IMMIGRATION COURT

(b) (6)

In the Matter of

(b) (6)

Respondent

Case No.: (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 21 May 2014. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to MEXICO or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to MEXICO.

Respondent's application for:

[X] Asylum was (X)granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: May 21, 2014

JOHN W. DAVIS
Immigration Judge

Appeal: Waived/Reserved Appeal Due By:

File: (b) (6)

Date: JUL 2 9 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sharon A. Healey, Esquire

ON BEHALF OF DHS: Cathy A. Auble
Senior Attorney

APPLICATION: Reconsider

The respondent, a native and citizen of Mauritania, has appealed the Immigration Judge's decision dated December 8, 2011 (I.J.#2), denying the respondent's motion to reconsider the Immigration Judge's decision dated November 3, 2011 (I.J.#1). The appeal will be sustained, the respondent will be found eligible for asylum, and the record will be remanded for updated background and identity checks.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's asylum application was filed prior to enactment of the REAL ID Act of 2005, and thus is not governed by its provisions. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

On March 29, 2004, the Immigration Judge denied the respondent's application for asylum based on an adverse credibility finding. On December 2, 2005, we dismissed the respondent's appeal. Subsequently, the United States Court of Appeal for the (b) (6) reversed the adverse credibility finding, found the respondent had been subject to past persecution, and remanded the record for further proceedings. *See* (b) (6) *v. Gonzales*, (b) (6) (b) (6). We, in turn, returned the record to the Immigration Judge. On June 11, 2009, the Immigration Judge granted the respondent asylum based on past persecution, and the Department of Homeland Security (DHS) filed an appeal. On June 7, 2011, we remanded the record for the Immigration Judge to fully address whether there has been a fundamental change in country conditions such that the respondent no longer has a well-founded fear of persecution.

On November 3, 2011, the Immigration Judge found that country conditions had changed to an extent which rebutted any presumption of a well-founded fear of persecution, and denied asylum. He concluded that the respondent did not warrant a grant of humanitarian asylum. The respondent subsequently filed a motion to reconsider, asserting, inter alia, that the Immigration Judge did not adequately assess his claim for humanitarian asylum. In a summary order dated December 8, 2011, the Immigration Judge denied the motion to reconsider. The respondent filed this appeal.

The Immigration Judge's denial of the motion to reconsider cannot be upheld, as it refers to a motion to reopen and relies solely on his prior order. Insofar as the respondent asserts that the Immigration Judge did not adequately assess the issue of humanitarian asylum in the first instance, we agree.[1] We find the respondent eligible for humanitarian asylum as he has demonstrated compelling reasons for being unable or unwilling to return to his country due to the severity of the past persecution. *See* 8 C.F.R. § 1208.13(b)(1)(iii)(A).

The respondent was persecuted by the government of Mauritania because he was Afro-Mauritanian and of Fulani ethnicity (Exh. 2; I.J.#1 at 8). In September 1989, when he was 13 years old, the police invaded his family's home, detained the family, stripped them of their Mauritanian identity documents, and killed the respondent's father in the family's presence. The respondent was then beaten with a stick, and the family was brought down to the river and forcibly deported to Senegal. The respondent and his remaining family entered a refugee camp, where the respondent's mother later died. The respondent spent 7 years there before coming to the United States (Tr. at 16-22; I.J.#1 at 3). The respondent has not returned to Mauritania since 1989, and has no family there.

Under the particular circumstances of this case, we find the respondent has demonstrated that a grant of humanitarian asylum is warranted under 8 C.F.R. § 1208.13(b)(1)(iii)(A); *see generally Vicente-Elias v. Mukasey,* 532 F.3d 1086, 1092-93 (10th Cir. 2008); *Matter of S-A-K- & H-A-H-,* 24 I&N Dec. 464 (BIA 2008) (humanitarian asylum granted to victims of female genital mutilation which caused permanent physical pain and discomfort); *Matter of Chen,* 20 I&N Dec. 16 (BIA 1989) (humanitarian asylum granted where applicant's suffering lasted from age 8 years until adulthood and applicant demonstrated permanent physical and emotional scars). We consider, among other things, the respondent's young age at the time of the events in question, the fact he saw his father murdered, and his long displacement from his country. We also find no adverse factors indicating that a favorable exercise of discretion is not generally warranted. The record will be remanded for the completion of background and identity checks. The following orders are entered.

ORDER: The appeal is sustained, and the Immigration Judge's prior decisions are vacated insofar as they denied asylum on a humanitarian basis.

