



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

3900 VETERANS MEMORIAL HIGHWAY
120
BOHEMIA, NY 11716-0000

Office of the District Counsel/BUF
130 Delaware Ave., Room 203
Buffalo, NY 14202

Name:
Riders:

Date of this notice: 7/22/2008

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:

GRANT, EDWARD R.
Kendall-Clark, Molly
Mann, Ana

Falls Church, Virginia 22041

Files:

Date:

JUL 22 2008

In re:

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:

ON BEHALF OF DHS: Joy A. Merriman
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The respondents were citizens of the former USSR. They appeal from the Immigration Judge's June 30, 2006, decision denying their applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and protection under the Convention Against Torture. The Immigration Judge also denied the request for cancellation of removal. That portion of the Immigration Judge's decision was not appealed. The record will be remanded.

The Immigration Judge noted during the hearing that he generally found that the lead respondent was credible, although he also noted concerns during the hearing regarding certain discrepancies in the record. *See* Tr. at 110-113. For example, a discrepancy was pointed out between the lead respondent's asylum application, the asylum interview, and his testimony with regard to whether he had in fact been arrested and detained at any point. *See* Tr. at 106, 110-113; *Compare* Tr. at 90-91, 216, *with* Exh. 2, *with* lead respondent's I-589 (unmarked Exh.). The Immigration Judge noted a couple of times during the hearing that, while he found the lead respondent to be generally credible,

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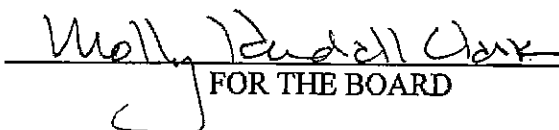
he was concerned about the discrepancy in the record pertaining to the alleged arrest and detention. *Id.* It is therefore unclear whether the lead respondent's testimony concerning the arrest and detention was credited. It is also unclear whether the lead respondent's testimony concerning the basis for such arrest was credited.

The Immigration Judge also indicated that the lead respondent's failure to raise any issues regarding a fear of persecution at the time of arrival made his claim questionable and cast doubt on his credibility. *See* I.J. at 12. In his decision, the Immigration Judge cited a decision issued by the First Circuit (which is not controlling precedent in this case), and indicated that the lead respondent's failure to immediately request asylum raised doubts about his credibility. We note that the lead respondent testified that he applied for asylum within 1½ weeks of his arrival in the United States. *See* Tr. at 192.

Thus, although the Immigration Judge did indicate during the hearing that he found the lead respondent generally credible, he also expressed concerns during the hearing about some aspects of his testimony. He did not make an explicit credibility determination in his decision, though the decision also indicated some concerns about credibility. We need to know what portion of the respondent's claim is credited. As the record is unclear, we will remand the record for a specific credibility finding.

We additionally note that, subsequent to the issuance of the Immigration Judge's decision in this case, the Second Circuit issued its decisions in *Beskovic v. Gonzales*, 467 F.3d 223 (2d Cir. 2006) and *Gjolaj v. B.C.I.S.*, 468 F.3d 140 (2d Cir. 2006), both of which discuss the distinction between harassment and persecution. The Second Circuit has determined that "a 'minor beating' or, for that matter, any physical degradation designed to cause pain, humiliation, or other suffering, may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground." *See Gjolaj v. B.C.I.S.*, *supra*, at 142; *see also Beskovic v. Gonzales*, *supra*, at 226. We find that, if the respondent's testimony concerning his arrest and the basis for such arrest is credited, the issue of whether the respondent suffered past persecution must be reconsidered and analyzed under these precedent decisions. The question of current country conditions should also be considered on remand if the respondents are found credible, as the events in question occurred prior to the lead respondent's arrival here in 1991.

Accordingly, the record is remanded for further proceedings consistent with the foregoing opinion.


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