

DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
BLOOMINGTON, MINNESOTA

File Number: A [REDACTED]

Date: March 11, 2014

In the Matter of: )  
 )  
 [REDACTED] )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

In Removal Proceedings

**Charge:** Section 212(a)(7)(A)(i)(I) – Not in possession of valid entry or identification documents

**Applications:** Asylum under section 208 of the Act; Withholding of Removal under section 241(b)(3) of the Act; relief under the Convention against Torture.

**ON BEHALF OF THE RESPONDENT:**

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**ON BEHALF OF THE DHS:**

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**WRITTEN DECISION OF THE IMMIGRATION JUDGE**

**I. Background**

Respondent is a 32-year-old male, native of Ethiopia and citizen of Eritrea. (Ex. 1).<sup>1</sup> On July 16, 2009, he entered the United States at or near Hidalgo, Texas without then possessing or presenting a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document. Id. Respondent was not then admitted or paroled after inspection by an immigration officer. Id. On September 2, 2009, the Department of Homeland Security (DHS) commenced removal proceedings against Respondent with the filing of a Notice to Appear (NTA), charging Respondent as removable pursuant to the above-captioned section of the Immigration and Nationality Act (Act or INA). (Exh. 2, pp. 5-19).

<sup>1</sup> There were some questions about whether Respondent was a citizen of Eritrea or Ethiopia since Respondent was born in Ethiopia to Eritrean parents. The Country Condition Report on Eritrea indicates that persons born abroad to at least one Eritrean parent are considered citizens. (Ex. 11 at 66). Respondent likewise claimed that he was an Eritrean citizen. See Ex. 6 at 13. The Country Condition Report on Ethiopia mentions that Ethiopian citizenship is derived from one's parents. See Ex. 11 at 33. Thus, the Court has no reason to doubt Respondent's citizenship claim, notwithstanding the lack of Eritrean identity documents in the record. Nonetheless, the Court still finds that Respondent was persecuted, and would likely face future persecution, in Eritrea or Ethiopia.

## II. Removability

Respondent appeared in Court and conceded proper service of the NTA. He admitted all of the factual allegations contained in the NTA and conceded the charge. (Exh. 1). Thus, removability is not at issue in these proceedings and the Court sustains the charge. See INA § 240(c)(2)(B). Eritrea was designated as the country of removal should such action become necessary.

## III. Evidence Presented

### a. Respondent's Testimony

The Court heard Respondent's testimony on June 30, 2011. Respondent testified about his experiences in Ethiopia and Eritrea. He spoke about his family history, his arrest and detainment, his mistreatment in those countries, as well as his journey to the United States.

### b. Competency

In Matter of M-A-M, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals (BIA) set forth a framework for Immigration Judges (IJ) to determine whether a respondent is sufficiently competent to proceed and whether the application of safeguards is warranted. Generally, an alien is presumed to be mentally competent to participate in removal proceedings. Id. at 477. The M-A-M framework is only triggered when there are indicia of mental incompetency. Id. at 484. Indicia of incompetency include observable behaviors, such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction, as well as evidence of mental illness or incompetency in the record. Id. at 479-80.

Although Respondent did not raise the issue of competency, he did testify regarding past depression, hospitalization, and using medication. See Exhibit 7. Moreover, at the master calendar hearing, Respondent was unsure of the names, or frequency of use, of any medication. Nonetheless, Respondent, through counsel, submitted a letter from his treating physician indicating that Respondent was competent to testify for his hearing despite any psychiatric condition. (Ex. 9). Moreover, during the individual merits hearing, there were no indications of incompetency. A review of Respondent's testimony shows a person who understood questions, replied in a logical manner, and was able to relate the place, person, times, and incidents that happened to him. Therefore, the Court finds that Respondent is competent.

### c. Exhibits

- Ex. 1: Notice to Appear, dated September 2, 2009 and filed September 15, 2009.
- Ex. 2: Respondent's 19-page filing in support of Motion to Change Venue, filed December 21, 2009.
- Ex. 3: Notice of Privilege of Counsel and Consequences of Knowingly Filing a Frivolous Application for Asylum.
- Ex. 4: Respondent's Written Pleading, received March 10, 2010.
- Ex. 5: Respondent's submission consisting of pages 20 to 196.
- Ex. 6: Respondent's application for asylum (Form I-589), attested to on January 13, 2011.