FURTHER ORDER: The respondent is eligible for asylum.

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).

Ellen Rubowitz
FOR THE BOARD

[1] We do not disturb the Immigration Judge's finding that the DHS rebutted the presumption that the respondent has a well-founded fear of persecution due to a fundamental change in country conditions in Mauritania (I.J.#1 at 8). *See* 8 C.F.R. § 1208.13(b)(1)(i)(A).

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

In the Matter of:
(b) (6)

RESPONDENT

Case No.: (b) (6)

Docket: DENVER, COLORADO

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of RESPONDENT

( ) Motion to Reconsider an Immigration Judge's decision

(✓) Motion to Reopen proceedings

filed in the above entitled matter, it is HEREBY ORDERED that the motion

( ) Be Granted

(✓) Be Denied for reasons indicated in the attached decision of 11-3-11

DAVID J. CORDOVA
Immigration Judge
Date: 12-6-11

Appeal: NO APPEAL (A/I/B)
Appeal Due By: Dec 5, 2011

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] DHS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Form EOIR 2 - 2T

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

In The Matter Of:	)	**Date: November 3, 2011**
(b) (6)	)	IN REMOVAL PROCEEDINGS
Respondent.	)	
File No.: (b) (6)	)	

CHARGE: Section 237(a)(1)(A) of the Immigration and Nationality Act ("INA" or "the Act"), as amended, in that at the time of entry or adjustment of status, the alien was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: alien immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card or other valid entry document not required by the Act, or who are not in possession of a valid unexpired passport, or other suitable travel document, or identity and nationality document if such document is required by regulations issued by the Attorney General under section 212(a)(7)(A)(i)(I) of the Act.

APPLICATIONS: Asylum Pursuant to INA § 208; Withholding of Removal Pursuant to INA § 241(b)(3); Relief Under the United Nations Convention Against Torture ("CAT") Pursuant to 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18.

ON BEHALF OF RESPONDENT:

Sharon A. Healey, Esq.
(b) (6)

ON BEHALF OF SERVICE:

Assistant Chief Counsel
U.S. Department of Homeland Security
(b) (6)

WRITTEN DECISION

I. Facts and Procedural History

The respondent (b) (6) ("Respondent"), is a male, native and citizen of Mauritania. (Ex. 1, Notice to Appear ["NTA"], 03/01/02; Form I-589, Application for Asylum and Withholding of Removal ["I-589"], 01/28/02.) Respondent was admitted to the United States on March 3, 2001 at New York, New York. (Ex. 1, NTA.) However, at that time, he did

not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document as required by the Act. (*Id.*) Respondent applied for asylum with the United States Citizenship and Immigration Services ("USCIS") on January 28, 2002 and the case was referred to this Court. (Assessment to Refer, 02/28/02.) On March 1, 2002, based on the foregoing allegations, the Department of Homeland Security ("DHS") issued an NTA, charging Respondent as removable from the United States pursuant to section 237(a)(1)(A) of the Act as an alien immigrant not in possession of a valid entry document. (Ex. 1, NTA.)

On May 1, 2002, Respondent appeared and admitted the factual allegations asserted against him and conceded the charge of removability. (Transcript, 05/01/02.) After several re-sets, Respondent testified as to the merits of his asylum claim on January 23, 2004 and March 29, 2004. (Transcript, 01/23/04 and 03/29/04.) After considering the testimony and documentary submissions, the Court determined that Respondent was not sufficiently credible and had not met his burden to establish that he had either suffered past persecution or held an objective well-founded fear of persecution on account of a protected ground. (Oral Decision, 03/29/04.) As such, this Court denied Respondent's request for asylum. (*Id.*) Upon appeal, the Board of Immigration Appeals ("BIA" or "the Board") dismissed, agreeing that Respondent "failed to carry his burden of proof to demonstrate his actual identity and did not establish either past persecution or a well-founded fear of future persecution that would justify a grant of asylum." (BIA Decision 1, 12/02/05.)

Respondent appealed the 2005 Board decision to the (b) (6) Court of Appeals. *See* (b) (6) *v. Gonzales*, (b) (6) (holding that the facts presented before the IJ did not support an adverse credibility finding). Thereafter, the record was remanded back to the Board, who subsequently sent the record back to this Court for further proceedings to "consider [Respondent's] applications and resolve any factual discrepancies and to determine whether there have been any material changes in country conditions." (BIA Decision 2, 10/09/07.)

