U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: I[redacted], K[redacted]

A[redacted]-247

Date of this notice: 7/7/2020

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:
Goodwin, Deborah K.
Donovan, Teresa L.
Greer, Anne J.

Humady!
Userteam: Docket

File: A[redacted]-247 – Ferriday, LA

Date: JUL - 7 2020

In re: K[redacted] I[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Greg C. Proctor, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Burkina Faso, has timely filed an appeal from an Immigration Judge's decision dated July 25, 2019, finding him removable as charged, and denying his applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3), respectively, and for protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.13, 1208.16-.18. The record will be remanded to the Immigration Court for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent claims eligibility for relief from removal based on political opinion and on membership in a proposed particular social group, described as "ex-military members who refuse the orders of their commander" or, as clarified on appeal, "ex-military members who refused the illegal and unhumanitarian orders of their commander" (IJ at 2; Tr. at 45) (*see* Respondent's Br. at 11). *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (holding that an applicant raising membership in a particular social group as the basis of the claim for relief has the burden to clearly delineate the group to which she claims she belongs).[1]

The respondent testified that, when he was a soldier in the Burkina Faso armed forces, he and a team of 5 soldiers led by a sergeant were sent to investigate a deadly attack upon members of another unit (IJ at 3; Tr. at 22-23, 26-28). During the investigation, the team came upon and detained 7 individuals who appeared to have been unarmed civilians (IJ at 3-4; Tr. at 28-30). The team leader briefed the colonel (who was the commander of the base where they were stationed) on the telephone, and the colonel ordered the execution of the civilians (IJ at 4; Tr. at 30-31). The

[1] We note that although a particular social group must be clearly delineated before the Immigration Judge and the Board does not accept delineation of a new particular social group on appeal, the respondent herein appeared before the Immigration Judge pro se, and it is the Immigration Judge who identified and delineated the particular social group for the respondent. *See Cantarero-Lagos v. Barr*, 924 F.3d 145 (5th Cir. 2019). As such, we will not foreclose the respondent from clarifying the definition of his proposed particular social group on appeal.

team members refused to carry out that order, they were relieved of their duties by another team on the colonel's orders, and they were placed under arrest on the base (IJ at 4; Tr. at 31-33). The respondent was charged with failing to obey an order of a superior officer (IJ at 4; Tr. at 39-40). During the 2-week period of detention before the respondent escaped, he was beaten, had water thrown on him, and was given only one meal a day (IJ at 4; Tr. at 33-35, 40, 44). The respondent fears arrest, detention, and death at the hands of the military for failure to follow an order if he were returned to Burkina Faso (IJ at 5; Tr. at 39).

The Immigration Judge denied relief based on an adverse credibility finding and, in the alternative, on the merits (IJ at 5-8). On clear error review, and considering the "totality of the circumstances," we reverse the Immigration Judge's adverse credibility finding. *See* section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii); *see also Wang v. Holder*, 569 F.3d 531, 538 (5th Cir. 2009).

Specifically, the Immigration Judge based his adverse credibility determination on an implausibility of the respondent's account that he was imprisoned, beaten, and subjected to other deprivations by the military but, at the same time, his report that he was allowed to seek medical treatment for a minor ailment while imprisoned (IJ at 6). The Immigration Judge also noted that the respondent indicated on cross-examination that he previously applied for a United States visa but did not report this during his interview with a border patrol agent (IJ at 6). However, the Immigration Judge did not articulate specific, cogent reasons to support his adverse credibility determination, and the totality of the circumstances does not support his determination (IJ at 6). *See Wang v. Holder*, 569 F.3d at 538 (stating that an adverse credibility determination may be supported by "any inconsistency or omission," provided that "the totality of the circumstances establishes that an asylum applicant is not credible") (internal quotation marks, emphasis, and citation omitted). As such, we conclude that the adverse credibility finding was clearly erroneous, and we will set it aside.

Moreover, on clear error review, we will reverse the Immigration Judge's finding that the respondent did not demonstrate a nexus between his political opinion and the harm that he suffered and fears at the hands of the Burkina Faso military. *See Revencu v. Sessions*, 895 F.3d 396, 402-04 (5th Cir. 2018) (holding that the alien must demonstrate that political opinion was one central reason for the claimed persecution); *see also Eduard v. Ashcroft*, 379 F.3d 182, 190-91 (5th Cir. 2004) (holding that an asylum seeker must demonstrate a nexus between the harm feared and a protected ground). Although the Immigration Judge concluded that the respondent was subjected to lawful prosecution for disobeying an order, the evidence reflects that the respondent refused an order to kill unarmed civilians (IJ at 4, 7). As such, the evidence reflects that the respondent was harmed because he refused to participate in inhumane conduct and, consequently, that he was harmed on account of his political opinion. *See Milat v. Holder*, 755 F.3d 354, 362-63 (5th Cir. 2014) (concluding that an asylum applicant's fear of punishment for evading military service establishes a well-founded fear of persecution in only two circumstances, where the applicant demonstrates that he would face disproportionate and severe punishment for refusing to serve on account of a protected ground, or that military service will necessarily require the applicant to participate in inhumane conduct). Likewise, although incarceration and subsequent court martial hearing would amount to lawful prosecution, repeated beating and other significant deprivations in pre-trial detention involve disproportionate and severe punishment. *Id.*

In view of the foregoing, the respondent's testimony and evidence of record persuade us that the Immigration Judge's adverse credibility and nexus findings were clearly erroneous and that the respondent's political opinion is at "at least one central reason" for the harm and threats he faced (IJ at 7-8). *See* section 208(b)(1)(B)(i) of the Act.

Consequently, we will remand the record to the Immigration Court for further proceedings and for reconsideration of the respondent's application for asylum, withholding of removal, and protection under the Convention Against Torture. Specifically, the respondent, who represented himself before the Immigration Judge, testified that he was subjected to beatings, deprivations, and "torture" while in military detention for refusing to kill unarmed civilians. However, the Immigration Judge did not question the respondent in detail with regard to the nature, severity, and length of the beatings to which he was subjected, or the nature and severity of any injury or harm that he may have sustained (Tr. at 33-34). Thus, on remand, the Immigration Judge should determine whether the severity of harm that the respondent suffered in the past rises to the level of persecution or torture. *See Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007) (noting that persecution is an extreme concept that does not include all treatment our society regards as offensive); *Abdel-Masieh v. INS*, 73 F.3d 579, 584 (5th Cir. 1996) (concluding that beatings during two separate arrests represented insufficient harm to rise to the level of persecution); *cf. Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998) (applicant detained for one month, periodically beaten, deprived of food established that he suffered harm rising to the level of past persecution).

If the Immigration Judge determines that the harm that the respondent suffered in the past rose to the level or persecution or torture, the Immigration Judge should determine, by applying appropriate analysis and legal standard, whether the presumption of future persecution and torture have been rebutted in this case, and whether the respondent is otherwise eligible for asylum, withholding of removal, or protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.13, 1208.16, 1208.17, 1208.18; *see also Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012); *Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008). The parties should be permitted to submit additional relevant evidence. We make no determination regarding the ultimate outcome of this case. In view of the foregoing, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD