTED]-363 – Batavia, NY

Date: MAY 19 2020

In re: S [REDACTED] O [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christine Danielle McClellan, Esquire

ON BEHALF OF DHS: Denise M. Bonk
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Ghana, has appealed the Immigration Judge's May 2, 2019, decision. The Immigration Judge denied the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, respectively, 8 U.S.C. §§ 1158 and 1231(b)(3), and 8 C.F.R. § 1208.16(c). The respondent contests the denial of all forms of relief. The record will be remanded for further proceedings.

We review an Immigration Judge's findings of fact, including findings with regard to credibility and the likelihood of future events, to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *see Hui Lin Huang v. Holder*, 677 F.3d 130, 134 (2d Cir. 2012) (holding that a determination of what will occur in the future and the degree of likelihood of the occurrence is a finding of fact subject only to clear error review); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). 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 claims that he is homosexual and was attacked about six times in Ghana due to his sexual orientation. The respondent asserts that he is a member of a particular social group consisting of men who are gay or are perceived to be gay in Ghana (IJ at 2). The respondent contests the Immigration Judge's adverse credibility determination and her alternative finding that, even if he had testified credibly, he did not adequately corroborate his claim.

The Immigration Judge found the respondent not credible because his testimony was lacking in detail, internally inconsistent, and inconsistent with the record (IJ at 4). Based on the totality of the circumstances, we conclude that the Immigration Judge clearly erred in finding the respondent incredible regarding his claim that he is homosexual and was harmed in Ghana. *See* section 208(b)(1)(B)(iii) of the Act; 8 C.F.R. § 1003.1(d)(3)(i).

The respondent has consistently asserted since entering the United States that he is homosexual and was harmed because of his sexual orientation. *See* Exh. 1, Record of Sworn Statement dated June 11, 2018 (respondent stating in an sworn statement taken before a border patrol agent a day

after his arrival in the United States that he was “constantly being beaten and harassed in Ghana for being homosexual”); Exh. 1, credible fear interview notes dated August 27, 2018 (respondent stating before an asylum officer in an interview conducted without the presence of counsel and about 2 months after his entry into the United States that he is gay and was physically harmed in Ghana because of his sexual orientation); Exh. 4, Tab A (respondent’s affidavit signed January 25, 2019, stating that he is gay and was physically attacked in Ghana by an anti-gay group in his community on approximately six separate occasions because of his sexual orientation); Exh. 3 at 5 (respondent’s asylum application stating that a group of young men beat him about six times because he is gay). The respondent also consistently stated in his credible fear interview, asylum application, asylum statement, and testimony before the Immigration Judge that he was physically harmed on six occasions because of his sexual orientation. *See* Exh. 1, credible fear interview notes dated August 27, 2018, at 5; Exh. 3 at 5; Exh. 4, Tab A; Tr. at 53-54.

The Immigration Judge found that the respondent did not tell the asylum officer about a bar fight incident and birthday incident, events which the respondent alleges occurred in 2009 and 2010 (IJ at 6). The respondent claims that he asserted in his credible fear interview that there were six incidents and highlighted the incidents which were most important to him (Exh. 1, credible fear interview notes; Respondent’s Br. at 15). The respondent contends that he is not required to mention every detail of his case in his credible fear interview and focused on the attacks that caused him the most harm and that the target of the bar fight in 2009 was his ex-partner (Tr. at 54-56; Respondent’s Br. at 17-18). Inasmuch as the respondent told the asylum officer that there were six incidents and discussed the most two recent incidents, the 2015 incident in which he was harmed and the 2018 incident during which he was threatened, we conclude that the fact that the respondent did not specifically describe the incidents in 2009 and 2010 in his credible fear interview is not a sufficient basis for the adverse credibility determination (Exh. 1, credible fear notes, at 5-7).

Similarly, the Immigration Judge found that the respondent did not adequately explain why he did not tell the asylum officer that his former partner J went to France because a warrant was issued for him due to the fact of his sexual orientation (IJ at 6). The respondent argues on appeal that the asylum officer did not ask the respondent why J left Ghana (Respondent’s Br. at 18). Furthermore, the respondent contends that the person to whom the respondent was referring was his friend J, not his former partner, J (Respondent’s Br. at 18). The credible fear interview notes indicate that the respondent told the asylum officer that he had a friend, named “J,” who was subjected to similar treatment as the respondent and that he had left Ghana. The respondent was asked where his friend was now and told the asylum officer that the last time he spoke to his friend, his friend told him that he was in Libya on his way to France (Exh. 1, credible fear interview notes at 6). The respondent was not asked further information about this matter. We are not persuaded that this is a supportable basis for finding the respondent incredible. *See generally Gao v. Sessions*, 891 F.3d 67, 78-79 (2d Cir. 2018) (“In the immigration context, in assessing the probative value of the omission of certain facts, an IJ should consider whether those facts are ones that a credible petitioner would reasonably have been expected to disclose under the relevant circumstances”).