The Court re-set the matter to consider any changed country conditions and rendered an oral decision on June 11, 2009 granting asylum. (Oral Decision, 06/11/09.) DHS appealed to the Board, which sustained the appeal because this Court failed to make specific findings unique to this Respondent. (BIA Decision 3, 06/07/11.) This Court held a brief status hearing on September 7, 2011 where it reserved written decision and allowed the parties an opportunity to re-brief changed country conditions, if they desired. (Digital Audio Recording ["DAR"], 09/07/11.) Neither party submitted new documentation, and as such, the Court's decision pursuant to the 2011 Board remand follows below.

II. Evidence

A. Documentary Evidence

The Court carefully considered the following documents contained in Respondent's record of proceedings, regardless of whether such exhibits are specifically mentioned in this decision, including: Respondent's original I-589 submitted in 2002; Respondent's Pre-Hearing Brief and Exhibits A-M submitted in January 2004; DHS submission of the asylum administrative record in February 2004; Respondent's second Pre-Hearing Brief and Exhibits

submitted in March 2009; DHS's updated country conditions exhibit submitted in May 2009; and all appeal briefs to the Board contained in the record of proceeding.

B. Summary of Testimonial Evidence

On January 23, 2004, Respondent testified as to the merits of his asylum claim. (Transcript, 01/23/04.) Respondent testified that he was born in Kaedi, Mauritania and lived there until he and his family were forcibly removed in 1989. (*Id.*) Specifically, Respondent testified as to an incident on September 20, 1989, where a number of officers entered his home and demanded proof of Mauritanian citizenship from his father. (*Id.*) Although his father produced some documents, Respondent indicated that the officers destroyed them. (*Id.*) Ultimately, an alteration ensued and Respondent testified that he observed the officers shoot and kill his father. (*Id.*)

Respondent stated that after his father was killed, the officers beat him with a stick. (*Id.*) The entire family – Respondent, his mother, and his four siblings – were taken to the police station where they spent approximately five hours detained. (*Id.*) Respondent testified that later that same day, the officers took them to the Senegal River and ordered them to cross into Senegal. (*Id.*) Respondent and his family went to the Matam refugee camp in Senegal, where Respondent remained until 1996. (*Id.*) Respondent's mother died at the camp in 1994 and he believes that his siblings still remain there. (*Id.*)

In 1996, Respondent went to Dakar, Senegal for a job to support his siblings. (*Id.*) However, because he had no identification documents, Respondent stated that he was unable to obtain a bank account or travel documentation. (*Id.*) Respondent indicated on cross-examination that he sold his refugee card in 1996 for money to support After a number of years, Respondent paid (b) (6) about 700 U.S. dollars for the use of a passport to come to the United States. (*Id.*) When he arrived, Respondent testified that he stayed with (b) (6) in New York and later moved to Colorado to stay with (b) (6) relative. (*Id.*)

III. Statements of Law

A. Credibility Determination

The respondent's testimony is of the utmost importance is proving an asylum claim because of the difficulty an individual faces in procuring documentary evidence after having fled a country. *Wiransane v. Ashcroft*, 366 F.3d 889, 897 (10th Cir. 2004). Thus, an asylum applicant's testimony, standing alone, may be sufficient to carry the burden of proof if it is deemed credible. *Id.*; 8 C.F.R. § 1208.13(a) (2011) ("[t]he testimony of the applicant, if credible, may be sufficient to carry the burden of proof without corroboration"). Therefore, an Immigration Judge ("IJ") must give "specific, cogent" reasons if he is to make an adverse credibility finding. *Wiransane*, 366 F.3d at 897-98.

Generally, the Board will defer to an IJ's credibility analysis. *Matter of S-A-*, 22 I&N Dec. 1328, 1331. The Board articulated a tripartite test to determine if an IJ's credibility finding should be sustained. *Id.* The Board stated that it defers to an IJ's adverse credibility finding

based on inconsistencies and omissions regarding events *central to an alien's claim* where a review of the record reveals: (1) the discrepancies and omissions described by the IJ are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions. *Id.* (citing *Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998)). The Board also noted the most pertinent discrepancies exist between the respondent's testimony and the I-589 or the testimony on direct-examination and the testimony on cross-examination. *Id.* at 1331-32.

