U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: [redacted] [redacted]

Date of this notice: 10/23/2013

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.
Pauley, Roger
Wendtland, Linda S.

Lulseges
Userteam: Docket

File: [redacted] - Hartford, CT

Date: OCT 23 2013

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: A. Nicole Hallett, Esquire

ON BEHALF OF DHS: Jerry R. DeMaio
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Convention Against Torture

The respondent, a native and citizen of Jamaica, appeals the Immigration Judge's April 5, 2013, decision denying the respondent's request for protection pursuant to the Convention Against Torture (CAT).[1] We review the Immigration Judge's factual findings for clear error and all other issues *de novo*. *See* 8 C.F.R. § 1003.1(d)(3). The case will be remanded.

The respondent bases his CAT request on his claim that, because he is a homosexual, it is more likely than not that he would be tortured in Jamaica by or with the acquiescence of a public official or other person acting in an official capacity. *See* 8 C.F.R. §§ 1208.16(c) and 1208.18(a). The respondent testified that, when he was a child, he was repeatedly sexually abused by his uncle in Jamaica, and that he was bullied and beaten by other children because he was perceived as being gay (I.J. at 19; Tr. at 160-62, 277-80). The Immigration Judge denied the respondent's CAT claim, finding that the respondent did not submit sufficient corroborating evidence to demonstrate that he is a homosexual and, therefore, the respondent did not satisfy his burden of proof (I.J. at 105, 107). On appeal, the respondent argues, *inter alia*, that the Immigration Judge erred by determining that the respondent did not meet his burden of proof. *See* Respondent's Brief at 29-37. We agree.

Section 208(b)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(ii), provides that "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden

[1] The respondent has been convicted for several crimes including the sale of narcotics and he is statutorily ineligible for asylum and withholding of removal. *See* Exh. 1 at 3; Attachment to Exh. 4.

[redacted]

without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient" to satisfy the respondent's burden of proof. *See* section 208(b)(1)(B)(ii) of the Act. "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." *Id.* Moreover, with regard to CAT claims, the regulations provide that "the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *See* 8 C.F.R. § 1208.16(c)(2).

As an initial matter, we note that, although the Immigration Judge found that there were some inconsistencies in the evidence presented by the respondent concerning whether he is a homosexual, the Immigration Judge made no adverse credibility finding in this case (I.J. at 106). Therefore, on appeal, the respondent is entitled to a rebuttable presumption of credibility. *See* section 240(c)(4)(C) of the Act (if no adverse credibility determination is explicitly made, the applicant shall have a rebuttable presumption of credibility on appeal).

Presuming that the respondent's testimony is credible, we disagree with the Immigration Judge that the respondent has not presented sufficient corroborating evidence to demonstrate that he is a homosexual. *See Huang v. Holder*, 677 F.3d 130, 135 (2d Cir. 2012).

The respondent testified that he has had intimate relationships with 10-12 men including [redacted] and [redacted] (I.J. at 39; Tr. at 155-59, 290). He also said that he had relationships with women in an attempt to "cover [] up" the fact that he was gay (I.J. at 17; Tr. at 173, 205). *See* Amicus Brief of Lambda Legal Defense and Education Fund, *et al.* (LLDEF Brief) at 10-22. The respondent has two children but has never been married (Tr. at 172). He testified that it was difficult for him to accept being gay because it was contrary to his religious beliefs (I.J. at 17; Tr. at 151-52, 173). The respondent testified that he accepted that he was gay in 2006 and has not had sexual relations with a woman since then (I.J. at 17; Tr. at 151, 154, 181, 202). He is currently involved with [redacted] (I.J. at 18; Tr. at 229-39, 458).

To corroborate his claim, the respondent presented the testimony of [redacted], who testified that he had a romantic relationship with the respondent for 6 months in 2006 (I.J. at 7; Tr. at 80-81). [redacted] testified that he is now married to a woman and that he has had other male and female romantic partners in the past (I.J. at 8; Tr. at 82, 88, 120-21). [redacted] testified that he and the respondent traveled together, went to parties and spent time together in New York, Las Vegas and Miami while they were involved (I.J. at 10; Tr. at 81, 96, 100, 102). *See* Exh. 6, Tab J at 1-2.

The respondent also submitted a declaration from [redacted] which indicated that he and the respondent began a relationship at Brooklyn Correctional Institute. *See* Exh. 6, Tab K. As the Immigration Judge found, this statement was not subject to cross-examination and is entitled to less weight (I.J. at 102).