- Ex. 7: Respondent's medical records concerning mental health diagnosis.
- Ex. 8: Respondent's submission of character statements.
- Ex. 9: Respondent's medical documentation.
- Ex. 10: DHS' July 1, 2011 exhibit regarding country conditions.
- Ex. 11: Respondent's submitted country information.

#### IV. Asylum

To establish eligibility for a grant of asylum, an applicant must meet the definition of a "refugee," defined as an individual who is unwilling or unable to return to his country of nationality because of past persecution or because he has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(a).

If the applicant can establish that he suffered past persecution, then he is entitled to a rebuttable presumption that his fear of future persecution is "well-founded" and so should be granted asylum. 8 C.F.R. § 1208.13(b)(1). The government can rebut this presumption if a preponderance of the evidence shows either (1) that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" in his native country or (2) that he "could avoid persecution by relocating to another part" of the country and that "it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i)(A)-(B), (b)(1)(ii).

If an applicant attempts to establish a well-founded fear of future persecution without having shown past persecution then he must show that his subjective fear has an objectively reasonable basis. Cubillos v. Holder, 565 F.3d 1054, 1058 (8th Cir. 2009) (internal citations omitted). An applicant's fear is not well-founded if the applicant could avoid persecution by relocating to another part of the country and, under the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(2)(C)(ii).

##### a. Credibility

As Respondent's application was filed after May 11, 2005, the credibility provisions of the REAL ID Act govern. INA § 208(b)(1)(B) n. 65.2. Consistent with the REAL ID Act, the following factors may be considered in assessing an applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not such inaccuracy or falsehood goes to the heart of the applicant's claim. INA § 208(b)(1)(B)(iii); see also Matter of J-Y-C-, 24 I&N Dec. 260 (BIA 2007).

Although there were some issues with Respondent's testimony, the testimony was generally consistent with Respondent's prior statements and certainly consistent with country condition evidence and events at the time. The Court finds that any discrepancies may be attributable to Respondent's post-traumatic stress and fragile mental state. Thus, the Court finds Respondent credible.

**b. One-Year Bar**

An applicant for asylum must demonstrate by clear and convincing evidence that he filed his application within one year after the date of his arrival in the United States. INA § 208(a)(2)(B). Respondent submitted his application on March 10, 2010, which is within one year of his arrival on July 16, 2009. (Exh. 1; Exh. 2). Thus, Respondent's application is timely filed.

**c. Past Persecution**

As evidence of past persecution, Respondent offers his six month detainment in a container by Eritrean authorities, as well as beatings and forced labor due to the belief that he was an Ethiopian spy.

Legal Standard

The Eighth Circuit has defined past persecution as “the infliction or threat of death, torture, or injury to one's person or freedom on account of a protected characteristic.” Litvinov v. Holder, 605 F.3d 548, 553 (8th Cir. 2010) (quoting Davila-Mejia v. Mukasey, 531 F.3d 624, 628 (8th Cir. 2008)). The protected ground must be “at least one central reason” for the persecution in cases governed by the REAL ID Act. INA § 208(b)(1)(B)(i). In addition, to constitute persecution the harm must be inflicted by the government or actors the government is “unwilling or unable to control.” Cubillos, 565 F.3d at 1057 (citing Flores-Calderon v. Gonzales, 472 F.3d 1040, 1043 (8th Cir. 2007)).

“[Persecution] is an extreme concept.” Litvinov, 605 F.3d at 553 (quoting Zakirov v. Ashcroft, 384 F.3d 541, 546 (8th Cir. 2004)), see also Gutierrez-Olivares v. Mukasey, 538 F.3d 899, 903-905 (8th Cir. 2008). Persecution has been construed to mean “harm or suffering...be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.” Matter of Acosta, 19 I&N Dec. 211, 223 (BIA 1987). Brief periods of detention, ethnic conflict, or isolated violence do not necessarily constitute persecution. Krasnopivtsev v. Ashcroft, 382 F.3d 832, 839 (8th Cir. 2004); see also Al Tawm v. Ashcroft, 363 F.3d 740, 743 (8th Cir. 2004) (noting that the mere presence of some physical harm or brief detention (two incidents of detention that occurred four years apart and lasted only a few hours) do not necessarily constitute persecution); Feleke v. INS, 118 F.3d 594, 598 (8th Cir. 1997) (holding that political unrest and ethnic conflict do not compel a finding of persecution); Eusebio v. Ashcroft, 361 F.3d 1088, 1091 (8th Cir. 2004) (“Minor beatings and brief detentions, even detentions lasting two or three days, do not amount to political persecution, even if government officials are motivated by political animus”).

