

Falls Church, Virginia 22041

File: [REDACTED] - Miami, FL

Date: MAY 27 2008

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL and MOTION

ON BEHALF OF RESPONDENT: James Feroli, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] -
Fraud or willful misrepresentation of a material fact

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

The respondent, a native and citizen of Albania, appeals from an October 3, 2006, Immigration Judge decision denying his applications for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158; withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); and his request for protection under the Convention Against Torture (CAT).¹ The Immigration Judge found that the respondent was not credible and denied all relief on that basis. On appeal, the respondent files two briefs. In the first brief¹, the respondent argues that he established past persecution and a well-founded fear of future persecution. He does not address the Immigration Judge's adverse credibility determination. Several months after the initial brief was filed, the respondent, through different counsel, moved us to accept a supplemental brief in support of his appeal. The respondent's second brief alleges ineffective assistance of counsel by the respondent's first counsel. He also argues that he testified credibly and met his burden of proof for all forms of relief. He requests that we reverse the Immigration Judge's adverse credibility determination and remand for an analysis on the merits of his asylum and withholding of removal applications. The respondent also contends that the Immigration Judge erred in denying his request for protection under CAT solely based on an adverse credibility determination.

As to the respondent's request to file his supplemental brief, we will grant that motion and accept the supplemental brief he filed. The respondent also asserts that his counsel at the merits

¹ The respondent's first counsel did not file a motion to withdraw, but the respondent's second counsel did file a form EOIR-27 and we consider him (James Feroli) to be the respondent's counsel on appeal.

proceedings below (who also filed his initial brief on appeal) was ineffective. We point out that the respondent's assertion that the Immigration Judge found that the respondent's initial counsel did not handle the case properly from the beginning is misleading. While the Immigration Judge did utter those words, he was referring to the fact that fingerprints had not been filed and that some documents were not submitted in a timely manner under the local rules (Tr. at 28, 31-34). However, the Immigration Judge continued proceedings for new fingerprints to be taken and admitted the documents the respondent submitted. With regard to the respondent's ineffective assistance of counsel claim, there is no indication that the respondent has complied with any of the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Thus, to the extent that the respondent is moving us to remand due to ineffective assistance of counsel, we will deny that request. 8 C.F.R. § 1003.2(c)(4).

Turning to the respondent's credibility, the Board only reverses a finding of credibility by an Immigration Judge if it is "clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(I). This clearly erroneous standard does not entitle the reviewing body to reverse the finding of a trier of fact merely because the reviewing body is convinced it would have decided the case differently. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 574 (1985). When there are two permissible views of the evidence, the fact-finder's choice between the two cannot be deemed clearly erroneous. *Id.* In this instance, we find that the Immigration Judge clearly erred in finding the respondent not credible. Many of the omissions upon which the Immigration Judge relied actually are included in the respondent's addendum to his asylum application (Exh. 7) or his testimony. Further, the respondent explained that his asylum application was completed without an attorney present (the respondent's attorney was in a different state) and with a different translator. In addition, the Immigration Judge's reliance of omissions from the credible fear interview is contrary to *Matter of S-S-*, 21 I&N Dec. 121 (BIA 1995). We also find that some of the Immigration Judge's proffered inconsistencies actually are based on mistakes in dates the Immigration Judge made. However, even though we find that the respondent is credible, we do not find that he demonstrated past persecution because he identified his attackers as "supporters of the ruling party."

Despite the fact that we find the respondent has not demonstrated past persecution, we find that a remand is needed. Specifically, the Immigration Judge should make additional findings of fact to determine whether the respondent has demonstrated a well-founded fear of future persecution and whether he is eligible for protection under CAT. We make no recommendation as to the respondent's eligibility for relief other than finding he did not meet his burden of proof as to past persecution. We also point out that the reports from the Department of State are "stale" and, thus, the Immigration Judge should accept new submissions in this area.

Accordingly, the following orders will be issued:

ORDER: The respondent's motion to file a supplemental brief is granted.

FURTHER ORDER: The respondent's motion for ineffective assistance of counsel is denied.

FURTHER ORDER: The respondent's appeal is sustained in part such that the Immigration Judge's adverse credibility determination is reversed and the record is remanded to the Immigration Judge for a determination of whether the respondent has demonstrated a well-founded fear of future persecution or met his burden of proof for protection under CAT, and any further proceedings as necessary, consistent with this decision.

Patricia A. Cole

FOR THE BOARD

Board Member Filppu respectfully dissents, without opinion, as to the finding of clear error in the Immigration Judge's credibility determination.