B. Asylum Pursuant to INA § 208

1. Eligibility for Asylum

Asylum is a discretionary form of relief available to aliens physically present or arriving in the United States who apply for relief in accordance with section 208 of the Act or section 235(b) of the Act. INA § 208(a)(1); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). The Attorney General may grant asylum to an applicant who establishes that he is a "refugee" as defined in section 101(a)(42) of the Act. INA § 208(b)(1)(A).

i. Burden of Proof

The burden of proof is on the alien to establish that he meets the definition of "refugee" as defined in section 101(a)(42). INA § 208(b)(1)(B)(i); 8 C.F.R. § 1208.13(a). This means that the applicant has to demonstrate that he is outside of his country of nationality and is unable or unwilling to return to, or unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42). The applicant does not have to demonstrate the exact motive for the persecution where different reasons for action are possible. *Matter of S-P-*, 21 I&N Dec. 486, 494-95 (BIA 1996). In a case where the persecutor has mixed motives, the applicant must show that at least one of the motives was or would be related to an actual or imputed protected ground. *Id.*; *see also Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211-12 (BIA 2007) (citing *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988)). Asylum is a discretionary form of relief and it can be denied to an applicant who is otherwise eligible. *See Ismaiel v. Mukasey*, 516 F.3d 1198, 1204 (10th Cir. 2008).

The trier of fact may require the applicant to supply corroborating evidence, even if the applicant's testimony is found to be credible, and the applicant must provide such evidence unless he does not have it or cannot reasonably obtain the evidence. INA § 208(b)(1)(B)(ii). The absence of corroborating evidence may lead to a finding that the alien has failed to meet his burden of proof. *Matter of S-M-J-*, 21 I&N Dec. 722, 725-26 (BIA 1997). However, this burden of proof analysis should not be confused with a credibility analysis. *Id.* at 731 ("[e]ven if an alien is found to be credible, if there is no context in which to evaluate [his] claim, [he] has failed to meet [his] burden of proof because [he] has not provided sufficient evidence of the foundation of [his] claim"). Where the Court finds significant, meaningful gaps in the record, applications will ordinarily have to be denied for failure to meet the burden of proof. *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).

ii. Timeliness

Subject to section 208(a)(2)(D), an alien is not eligible to apply for asylum unless he can demonstrate by clear and convincing evidence that he filed his asylum application within one year after the date of his last entry into the United States. INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2)(i). An application may be considered, notwithstanding the fact that it was filed more than one year after the alien's last entry into the United States, if the alien demonstrates either the existence of changed circumstances which materially affect his eligibility for asylum relief or the existence of extraordinary circumstances relating to the delay in filing an application. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)-(5).

2. Persecution

Persecution means the infliction of harm or suffering on an individual in order to punish him for possessing a belief or characteristic the persecutor seeks to overcome. *See Matter of Acosta*, 19 I& N Dec. 211, 223 (BIA 1985) (overruled on other grounds). The(b) (6) stated, "persecution requires the infliction of suffering or harm upon those who differ…in a way regarded as offensive and must entail more than just restrictions or threats to life or liberty." *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008). The(b) (6) does allow for the aggregation of harmful events when evaluating whether an applicant has suffered persecution. *Id.* at 1337-38. The persecution must be carried out either by the government or a group the government is unable or unwilling to control. *See Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005); *see also Hayrapetyan*, 534 F.3d at 1337.

Past persecution is persecution which was suffered in the past on account of one of the five protected grounds. 8 C.F.R. § 1208.13(b)(1). An applicant who has been found to have suffered past persecution is presumed to have a well-founded fear of future persecution on account of the same ground. *Id.* The presumption of future persecution can be rebutted if the government demonstrates there has been a fundamental change such that the applicant no longer has a well-founded fear of persecution, or the applicant could relocate to another part of the country to avoid future harm, and it would be reasonable to expect the applicant to do so. 8 C.F.R. §§ 1208.13(b)(1)(i)(A)-(B). Ultimately, where an applicant has demonstrated past persecution the government bears the burden of rebutting the presumption of a well-founded fear of future persecution by a preponderance of the evidence. 8 C.F.R. § 1208.13(b)(1)(ii).

In the absence of evidence of past persecution, an applicant is deemed to have a well-founded fear of future persecution if there is a "reasonable likelihood" the applicant would be persecuted upon returning to his country of nationality on account of one of the five protected grounds and is unable or unwilling to avail himself of the protections of that country based upon such fear. 8 C.F.R. § 1208.13(b)(2). The applicant need not show it is more likely than not that he will be persecuted upon being returned to his country of nationality. *Cardoza-Fonseca*, 480 U.S. at 449. Rather, it is enough for an applicant to show that persecution is a reasonable possibility. *Id.* at 440 ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").

