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U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted] - Chicago, IL

Date: APR -7 2010

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Amanda N. Raad, Esquire

ON BEHALF OF DHS: Robin J. Rosche
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

In a decision dated March 13, 2009, an Immigration Judge found the respondent removable as charged and granted her application for asylum. Specifically, the Immigration Judge found that the respondent did not engage in terrorist activity because of her affiliation with the Mujahedin-e Khalq (MEK) and, therefore, was not barred from relief. *See* section 208(b)(2)(A)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(v). After spending 4 years in prison where she was beaten and tortured, the Immigration Judge also determined that the respondent had established past persecution and that the presumption of a well-founded fear of future persecution had not been rebutted by the Department of Homeland Security (DHS). The DHS's appeal will be dismissed.

The Immigration Judge discussed the facts of this case extensively and, therefore, we will provide only a brief summary here. The respondent, a native and citizen of Iran, joined the MEK while in school because it was in favor of free speech and democracy (Tr. at 58-60; I.J. at 4). She had minimal involvement in the group and mainly participated by distributing flyers and newspapers (Tr. at 60-62, 66; I.J. at 5). When the respondent was 15, she was arrested at home by the Iranian police (Tr. at 70-77; I.J. at 6-7). She was beaten and tortured and held in prison for 4 years (Tr. at 75-76; I.J. at 6-8). After her release, the respondent was not involved in the MEK but was required to report to the police on a regular basis and sign a paper stating she would not return to the organization (Tr. at 85-87; I.J. at 8). The respondent finished her schooling by taking evening classes and eventually worked in her uncle's travel agency; she left Iran 16 years after being released from prison (Tr. at 90-92).

The first issue raised by the DHS on appeal is the respondent's credibility (DHS's Br. at 15-17). The Immigration Judge found the respondent's testimony credible in that it was "sufficiently detailed

and consistent" (I.J. at 14, 17-20), particularly in light of background materials discussing country conditions and other corroborating evidence of record (I.J. at 17, 20). There were some credibility issues which were raised by the DHS at the hearing, but the Immigration Judge credited the respondent's explanations for them and also found they did not go to the heart of the respondent's claim (I.J. at 18-20). The one exception was the respondent's testimony that she was raped while in prison. The Immigration Judge did not find this credible because the respondent raised her rape only during the hearing and could not adequately explain why she did not disclose the information in her asylum application or when being interviewed by the asylum officer (I.J. at 19 n.6). Nevertheless, he did not find that this warranted a negative credibility finding because it did not go to the heart of the respondent's political asylum claim. *See San Kai Kwok v. Gonzales*, 455 F.3d 766, 769 (7th Cir. 2006) (stating that adverse credibility determinations must focus on issues relating to the heart of an alien's asylum claim).

Aside from raising the issue of the respondent's rape again on appeal as a basis for finding clear error in the Immigration Judge's positive credibility determination, the DHS argues that there were other credibility issues not adequately addressed – conflicting statements between the respondent's application for relief and when she was interviewed by the asylum officer as well as her testimony about her involvement in the MEK; according to the DHS, the respondent should have presented additional corroboration from her family members, a source of corroboration not adequately considered by the Immigration Judge (DHS's Br. at 15-17).

The respondent points out that, in contrast to the DHS's assertion regarding her rape as an afterthought, she did disclose the rape during a psychiatric evaluation prior to trial (Respondent's Br. at 8). She also asserts that her testimony about her involvement in the MEK has been consistent all along and that the Immigration Judge correctly viewed any perceived admission on her part of continuing involvement with the group as an error on her application and also the result of poor word choice (Respondent's Br. at 8-9).

While not bound by amendments under the REAL ID Act requiring that the totality of the circumstances be assessed (because the respondent's application for asylum was filed prior to 2005), the Immigration Judge appears to have engaged in such an assessment of the respondent's case. He viewed all of the evidence presented and found the respondent credible with regard to the majority of her claim. Any credibility issues raised were adequately explained or did not lead him to doubt the respondent's veracity. As such, we cannot find clear error in the Immigration Judge's determination and his decision finding the respondent credible will be affirmed.

The DHS also asserts error in the Immigration Judge's finding that the respondent is not barred from asylum for having provided material support to a terrorist organization (DHS's Br. at 17-26). The Immigration Judge noted that the MEK was designated as a terrorist organization by the Department of State in 1997 (I.J. at 15 n.3). It is also fairly clear that the respondent, who handed out flyers and newspapers promoting MEK's ideas, provided material support. *See Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006) (noting that there does not appear to be a limitation on the definition of the term "material support").

However, citing case law discussing whether aliens have had knowledge of terrorist activity, the Immigration Judge relied on the respondent's testimony about her belief that the MEK would effect positive political change in Iran and her minimal support of its cause to find that the respondent did not know or have reason to know the MEK was a terrorist organization (I.J. at 15-16 (citing *Hussain v. Mukasey*, 518 F.3d 534 (7th Cir. 2008); *Daneshvar v. Ashcroft*, 355 F.3d 615 (6th Cir. 2004))).