Membership in a Particular Social Group

Respondent claims to have suffered past persecution in Eritrea on account of his membership in a particular social group. See Ex. 6 at 6 (Eritreans born in Ethiopia who do not associate with the Eritrean language or culture). A particular social group requires members have an immutable characteristic. Matter of W-G-R-, 26 I. & N. Dec. 208, 212 (BIA 2014) (citing Matter of Acosta,

19 I&N Dec. 211, 233 (BIA 1985)). The group also must be particular and socially distinct. Matter of W-G-R-, 26 I. & N. Dec. at 212. An immutable characteristic is one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." Id. (quoting Matter of Acosta, 19 I&N Dec. at 233). Social distinction is not determined by the persecutor's perception but "exists where the relevant society perceives, considers, or recognizes the group as a distinct social group." Matter of W-G-R-, 26 I. & N. Dec. at 217-18. Nor does social distinction require "ocular" visibility. Id. at 216. Particularity requires that the group is distinct enough that it "would be recognized, in the society in question, as a discrete class of persons." Matter of W-G-R-, 26 I. & N. Dec. at 214 (quoting Matter of S-E-G-, 24 I&N Dec. 579, 584 (BIA 2008)). This particularity inquiry may require looking into the culture and society of Respondent's home country to determine if the class is discrete and not amorphous. Matter of W-G-R-, 26 I. & N. Dec. at 214.

The Court finds that Respondent suffered persecution on account of his status, albeit mistaken, as an Ethiopian spy and/or his imputed Ethiopian nationality. Respondent was detained for 6 months on suspicion of being a spy because he was born in Ethiopia and had limited Tigrinyan language abilities. See Exhibit 6 at 5. He was placed in a shipping container and held in extremely hot conditions.<sup>2</sup> See Exhibit 6 at 16. Respondent was beaten at least twice daily. Id. He was also interrogated, threatened with guns, and slapped by Eritrean military interrogators. Id. Respondent claimed that he developed his mental health problems during this confinement. Id. Moreover, Respondent was forced to participate in hard labor after authorities transported him via a military truck to work on a pipeline. The Court finds that the treatment Respondent suffered while detained at the hands of government officials constitutes "an infliction or threat of death, torture, or injury to one's person or freedom." Litvinov, 605 F.3d at 548. Respondent's detainment was long and his mistreatment was severe. Therefore, the Court finds that these experiences rise to the level of persecution.

#### d. Well-Founded Fear of Future Persecution

As Respondent has satisfied his burden of showing that he suffered past persecution on account of his suspected status as a spy for Ethiopia and/or mistaken nationality, he is entitled to a presumption of a well-founded fear of future persecution on the basis of his claim. 8 C.F.R. § 1208.13(b)(1). The burden shifts to the DHS to establish by a preponderance of the evidence that there is a fundamental change in circumstances or that Respondent could avoid the persecution by relocating to a different part of the country and it would be reasonable to expect Respondent to do so. 8 C.F.R. §§ 1208.13(b)(1)(i)(A), (B), (ii). In cases in which the persecutor is a government actor, there is a rebuttable presumption that internal relocation is not reasonable. 8 C.F.R. § 1208.13(b)(3)(ii).

The Court finds that the conditions in Eritrea have not sufficiently changed. The Country Condition Report indicates that Eritrea is an authoritarian regime with consistent and persistent reports of serious human rights violations, including harsh and life-threatening prison conditions

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<sup>2</sup> The Country Condition Report specifically mentions exposure to extreme heat from confinement in crowded and unventilated metal shipping containers as a form of torture used in Eritrea. See Exhibit 11 at 45. This evidence supports the credibility of Respondent's claim that he was indeed detained in a container.

that include torture and incommunicado detention, as well as forced labor of indefinite duration. (Ex. 11 at 43). The Report further indicates that there is arbitrary arrest and detention of national service evaders and their family members, as well as detention of political prisoners and detainees. Id. Finally, the Report indicates that impunity is the norm, and that the government sanctions the torture and abuse methods used against dissenters, including persons attempting to flee the country without travel documents. See Exhibit 11 at 45. Thus, the likelihood of persecution upon return is increased by the fact that Respondent fled Eritrea without permission or travel documents.