(b) (6)

Establishing a well-founded fear requires both a subjective and objecting showing. *Yan v. Gonzales*, 438 F.3d 1249, 1251 (10th Cir. 2006); *Sadeghi v. INS*, 40 F.3d 1139, 1142 (10th Cir. 1994); *see also Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (stating the reasonable person standard is used in well-founded fear determinations). The subjective element requires that the applicant's fear be genuinely held. *Yan*, 438 F.3d at 1251. The objective component requires that the applicant's fear be objectively reasonable. *Id.* The objective component is proven through "credible, direct, and specific" evidence that shows the reasonableness of the fear. *Id.* Specifically, the applicant must possess a belief or characteristic a persecutor seeks to overcome by means of punishment of some sort; he must demonstrate the persecutor is already aware, or could easily become aware, that he possesses the belief or characteristic; he must show the persecutor has the capability to punish his; and he must prove the persecutor has the inclination to punish his. *Mogharrabi*, 19 I&N Dec. at 446.

3. "On Account Of"

An applicant must demonstrate that he was or will be persecuted "on account of" race, religion, nationality, membership in a particular social group, or political opinion to meet the definition of refugee pursuant to INA § 101(a)(42). One of these five protected grounds must be "at least one central reason" for the persecution. INA § 208(b)(1)(B)(i); *see also J-B-N- & S-M-*, 24 I&N Dec. at 211-12. However, an applicant is not required to prove that the persecutor acted with the punitive intent to harm. *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

C. Withholding of Removal Pursuant to INA § 241(b)(3)

The Attorney General may not remove an alien to a country if he decides that the alien's life or freedom would be threatened in the country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A). In determining whether the alien has established the requisite elements for relief under section 241(b)(3), the trier of fact shall utilize sections 208(b)(1)(B)(ii) and (iii) of the Act to determine whether the alien is credible and has met his burden of proof. INA § 241(b)(3)(C); *see also Matter of S-B-*, 24 I&N Dec. 42, 43 (BIA 2006).

D. CAT Pursuant to 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18

To qualify for relief under 8 C.F.R. § 1208.16(c), an alien has the burden of demonstrating that it is more likely than not that he will be tortured if removed to the proposed country of removal. In assessing whether the alien has met his burden, all relevant evidence shall be considered including, but not limited to: (A) evidence of past torture inflicted upon the applicant; (B) evidence that the applicant could relocate to a part of the country where he will not likely be tortured; (C) evidence of gross, flagrant, or mass violations of human rights within the proposed country of removal; and (D) other relevant information regarding country conditions in the proposed country of removal. 8 C.F.R. § 1208.16(c)(3). If an applicant meets his burden under 8 C.F.R. § 1208.16(c), he shall be granted deferral of removal and shall not be removed to the country where it is more likely than not he will be tortured. 8 C.F.R. § 1208.17(a).

The term "torture" is defined as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon a person for such purposes as obtaining from him information or a confession, punishing him for an act he has committed, or is suspected of having committed, or intimidating or coercing him for any reasons based on discrimination or any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 1208.18(a)(1).

IV. Discussion and Analysis

A. Credibility Determination

Respondent filed his application for relief on January 28, 2002. (I-589.) As a result, he is not subject to the credibility provisions of the REAL ID Act. *See J-Y-C-*, 24 I&N Dec. at 262; *see also S-B-*, 24 I&N Dec. at 43. Although this Court previously expressed its concerns with Respondent's credibility, specifically pertaining to his birth certificate, the Court notes that throughout these proceedings Respondent's testimony was largely consistent with the asylum application and his statements to the asylum officer in his asylum interview. (Transcript, 01/23/04 and 03/29/04; I-589; Assessment to Refer, 02/28/02.) While the asylum officer ultimately found Respondent not credible due to material inconsistencies in his application and interview, the Court notes that the referral focused on circumstances surrounding Respondent's birth certificate. (Assessment to Refer, 02/28/02.) Specifically, the concern was that Respondent testified that many family identification documents were destroyed in 1989 when they were forced into exile in Senegal. (*Id.*) However, the Court notes that, in testimony, Respondent credibly explained that some documents, including his birth certificate, were saved. (Transcript, 01/23/04 and 03/29/04.) Moreover, he reiterated that when the officers came to his home, they specifically asked for his father's documents and destroyed those. (*Id.*) It was unclear from testimony, therefore, whether any other family members' documents were produced at that time. (*Id.*) Further, Respondent submitted a number of country condition evidence that corroborates his claim. Consequently, this Court finds that Respondent and his witnesses are credible as to all matters.

