



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*

**Acalin, David Thomas
Law Offices of Marks & Acalin
4221 Wilshire Blvd. Suite 330
Los Angeles, CA 90010**

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

Name: S [REDACTED], R [REDACTED]

A [REDACTED]-256

Date of this notice: 2/21/2020

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:
Morris, Daniel
Liebowitz, Ellen C
Hunsucker, Keith

HM:ad: I
User team: Docket

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RC

Falls Church, Virginia 22041

File: A [REDACTED]-256 – Los Angeles, CA

Date:

FEB 21 2020

In re: R [REDACTED] S [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David T. Acalin, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case was last before the Board on October 10, 2017, when we remanded the case to the Immigration Judge. The respondent, a native and citizen of Armenia, appeals the Immigration Judge's January 24, 2018, decision. The appeal will be sustained in part, and the record will be remanded.¹

We assume the parties' familiarity with the procedural history of this case. As is relevant to this appeal, we note the following. Our October 10, 2017, remand order, consistent with the order of the United States Court of Appeals for the Ninth Circuit granting the Government's amended unopposed motion to remand, directed the Immigration Judge "to reassess the respondent's credibility and his competency to testify in light of relevant Board precedent" (BIA at 2). In addition, we stated that "[t]he parties and the Immigration Judge may address any additional issues on remand" (BIA at 2). Upon remand, the Immigration Judge did not hold a hearing or request any evidence or briefing from the parties. Rather, she issued a written decision dated January 24, 2018, finding the respondent competent, protected by sufficient safeguards, not credible, and, in the alternative, ineligible for protection under the Convention Against Torture based on the merits of his claim (IJ at 2-7).

Upon remand, the Immigration Judge found that the transcript of proceedings and psychological evaluation provided "some indicia of Respondent's incompetency" (IJ at 4). Despite these indicia, the Immigration Judge found that the respondent was competent because the record, as a whole, did not indicate that the respondent lacked a rational and factual understanding of the nature of the proceedings (IJ at 4). The Immigration Judge's competency evaluation is not complete. In *Matter of M-A-M-*, we stated the following: "When there are indicia of incompetency, an Immigration Judge must take measures to determine whether a respondent is competent to participate in proceedings." *Matter of M-A-M-*, 25 I&N Dec. 474, 480 (BIA 2011). These measures may include a competency hearing, wherein the Immigration Judge may ask the respondent questions that "should include questions about where the hearing is taking place,

¹ All references to the BIA's decision refers to our October 10, 2017, decision unless otherwise indicated. Similarly, all references to the IJ's decision refers to the January 24, 2018, decision unless otherwise indicated.

the nature of the proceedings, and the respondent's state of mind." *Id.* at 480. "Another measure available to Immigration Judges is a mental competency evaluation." *Id.* at 481. The Immigration Judge did not implement these or any other measures in this case. Rather, she simply reviewed the record to determine the respondent's competency. The Immigration Judge's competency determination is not in accordance with *Matter of M-A-M-*, and therefore we find it necessary to remand the record again for the Immigration Judge to evaluate the respondent's competency.²

In the alternative, the Immigration Judge found the respondent incompetent and implemented the safeguard of assuming the respondent credible and that his fear of returning to Armenia was genuine (IJ at 5). *See Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015). Even assuming the respondent credible, the Immigration Judge determined that the respondent was not eligible for protection under the Convention Against Torture because his claim of fear was based on a series of assumptions, rather than evidence establishing that he met his burden of proof by a preponderance of the evidence (IJ at 5-7). In making this determination, the Immigration Judge relied, in large part, on her determination that the respondent did not provide any corroborating evidence that [REDACTED] is still interested in harming him "after the passage of approximately twenty years" (IJ at 6).³ We note, however, that the Immigration Judge never provided the respondent the opportunity to provide this corroborating evidence. Despite our remand order, which stated, "[t]he parties and the Immigration Judge may address any additional issues on remand," the Immigration Judge issued a new decision without accepting any new evidence or argument from the respondent (BIA at 2 (emphasis added)). This, too, was in error.

For the aforementioned reasons, we conclude that a remand is necessary. On remand, the parties should be given the opportunity to update the evidentiary record.⁴ Accordingly, the following orders will be entered.

ORDER: The appeal is sustained in part.

² We acknowledge, as the Immigration Judge points out, that a competency hearing now may not be the most reflective of whether the respondent was competent during his prior proceedings (IJ at 3 n.3). However, the Immigration Judge's current competency determination is not in accordance with *Matter of M-A-M-* generally, or the remand order of the Ninth Circuit specifically. Therefore, it cannot be upheld on appeal.

³ The Immigration Judge did not explain how the country reports evidence, which discusses the treatment of Jehovah's Witnesses in Armenia, undermines the respondent's claim for protection from removal, which is based on his fear of retaliation from his former boss, [REDACTED], for allegedly disobeying orders and whistleblowing (IJ at 6).

⁴ As the Immigration Judge who issued the last decision is retired, we need not address the respondent's request that the record should be remanded to a different Immigration Judge.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with this decision.



FOR THE BOARD

Board Member Keith E. Hunsucker respectfully dissents without a separate opinion.