Dr. Taiye Ogundipe, M.D., a psychiatrist who examined the respondent, also testified at the respondent's removal hearing (I.J. at 43; Tr. at 340). Dr. Ogundipe testified that the respondent talked about his experiences in Jamaica and said that he is a homosexual (I.J. at 44; Tr. at 342-44). Dr. Ogundipe diagnosed the respondent with Post Traumatic Stress Disorder based on his

[redacted]

history of sexual and physical abuse in Jamaica (I.J. at 44; Tr. at 343-44). *See* Exh. 6, Tab B at 14-15. Dr. Ogundipe said that he does not believe that the respondent is malingering because there was no "overproduction of symptoms" and because he observed "unconscious conflicts" from the respondent's childhood trauma (I.J. at 45; Tr. at 345-46, 402).

Dr. Ogundipe also testified that he spoke on the phone at length to the respondent's mother, [redacted] She confirmed to Dr. Ogundipe that she believes that the respondent is gay and that this is upsetting to her because it is contrary to her religious beliefs (I.J. at 51; Tr. at 346, 505-08).

The respondent also presented the testimony of Reverend Joshua Pawelek, a minister from the Unitarian Universalist Church who has provided pastoral counseling to the respondent for approximately 1 year (I.J. at 4; Tr. at 67-70). Reverend Pawelek testified that the respondent revealed that he was a homosexual to Reverend Pawelek (I.J. at 6; Tr. at 69-70). *See* Exh. 6,Tab H at 63.

Although the Immigration Judge found that the respondent could have presented additional corroborating evidence including pictures and letters that he exchanged with [redacted], and issues of the Ultra Violet magazines that he received, the respondent testified that he did not have these items any longer (I.J. at 101; Tr. at 224, 264, 303). The Immigration Judge also found that the respondent should have submitted testimony from his father who lives in Long Island (I.J. at 103). The respondent testified, however, that he and his father do not have a close relationship and that his father did not tell his current wife about the respondent (Tr. at 301).

Even assuming that the Immigration Judge gave the respondent sufficient notice that he needed to submit such additional corroborating evidence (Respondent's Brief at 35-37), we conclude that, as noted above, the respondent submitted sufficient evidence to corroborate his testimony. Therefore, we reverse the Immigration Judge's determination that the respondent has not satisfied his burden of demonstrating that he is a homosexual.

Because the Immigration Judge incorrectly found that the respondent did not satisfy his burden of demonstrating that he is gay, the Immigration Judge did not make factual findings with regard to whether the respondent demonstrated that, as a gay man, it is more likely than not that he would face torture in Jamaica by or with the acquiescence of a public official or other person acting in an official capacity (I.J. at 107). Therefore, we will remand this case to the Immigration Judge to make the necessary findings of fact in the first instance. *See Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (notes Board's limited fact-finding function).[2] While the respondent urges that we assess the likelihood of future torture without remanding, we are unable to do so in cases such as the present one that are governed by the law of the United States Court of Appeals for the Second Circuit, which has held that predictions as to the likelihood of future torture are findings of fact that must be made by the Immigration Judge in the first instance and reviewed by this Board for clear error only. *See Huang v. Holder, supra.*

[2] We note that amicus briefs have been filed addressing these issues. *See* LLDEF Brief at 22-30; Brief of Global Rights and the Equal Rights Trust at 6-21.

[redacted]

Finally, the respondent argues that the Immigration Judge erred by failing to terminate the respondent's removal proceedings because his removal from the United States would constitute a grossly disproportionate penalty for his offenses. *See* Respondent's Brief at 59-62. However, although the respondent argues that he is not asking the Immigration Judge or this Board to rule on the constitutionality of the Act, he appears to be, de facto, asking us to conclude that the statute is unconstitutional as applied to the respondent. *See* Respondent's Brief at 56. As the Immigration Judge found, however, we do not have the authority to rule on the constitutionality of the regulations and statutes which we administer. *See, e.g., Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002); *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1035 (BIA 1999). Further, even construing the respondent's argument as one of statutory construction to avoid potential constitutional problems (and assuming without deciding that such problems exist), we note that the Supreme Court has recognized that such an alternative construction is permitted only where "fairly possible." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted). In this instance, it is not "fairly possible" to construe the removability provisions to afford enforcement discretion to the immigration courts or this Board in circumstances not specified by the statute, as the respondent urges. Rather, such prosecutorial discretion resides solely with the Department of Homeland Security. *See, e.g., Matter of Avetisyan*, 25 I&N Dec. 688, 694-95 (BIA 2012); *Matter of Quintero*, 18 I&N Dec. 348 (BIA 1982). Therefore, we uphold the Immigration Judge's denial of the respondent's request to terminate his proceedings. Accordingly, the following order will be entered.

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

FOR THE BOARD