C. Respondent Has Not Established Burden For Asylum

1. Respondent Timely Filed for Asylum

Respondent entered the United States on March 3, 2001 and subsequently filed his asylum application on January 28, 2002. (Ex. 1, NTA; I-589.) As such, this Court finds that Respondent has filed for asylum within one year of his last entry. INA § 208(a)(2)(B).

2. Respondent Suffered Past Persecution On Account of a Protected Ground

Respondent asserts that he suffered past persecution; specifically, that he and his family were detained, forcibly stripped of their Mauritanian identity documents, and forced to emigrate to Senegal. (Transcript, 01/23/04 and 03/29/04.) Moreover, Respondent alleged that he observed his father's violent death. (*Id.*) He asserts that these actions occurred because he is a member of a particular social group and/or his race.[1] Specifically, Respondent states that the White Moorish ruling population performed these acts against him and his family because they are black Mauritanians and members of the Fulani ethnic group. (Pre-Hearing Brief, 01/12/04.) Moreover, in its most recent appeal to the Board, DHS does not dispute that Respondent has suffered past persecution on account of his race. (Dep't Brief After Remand, 11/10/09.) Consequently, under a totality of the circumstances approach, the Court concedes that Respondent has suffered past persecution on account of his race and/or membership in a particular social group. *Cf. Halmenschlager v. Holder*, 577 F.3d 1122, 1130-32 (10th Cir. 2009) (incidents of mere discrimination and/or harassment do not rise to the level of persecution).

3. Respondent No Longer Has a Well-Founded Fear On Account of a Protected Ground

However, while this Court has found that Respondent has suffered past persecution on account of a protected ground, it also finds that DHS has met its burden to rebut the presumption of a well-founded fear by a preponderance of the evidence. 8 C.F.R. § 1208.13(b)(1)(ii). Specifically, DHS established that there has been a fundamental change in country conditions such that Respondent no longer has a well-founded fear of persecution on account of any protected ground. *Id.* §§ 1208.13(b)(1)(i)(A); 1208.13(b)(1)(ii). Here, DHS presented substantial documentation that the Mauritanian government is taking significant steps to mend the relationship with the black Mauritanian population resulting out of the 1989-91 expulsion.

Specifically, DHS submitted documents that establish that a large number of Mauritanian refugees living in Senegal and other refugee camps have been repatriated and have begun the process of obtaining identity documents. (DHS Updated Country Conditions at 1, 7.) Indeed, the documents indicate that the Mauritanian government has launched this repatriation program in concert with the United Nations High Commissioner for Refugees ("UNHCR"). (*Id.* at 7.) Moreover, on January 2, 2008, the Mauritanian government created an agency, the National Agency for Support and Integration of Refugees ("ANAIR"), with the specific mandate to "ensure the integration of repatriated refugees, provide administration and identification support, and contribute to social economic development of resettlement areas." (*Id.* at 14.) Further, there is evidence that the current government is collaborating not only with UNHCR, but also a number of other humanitarian organizations to facilitate the return and reintegration of the refugees. (*Id.* at 4.)

Although Respondent argues that these programs are not entirely successful and that a number of individuals experience trouble obtaining identity documents and/or have experienced

[1] Respondent also argues that this persecution was on account of his nationality; however, he asserts in asylum application that he is Mauritanian.

frustration with land issues and compensation, the current government is addressing this issue. (*Id.*) While there are conflicting reports of the success of the repatriation efforts, the consensus of the documents submitted suggests at least 18,000 returnees have been repatriated by 2009 (*Id.* at 1.), although more recent numbers suggest that more than 21,000 repatriations were complete at that time.[2] *See* Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *2010 Human Rights Report: Mauritania* (Apr. 8, 2011), *available at* http://www.state.gov/g/drl/rls/hrrpt/2010/af/154358.htm ("*2010 HR Report*"). These repatriation numbers are made more significant based upon the estimation that 25,000 – 34,000 total black Mauritanians took refuge during the 1989-91 crisis. (DHS Updated Country Conditions at 14.)