The Immigration Judge found that the respondent stated in his credible fear interview that he “never had any problems with any of the men involved in the 2015 incident before” his 2015

beating (IJ at 5). The respondent testified that he was attacked by the same men in 2010 (IJ at 6; Tr. at 89). The asylum interview provides that the respondent was asked if he ever had any problems with “these seven people before December 20th 2015” and the respondent replied “No, I never had any problems with anybody, none of them” (Exh. 1, credible fear interview notes at 7). The respondent was asked about this discrepancy at the hearing and testified, “What I was telling him was that apart from the gay issue, I didn’t have no problems whatsoever with them” (Tr. at 89). The credible fear interview notes indicate that earlier in his fear interview, the respondent told the asylum officer that he was harmed or threatened by a group of young men in the area where he lived and when asked if the same people threatened and harmed him each time, he responded, “Yes, the same group, because that group is in the same community as me” (Exh. 1, credible fear interview notes, at 5).

The respondent claims that the Immigration Judge acknowledged but did not evaluate his assertion that he had told the asylum officer that he did not have any problems with his assailants “apart from the gay issue” (IJ at 11; Respondent’s Br. at 13, 16). The respondent claims that the alleged discrepancy is not a sufficient ground for the adverse credibility determination because he provided a reasonable explanation and the Immigration Judge did not evaluate it. See Respondent’s Br. at 16; *Diallo v. Gonzales*, 445 F.3d 624, 629 (2d Cir. 2006) (quoting *Latifi v. Gonzalez*, 430 F.3d 103, 105 (2d Cir. 2005)) (an Immigration Judge should “engage or evaluate” an asylum applicant’s explanations for apparent discrepancies in the record). Considering the entirety of the respondent’s statements to the asylum officer, the cited discrepancy is not sufficient to support the adverse credibility determination.

The Immigration Judge found that the respondent testified incredibly, in part, due to the respondent’s characterization of his relationship with his former partner, J, that they were “living as a man and wife would” (IJ at 10; Tr. at 39). The Immigration Judge found that the respondent’s characterization that he lived with his partner “as man and wife would live” was inconsistent with his statements in his asylum statement (IJ at 10-11). The respondent’s statement provides that they could not show affection in public because being gay is illegal in Ghana and that most of the time they would go to hotels to have time together and sometimes J would go to the respondent’s house (Exh. 4, Tab A). The respondent argues that he should have been given an opportunity to explain what he meant by the phrase “living as man and wife would” to determine whether there was a meaningful discrepancy (Respondent’s Br. at 19 n.1).

We conclude that this perceived discrepancy is not a sufficient basis for the adverse credibility determination. The Immigration Judge and the counsel for the DHS raised this alleged discrepancy at the conclusion of proceedings and the respondent’s counsel explained that the respondent meant that he and his former partner were in an intimate relationship (Tr. at 105-09). The respondent was not asked about the meaning of this phrase at the hearing.

The transcript of proceedings supports the respondent’s argument. Shortly after the respondent testified that he and his partner “lived together as a man a wife would live,” the respondent testified that they loved each other and were in a relationship for 3 years (Tr. at 39). The respondent also subsequently testified that J purchased him a car and would call him because “we could not be seen together, so we had a special spot” (Tr. at 39). The respondent also later testified that he did not live with J and never said that he lived with J (Tr. at 82). These statements are

consistent with the statements the respondent made in his asylum statement that they could not show affection in public because being gay is illegal in Ghana and that most of the time they would go to hotels to have time together and sometimes his former partner would go the respondent's house (Exh. 4, Tab A).

The Immigration Judge found the respondent incredible, in part, based on the lack of detail in his claim (IJ at 4). For example, the Immigration Judge observed that the respondent did not provide a physical description of the men who attacked him (IJ at 7). However, the respondent referred to his attackers as boys from the neighborhood and testified that he did not know their names because he was not friends with them (IJ at 7; Tr. at 54). We conclude that the respondent's testimony provided sufficient detail regarding his claim.

