

Falls Church, Virginia 22041

File: ██████████ - San Antonio, TX

Date:

JUL 30 2012

In re: ██████████

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Feroli, Esquire

ON BEHALF OF DHS: Justin Adams
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Somalia, appeals the Immigration Judge's January 25, 2010, decision denying his applications for asylum under section 208(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1), withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture ("CAT"). The appeal will be sustained, and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met their burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent's asylum application was filed after May 11, 2005 (Exh. 4), it is governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent is a member of the minority Wardey clan. He testified that in February 2000, members of the Hawiye tribe beat and tortured him, and killed his father in his presence (Tr. at 259; Exh. 4; I.J. at 7). The respondent testified further that he sustained scars and disfigurements from the attack, and after recovering in a hospital, fled to Kenya (Tr. at 267; I.J. at 10). The respondent claims that upon returning to Somalia in 2007 to visit his family, he was again threatened by the Hawiye because he is the oldest living male in his family (Tr. at 273; I.J. at 11).

The Immigration Judge's adverse credibility finding is clearly erroneous. The Immigration Judge found the testimony of the respondent and his witnesses not credible, and stated that the respondent "intentionally filed an asylum application with material elements which he deliberately fabricated" (I.J. at 16). The Immigration Judge's adverse credibility finding is based primarily upon the testimony of witnesses who were called to confirm the respondent's identity (*see* I.J. at 16-18). However, the Immigration Judge did not consider the testimony of two other witnesses, Ms. ██████████ (Tr. at 54), and Ms. ██████████ (Tr. at 118), both legal permanent residents who testified that they know the respondent's family. Moreover, Ms. ██████████ corroborated the respondent's testimony that his father had been killed because he "was minority tribe" (Tr. at 63), and Ms. ██████████ is related to the respondent (Tr. at 121). The Immigration Judge also did not identify any inconsistencies in the record related to the respondent's account of being beaten and witnessing his

father's killing. The Immigration Judge's observation that the respondent's "omission of medical records from his hospital stay in Somalia lends further suspicion to his claim" (I.J. at 20), is at odds with extensive medical evidence of treatment obtained in the United States which corroborates the respondent's testimony of being struck with a hammer on his knee during the attack in 2000 (*see* Tr. at 285; Group Exh. 7, Tab J; Exhs. 20, 27). For these reasons, we conclude that under the totality of the circumstances, the Immigration Judge's adverse credibility finding is clearly erroneous. *See Wang v. Holder*, 569 F.3d 531, 538 (5th Cir. 2009).

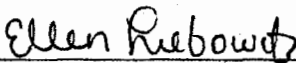
We also point out that the extensive country background information of record, including State Department information, detail circumstances in Somalia which are consistent with the respondent's account. *See* Exhs. 5, 7, at Tab D, Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Somalia - Country Reports on Human Rights Practices (March 2007) (noting "[i]ncidents of arbitrary deprivation of life . . . in numerous contexts" since the collapse of the government in 1991). This should be considered on remand.

Accordingly, we will remand the record for reconsideration of the respondent's credibility, for further findings of fact commensurate with the new credibility determination, and for determinations regarding the respondent's claims of past persecution and a well-founded fear of persecution. A finding of past persecution within the meaning of the Act triggers the presumption that there exists a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(i). If necessary, both parties should have the opportunity to address this presumption and present evidence of changed country conditions, or the possibility that the respondent could avoid future persecution by relocating to another part of Somalia. 8 C.F.R. §§ 1208.13(b)(1)(ii)(A), (B). Further, if necessary, the parties should address whether the respondent's past persecution is sufficient to warrant a humanitarian grant of asylum in the absence of a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1)(iii). The Immigration Judge should also re-evaluate the respondent's application for withholding of removal and protection under the CAT if necessary. Both parties should be otherwise permitted to update the evidentiary record.

We recognize that the respondent's counsel has expressed concern about the Immigration Judge's treatment of this case (Resp. Br. at 35-40), and the Immigration Judge asserts that the respondent's counsel acted unprofessionally.¹ Out of an abundance of caution, and due to the contentious nature of the prior proceedings, this case should be assigned to a different Immigration Judge on remand.

Accordingly, the following order is issued.

ORDER: The appeal is sustained, the Immigration Judge's January 25, 2010, decision is vacated, and the record is remanded for further proceedings and assignment to a new Immigration Judge, and for the issuance of a new decision consistent with the foregoing order.



FOR THE BOARD

¹ The Immigration Judge found minor mistakes in the respondent's witness affidavits, which were prepared with the assistance of the respondent's counsel, and concluded that the counsel was "either completely reckless" or intentionally attempted to mislead the court (I.J. at 20). On the record before us, we do not conclude that the respondent's counsel has acted inappropriately.