The Court notes that there have been administrative problems in the effective distribution of identity documents, recompensation programs, and settlement of land disputes. (*See id.*); *see also 2010 HR Report.* However, there is evidence that many individuals have been reinstated to their original positions in the government, former jobs and former homes. *2010 HR Report.* Further, there is no evidence that such administrative problems are anything but bureaucratic delays; it does not appear from any evidence before this Court that the delay in issuing identity cards is a form of persecution or discrimination upon a protected ground. *See Ba v. Mukasey*, 539 F.3d 1265, 1270 (10th Cir. 2008) (petitioner failed to discuss where "unwillingness to grant identity cards to all returning black African Mauritanians has resulted in social or economic consequences so sever for those returnees that it should be considered persecution").

Because DHS has, by a preponderance of the evidence, rebutted the presumption of future persecution, the burden shifts to Respondent to establish compelling reasons for being unable or unwilling to return to Mauritania. 8 C.F.R. § 1208.13(b)(1)(iii). Compelling reasons include those arising "out of the severity of the past persecution" or evidence of a "reasonable possibility that he or she may suffer other serious harm." *Id.* Here, Respondent has not proffered any compelling reasons for this Court to grant his application. Although Respondent points to the failure of the Mauritanian government to completely repatriate and re-document all returning black Mauritanians as grounds of his fear, this fear is not objective in light of the successes presented by DHS. Moreover, Respondent has not established that his past persecution was so severe as to grant his application in the absence of well-founded fear. *Cf. Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008) (mother and daughter female genital mutilation); *Woldemeskel v. INS* , 257 F.3d 1185, 1187-90 (10th Cir. 2001) (past persecution not severe where petitioner was tortured and kept in prison but upon release was permitted to marry and live in Ethiopia for a number of years). Further, although Respondent made a passing comment that he believed that the same government was in power as was in 1989, he has not substantiated that comment through his documents. In fact, the documentary evidence documents a number of regime changes since 1989. Respondent has not presented any evidence that he fears the current government for actions linked to the 1989 crisis. Therefore and for the foregoing reasons, the Court will deny Respondent's asylum application.

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[2] *See Kapcia v. INS*, 944 F.2d 702, 705-06 (10th Cir. 1991) (quoting *McLeod v INS*, 802 F.2d 89, 93 n. 4 (3d Cir. 1986) ("An agency such as the Board may take 'official notice' of 'commonly acknowledged facts, [and] ... technical or scientific facts that are within the agency's area of expertise.")

B. Withholding of Removal

Inasmuch as Respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that he has also failed to satisfy the more stringent clear probability of persecution standard required for withholding of removal. *See INS v. Stevic*, 467 U.S. 407, 413 (1984). Therefore, the Court also denies relief pursuant to section 241(b)(3) of the Act.

C. Eligibility for Relief under the Torture Convention

Respondent alleged that he suffered torture in Mauritania; specifically that he was beaten and forcibly expelled from Mauritania. (Transcript, 01/23/04 and 03/29/04.) However, this incident occurred twenty-two years ago. (*Id.*) There is no evidence that the Mauritanian government is currently and systematically engaged in committing or acquiescing in gross, flagrant, or mass violations of human rights that would warrant a grant of withholding of removal under the Torture Convention. 8 C.F.R. § 1208.16(c)(3); *see, generally, 2010 HR Report*. In fact, Mauritanian law prohibits the use of torture and the torture complaints documented in the most recent report focus instead on suspected terrorists rather than citizens/residents. *See 2010 HR Report*. As such, Respondent has not established that it is more likely than not that he will be subjected to torture in Mauritania. Thus, the Court finds Respondent is ineligible for relief under the Torture Convention.

III. Conclusion

Although Respondent has established that he has suffered past persecution on account of his race – black Mauritanian, and his membership in a particular social group - Fulani, DHS proved by a preponderance of the evidence that there have been fundamental and significant changes in Mauritania as they pertain to black repatriated Mauritanians. As such, Respondent is ineligible for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Act. Respondent has also failed to carry the burden of proof necessary for relief under the Torture Convention. In particular, he failed to establish that it is more likely than not that he will be subjected to torture upon returning to Mauritania. 8 C.F.R. § 1208.17(a). Accordingly, Respondent's applications for asylum, withholding of removal and relief under the Torture Convention shall be denied, and he shall be removed to Mauritania.

(b) (6)

ORDER

IT IS HEREBY ORDERED that Respondent's Application for Asylum and Withholding of Removal be DENIED.

IT IS HEREBY FURTHER ORDERED that Respondent's Application for Relief under the Convention Against Torture be DENIED.

