U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: A[redacted] F[redacted], A[redacted] J[redacted] L[redacted]... **A [redacted]-910**

Date of this notice: 12/7/2018

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:
Greer, Anne J.
Wendtland, Linda S.
Donovan, Teresa L.

Userteam: Docket

File: A[redacted]-910 – Philipsburg, PA

Date: DEC - 7 2018

In re: A[redacted] J[redacted] [redacted] A[redacted] F[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Laura J. Glickman, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

APPLICATION: Reopening; termination

The respondent, a native and citizen of Iraq, appeals from the Immigration Judge's April 30, 2018, decision denying his motion to reopen. He also moves to terminate his removal proceedings. The motion will be denied, the appeal will be sustained, and the record will be remanded.

This Board defers to the Immigration Judge's factual findings, including credibility findings, unless they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On April 10, 2018, the respondent filed a motion to reopen before the Immigration Judge to afford him the opportunity to apply for withholding and deferral of removal. He argued that there was no time limit on filing the motion because it was based on changed country conditions arising in Iraq since the time of his 2009 removal hearing. *See* section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(i). The respondent argues due to his particular circumstances (he is Westernized, suffers from mental illness, would be a criminal deportee, and he previously deserted the Iraq military), it is more likely than not that he will be tortured by or with the acquiescence of an Iraqi public official if returned to Iraq. He further claims as a *Hamama* class member and a criminal deportee he is likely to be detained, interrogated, and tortured by government officials or the militia.[1]

The Immigration Judge denied the motion. He found the respondent statutorily ineligible for withholding of removal and he concluded that the respondent did not establish a material change in country conditions in Iraq since his 2009 hearing (IJ at 4-6). *See Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007).

We affirm the Immigration Judge's determination that the respondent is ineligible for withholding of removal because his drug trafficking crime is presumptively a particularly serious crime (IJ at 3-4). *See Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). We also

[1] The *Hamama* putative class includes "all Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by ICE." *See Hamama v. Adducci*, 261 F. Supp. 3d 820, 841 (E.D. Mich. 2017) ("*Hamama I*").

agree that *Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018) (overruling the Board's decision in *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014)), does not control this case which arises within the jurisdiction of the Third Circuit (Respondent's Br. at 18-21).

We reverse the Immigration Judge's determination that the respondent did not demonstrate changed circumstances in Iraq sufficient to excuse the untimeliness of his motion and justify reopening of his removal proceedings. We agree with the respondent's appellate argument that the respondent need not show a "drastic" change in the attitude of Iraqi government officials toward Westerners (IJ at 5). Instead, he must show, as he has here, that the evidence of country conditions submitted with the motion shows a material change from the time of his 2009 removal hearing. *See Matter of S-Y-G-*, 24 I&N Dec. 247, 253 (BIA 2007) ("In determining whether evidence accompanying a motion to reopen demonstrates a material change in country conditions that would justify reopening, we compare the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below."). Also, the Immigration Judge did not consider the anti-Western threat from the government-sponsored Popular Mobilization Forces (PMF) (Respondent's Br. at 8-9). Based on the foregoing, we conclude that the respondent has made a prima facie case of changed country conditions insofar as he has produced cumulative, consistent, and personalized objective evidence demonstrating a reasonable likelihood that he is entitled to relief.

Insofar as the respondent's claim is based on his mental illness, the Immigration Judge will have the benefit of our recently issued decision in *Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018), to determine whether it is more likely than not that the respondent will experience acts of torture specifically intended to inflict severe pain and suffering. He asserts that as a mentally ill prisoner it is more likely than not that he would be tortured by or with the acquiescence of the prison guards. *See also Roye v. Att'y Gen. of U.S.*, 693 F.3d 333, 343-44 (3d Cir. 2012) ("acquiescence to torture can be found" where prison officials turn a blind eye to severe physical or mental pain inflicted a mentally ill person). *See* Respondent's Motion to Reopen at 40-43; Tabs CC (Dr. Hassan statement ¶¶ 16-18), DDD (Researcher Daniel W. Smith Affidavit ¶¶ 30-36), ZZZ (Dr. Ahmed Amin statement), and AAAA (International Journal of Mental Health Systems).

The respondent also argues that these proceedings should be terminated because his Notice to Appear (NTA) was defective for purposes of placing him in proceedings, given the Supreme Court's recent ruling in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (holding that a NTA that does not designate a specific time and place of an alien's removal proceedings does not trigger the Act's stop-time rule ending his period of continuous presence in the United States for purposes of section 240A(b) of the Act, 8 U.S.C. § 1229b(b)). We disagree. We recently held that a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a) (2012), so long as a notice of hearing specifying this information is later sent to the alien, as occurred in this case. *See Matter of Bermudez-Cota,* 27 I&N Dec. 441 (BIA 2018). Accordingly, the respondent's motion to terminate will be denied.

On June 27, 2018, we accepted and placed in the record of proceedings a brief filed on behalf of amici curiae in support of the respondent. They requested to appear as amici curiae due to the significant public interest generated by the *Hamama* litigation. The Department of Homeland

Security (DHS) has since objected to the consideration of amici brief because they have a strong interest in the case. The Board of Immigration Appeals may, in its sole discretion, grant permission to an amicus curiae to appear, on a case-by-case basis, where it serves the public interest. 8 C.F.R. § 1292.1(d). Because we reached our decision independent of the amici brief and exhibits, we need not reach this issue. The Immigration Judge may determine in reopened proceedings whether the proffered declarations are probative and fundamentally fair. *See Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015) ("the test for admitting evidence is whether it is probative and fundamentally fair). Based on the foregoing, the following orders will be entered.

ORDER: The motion to terminate is denied.

FURTHER ORDER: The appeal is sustained, and the Immigration Judge's April 30, 2018, decision denying the motion to reopen is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

Teresa L. Dolan

FOR THE BOARD