The DHS argues that the Immigration Judge improperly relied exclusively on the respondent's age (15) to show she was not aware of the MEK's violent acts (DHS's Br. at 24-25). In this regard, it also asserts that *Daneshvar, supra*, is not binding precedent and that the case can be distinguished (DHS's Br. at 24-25). We do not agree. First, the Immigration Judge did not rely solely on the respondent's age so much as the overall picture of what occurred when the respondent was a youth, including her short affiliation with the MEK, the fact that, when she joined, she was a student who was interested in effecting social change, and that the type of information she and many students were given about the MEK and the Iranian government was not always accurate (I.J. at 15-16; *see* Respondent's Br. at 15-16). Like the Immigration Judge, we find *Daneshvar, supra,* persuasive albeit not binding. As noted by the Immigration Judge, in contrast to the alien in *Hussain, supra,* the respondent was not a high-level official in the MEK who would be privy to the goals and strategies of the group (I.J. at 15). There is no evidence to suggest she was aware of any terrorist leanings.

In addition, the respondent's involvement was limited to distributing newspapers and flyers, and the documentary evidence shows that the MEK was one of many political organizations which developed in the aftermath of the Iranian Revolution and which was opposed to the Western influence cultivated by the Shah's regime (I.J. at 16). *Daneshvar, supra*, at 619, 628. It is true, as noted by the DHS, that the respondent here did not necessarily distance herself from the MEK, as did the alien in *Daneshvar* (DHS's Br. at 25). *Id.* at 628. However, there are other parallels which are hard to ignore. These include the youth of both the respondent and Daneshvar, the similar types of participation, the lack of either alien having engaged in violent acts of terrorism, and the lack of evidence that the respondent knew that MEK was involved in planning and carrying out terrorist activities. *Id.*

Based on the evidence, we cannot find error in the Immigration Judge's conclusion that the respondent did not know that she was involved in a terrorist organization. Because of the brutality of the Shah's regime in Iran at that time, the court in *Daneshvar* stated that it "would be hard-pressed to classify any minor who sold newspapers for an organization that supported an armed revolt against a tyrannical monarch as a terrorist." *Id.* Furthermore, "[t]o impute such political sophistication to a teenager that apparently even the U.S. Congress failed to achieve,[1] in our minds, would amount to a manifest injustice." *Id.*

[1] The court refers to the fact that a number of United States Congressmen apparently opposed the designation of the MEK as terrorist at that time. *Id.* n.14.

The DHS asserts that the Immigration Judge applied the wrong standard in assessing the evidence because he only required the respondent to establish by a "preponderance of the evidence" that she did not know the MEK was a terrorist organization (DHS's Br. at 26; I.J. at 14). While this is the burden of proof generally with regard to applications for relief, the DHS points out that section 212(a)(3)(B)(iv)(VI)(dd) of the Act, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd), requires that alien alleging no knowledge of terrorism to show this by "clear and convincing evidence" (DHS's Br. at 26).

We cannot find evidence in the Immigration Judge's decision to support this argument. Although the Immigration Judge mistakenly refers to the wrong standard initially, he quotes the statute's language with the correct standard immediately thereafter (I.J. at 14) and then concludes that the respondent has met her burden that she could not reasonably have known that the MEK was a terrorist organization (I.J. at 15). As noted by the respondent, the evidence relied on by the Immigration Judge supports a determination that the respondent satisfied the clear and convincing standard and, therefore, any mistaken reference is harmless.

Finally, we are not persuaded by the DHS's arguments on appeal that the Immigration Judge erred in finding that the respondent has established a well-founded fear of persecution if returned to Iran (DHS's Br. at 27-29). The Immigration Judge found past persecution based on the torture she endured while detained; therefore, she was entitled to a presumption of future persecution (I.J. at 20-21). 8 C.F.R. § 1208.13(b)(1) (2009). In finding no changed country conditions which would rebut the presumption, the Immigration Judge distinguished *Daneshvar, supra*, stating that although that case found changed country conditions in Iran, the respondent here showed continued government surveillance and interest in her until the day she left Iran (I.J. at 22). Country condition reports corroborated the respondent's claim that the Iranian government continues to engage in human rights violations, particularly against groups like the MEK which are opposed to the government (I.J. at 22-23). The Immigration Judge acknowledged a recent country report's indication that the Iranian government has offered amnesty to members of the MEK who are outside of Iran, but rejected that as sufficient evidence to rebut the presumption of a well-founded fear (I.J. at 23). He stated that this "is the only evidence in a lengthy record of a change of policy toward MEK members" (I.J. at 23).

The DHS argues that the Immigration Judge ignores the fact that the respondent lived in Iran for 16 years after her release from prison and was eventually able to find employment and was required to report less and less often to police over the years; she was also able to obtain a passport and travel freely and her family has not been harmed since she left, all of which negates a fear of persecution according to the DHS (DHS's Br. at 28-29).

While the respondent may have been given more freedom than when she was imprisoned, and even targeted less as the years went on, we cannot conclude that the Immigration Judge erred in finding that the DHS did not meet its burden of rebutting the presumption of a well-founded fear of future persecution here. Having to report to the police on a regular basis is not living "without interference," as asserted by the DHS (DHS's Br. at 28). We also agree with the Immigration Judge that because she continued to be singled out by the Iranian government, the respondent's case is

distinguishable from *Daneshvar, supra* (I.J. at 22). Finally, the country conditions information is sufficient by itself to establish that the respondent's fear of persecution is not rebutted. Accordingly, we find that the respondent has met her burden of establishing eligibility for asylum.[2]

ORDER: The Department of Homeland Security's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

[2] Although the DHS asserts that the Immigration Judge should have denied the respondent's claim for asylum as a matter of discretion because of her engagement in terrorist activity, it does not address this issue in its brief on appeal. In light of our decision affirming the Immigration Judge's determination that the respondent is not barred from relief for engaging in terrorist activity, we find no basis to remand for further analysis of whether the respondent merits relief as a matter of discretion.