IT IS HEREBY FURTHER ORDERED that Respondent be Removed to MAURITANIA.

IT IS HEREBY FURTHER ORDERED that Appeal is Reserved on Behalf of Both Parties.

November 3, 2011

David. J. Cordova
Immigration Judge

File: (b) (6) Date:

In re: (b) (6) JUN -7 2011

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sharon A. Healey, Esquire

ON BEHALF OF DHS: Cathy A. Auble
Senior Attorney

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The Department of Homeland Security ("DHS") has appealed from an Immigration Judge's decision, dated June 11, 2009, granting the respondent's application for asylum. The respondent opposes the appeal. The appeal will be sustained and the record will be remanded.

We review findings of fact, including the determination of credibility, under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, including whether the parties have met the relevant burden of proof, and issues of discretion under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

In a decision dated March 29, 2004, the Immigration Judge denied the respondent's application for asylum and related relief and protection from Mauritania. The Immigration Judge found that the respondent was not a credible witness. The Board dismissed the respondent's appeal of this decision. The United States Court of Appeals for the (b) (6) subsequently reversed the adverse credibility determination and remanded the record for further proceedings. *See* (b) (6) *Gonzales*, (b) (6) In a decision dated October 9, 2007, the Board remanded the record to the Immigration Judge for further proceedings to consider the respondent's asylum application and for the parties to have the opportunity to submit relevant evidence, including that related to current country conditions in Mauritania.

On remand, the Immigration Judge found that the respondent had established past persecution on account of an enumerated ground, and that the DHS had not rebutted the resulting presumption of future persecution. *See* 8 C.F.R. § 1208.13(b)(1). He accordingly granted the respondent asylum. The DHS has filed an appeal, centrally arguing that the Immigration Judge did not adequately assess the evidence of changed country conditions it had submitted to show a fundamental change in country conditions.

We will remand the record for further proceedings. The DHS submitted an abundance of documentary evidence below to support its position. The Immigration Judge indicated that he reviewed all the evidence in this case, but he does not provide any specific references to the documents submitted by the DHS, including recent reports published by the Department of State.

Furthermore, the Immigration Judge substantially relies on matters not of record, namely his recall of other cases which he felt were similar to the present case (I.J. at 6-7). This is not appropriate evidence to support his decision. *See Matter of S-M-J-*, 21 I&N Dec. 722, 728 (BIA 1997).

The Board will not review the evidence in this record in the first instance, and we do not have proper findings of fact to enable us to meaningfully review the appeal. *See* 8 C.F.R. §§ 1003.1(d)(3)(i), (ii); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We accordingly will remand the record to the Immigration Judge for further proceedings and for the entry of a new decision.

ORDER: The appeal is sustained, and the Immigration Judge's decision dated June 11, 2009, is vacated.

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

Ellen Rubowitz
FOR THE BOARD

IMMIGRATION COURT

(b) (6)

In the Matter of (b) (6)

Case No. (b) (6)

Res

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on June 11, 2009.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternative order of removal to _____.

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for [ ] withholding of removal [ ] deferral of removal under Article III of the Convention Against Torture was ( )granted ( ) denied ( ) withdrawn ( ) other.

[ ] A Waiver under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Cancellation of removal under section 240A(a)was ( ) granted ( ) denied ( ) withdrawn ( ) other.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of Status under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: June 11, 2009

David J. Cordova
Immigration Judge

Appeal waived Reserved: A I B
Appeal due by: 7-15-09

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [X] DHS
DATE: 06/11/09 BY: COURT STAFF Amanda Lozano
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Q6

File: (b) (6)

Date: OCT 09 2007

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sharon A. Healey, Esquire

ON BEHALF OF DHS: Cathy A. Auble
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. On December 2, 2005, the Board dismissed the respondent's appeal from an Immigration Judge's decision dated March 29, 2004. The respondent filed a petition for review in the United States Court of Appeals for the (b) (6) which issued a decision on (b) (6) (b) (6) overturning the adverse credibility finding against the respondent, vacating our December 2, 2005, decision and remanding the record for further proceedings. We will remand the record to the Immigration Judge to further consider the respondent's applications and resolve any factual discrepancies and to determine whether there have been any material changes in country conditions. The parties should be provided the opportunity to submit additional relevant evidence, including evidence of current country conditions.

Accordingly, the record is remanded to the Immigration Judge for further proceedings not inconsistent with the foregoing opinion and for entry of a new decision.

FOR THE BOARD