Moreover, Respondent claims a fear of return because he was born in Ethiopia to Eritrean parents and has limited proficiency in Tigrinyan, the native language in Eritrea. While the Country Condition Report indicates that Eritrea generally considered persons of Eritrean descent to be citizens (Ex. 11 at 61), Respondent was previously detained because Eritrean authorities thought that was an Ethiopian spy. See Exhibit 6 at 5. Accordingly, Respondent could face increased risk of persecution in Eritrea if he were perceived as an Ethiopian or as an Ethiopian sympathizer. The Country Condition Report demonstrates the hardship and persecution faced by Ethiopians in Eritrea based on nationality, including: Ethiopians not being granted asylum in Eritrea (Ex. 11 at 61), Ethiopians being systematically rounded up until authorities verified they were not indigent or they paid a fine (Id. at 62), Ethiopians being discriminated against and not receiving food coupons (Id. at 73), and Ethiopians being subjected to governmental and societal abuse, including arbitrary arrest and being asked to pay bribes to be released (Id. at 69).

DHS in turn argues that Respondent could return to Ethiopia. In support of this argument, DHS cited the Department of State's 2010 Human Rights Report on Ethiopia, which stated that the Ethiopian government enacted a policy that allowed exiled Eritreans living in Ethiopia to become permanent legal residents with full entitlement to public services. See Ex. 10 at 40, 42; see also Ex. 10 at 66 (report mentioning the halt of deportations from Ethiopia of persons of Eritrean origin). Assuming that such relocation is even possible given the history of Respondent and his family in Ethiopia, the Court is not persuaded by this argument and does not believe that such relocation would be reasonable. See Exhibit 11 at 5-6 (mentioning arrests of opposition political figures and impunity in Ethiopia). In addition to Eritrea, the Court finds that Respondent would likely be persecuted if returned to Ethiopia based on his family history and/or imputed political opinion. Respondent's father supported independence-related groups and voted in the Eritrean independence referendum. Respondent's parents and siblings were subsequently deported from Ethiopia to Eritrea. See Exhibit 8 at 6, 8 (stating that Respondent's parents were sent to Eritrea). Respondent himself was deported after being detained in solitary confinement by the police for one month, as well as being sent to a prison camp for 2.5 years of hard labor and abuse.

Therefore, Respondent has established that he was persecuted in the past. He has also established a well-founded fear of future persecution and that the threat exists throughout Eritrea. Therefore, the Court will grant Respondent's application for asylum.<sup>3</sup>

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<sup>3</sup> The Court further notes it would still grant Respondent humanitarian asylum, even assuming that conditions have improved in Eritrea. See 8 C.F.R. § 1208.13(b)(1)(iii); see also Matter of Chen, 20 I&N Dec. 16, 21 (BIA 1989). Respondent suffered severe and lasting persecution based on his detainment for six months under extreme conditions in a shipping container, continuous interrogations, threats, and beatings, as well as forced hard labor.

**V. Withholding of Removal**

The Court does not reach the issue of withholding of removal under section 241(b)(3) of the Act because the Court is granting Respondent's application for asylum under section 208 of the Act.

**VI. Relief under the Convention Against Torture**

The Court does not reach the issue of relief under Article III of the Torture Convention because the Court is granting Respondent's application for asylum under section 208 of the Act.

**ORDER**

**IT IS HEREBY ORDERED** that Respondent's application for asylum under § 208 of the Act be **GRANTED**.

Date: March 11, 2014

  
Susan Castro  
Immigration Judge

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Respondent stated that this past persecution caused his depression and fragile mental state, for which he received treatment. See Abrha v. Gonzales, 433 F.3d 1072, 1076 (8th Cir. 2006) (citations omitted). Based on Respondent's psychological condition and the continued civil strife in Eritrea, if returned, there is a good chance that Respondent's condition could again deteriorate or that he could otherwise suffer extreme hardship.