The respondent also submitted evidence to support his testimony regarding his claim. The respondent submitted a sworn statement from Mr. [REDACTED], who previously had a relationship with the respondent while there were both living in Ghana (Exh. 8). The Immigration Judge found that the statement lacked specificity (IJ at 8). However, the statement provides, consistent with the respondent's testimony, that Mr. [REDACTED] and the respondent had a relationship for about 6 months in 2010 (Tr. at 42-43; Exh. 8). The statement also provides that they would spend time at each other's houses and would sometimes go to parties or the beach (Exh. 8 at 4). The statement describes, consistent with the respondent's testimony, an incident in 2010 when Mr. [REDACTED] and the respondent were together celebrating Mr. [REDACTED]'s birthday in the respondent's room in his apartment when people entered the respondent's home and slapped the respondent while Mr. [REDACTED] escaped (Tr. at 43-44; Exh. 8 at 4-5). We conclude that Mr. [REDACTED]'s statement provides sufficient specificity regarding his relationship with the respondent and the incident of harm which occurred about 9 years ago and corroborates the respondent's claim.

The respondent also submitted a letter from his sister (Exh. 7). We agree with the Immigration Judge that the respondent's sister's letter does not provide much detail. However, his sister's statement provides, consistent with his testimony, that she is the only family member who knows about his sexual orientation and that this was kept from the rest of her family. *See* Exh. 7; Tr. at 67 (testifying that only his sister knows he is gay).

Based on the foregoing, considering the totality of the circumstances and all relevant factors, we reverse the adverse credibility finding as clearly erroneous. *See* section 208(b)(1)(B)(iii) of the Act; 8 C.F.R. § 1003.1(d)(3)(i). Furthermore, we reverse the Immigration Judge's determination that the respondent did not adequately corroborate his claim. The respondent submitted statements from his sister and a former partner to support his claim.¹ We are not persuaded by the

¹ The respondent reasonably explained that his sister and Mr. [REDACTED] could not testify in person at the hearing in Batavia, New York, because of logistic and financial hardship (Respondent's Br. at 22). The respondent's motion for telephonic testimony provides that his sister lives in New Jersey and is the caretaker for her husband, who suffers from a heart condition, and their 11-year old child and Mr. [REDACTED] lives in Maryland and was recently released from immigration detention. We need not address the respondent's claims that he was denied due process when the Immigration

Immigration Judge's determination that the respondent could have obtained statements from a friend named J who is in Libya and a former partner named J who is in France (IJ at 10). The record does not indicate that such evidence was reasonably available. Cf. section 208(b)(1)(B)(ii) of the Act. In particular, the respondent testified that he has not spoken to his former partner since 2010 when his former partner told him not to contact him again (Tr. at 41-42, 98, 100; Respondent's Br. at 24). The respondent contends that he last spoke to his friend J when the respondent was in Brazil before he came to the United States and testified that J was in Libya (Tr. at 98; Respondent's Br. at 24).

Inasmuch as we conclude that the respondent testified credibly and adequately corroborated his claim, we will remand the record to the Immigration Judge to make findings on whether the respondent has established that he suffered past persecution or has a well-founded fear of persecution on account of his particular social group. Upon remand, the Immigration Judge shall enter a new decision on the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture.

Accordingly, 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

Judge denied his motion to have these witnesses testify telephonically, because we conclude that their statements corroborate the respondent's claim (Respondent's Br. at 22-24).

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A [REDACTED]-363 – Batavia, NY

Date:

MAY 19 2020

In re: S [REDACTED] O [REDACTED]

CONCURRING/DISSENTING OPINION: Deborah K. Goodwin

I write to dissent in part and concur in part with the majority decision. I respectfully disagree with reversing the Immigration Judge's adverse credibility finding. The adverse credibility finding is supported by inconsistencies within the record. The respondent has not fully explained these many inconsistencies or his vague testimony, either at the hearing or in his appeal brief. "Clearly erroneous" review precludes us from reversing an Immigration Judge's factual determinations simply because we think we may have decided the case differently, or weighed the evidence differently, had we been the fact-finder. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985). Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be deemed clearly erroneous. *Id.* Because I would uphold the adverse credibility finding, I would not remand for further findings concerning whether the respondent experienced past persecution. I would defer to the Immigration Judge's permissible view of the evidence, and conclusion that the respondent had failed to establish past persecution. However, I join the majority in reversing the Immigration Judge's findings concerning lack of corroboration. The Immigration Judge accepted the witnesses' statements as credible. While the statements may not adequately corroborate the incidents of past persecution, they do corroborate the respondent's membership in a cognizable particular social group. I join in remanding this matter to the Immigration Judge, but would have limited the scope of remand to consider whether the respondent possesses a well-founded fear of future persecution, should he return to Ghana, based on his corroborated membership in his particular social group, despite the adverse credibility finding concerning his alleged incidents of past persecution.



Deborah K. Goodwin