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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	
R H-	)	File No.:
In Removal Proceedings	)	

RESPONDENT'S APPEAL BRIEF

This appeal is not appropriate for affirmance without opinion under 8 C.F.R. § 1003.1(a)(7), and it should be reviewed by a three-member panel.

ORAL ARGUMENT REQUESTED

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ISSUES

1. Did the Immigration Judge violate the fundamental rights of the respondent as guaranteed by the Due Process Clause, statute and regulations and immigration regulations by not assessing whether the respondent was competent to proceed and not assisting the respondent in obtaining representation in his removal proceeding, where the Immigration Judge and government counsel both knew the respondent is mentally ill and where the respondent did not understand the nature of the removal proceeding?

2. Did the Immigration Judge err in concluding that the respondent was not eligible for relief for withholding of removal under INA §241(b)(3) because he was convicted for sale of cocaine, when the Immigration Judge failed to conduct an individualized review to determine whether such conviction actually constituted a particularly serious crime, as required under *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *Ford v. Bureau of Immigration and Customs Enforcement*, 294 F.Supp2d 655, 659-63 (M.D. Pa. 2003); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982)?

3. Did the Immigration Judge err in concluding that the respondent was not eligible for relief for withholding of removal and protection under the Convention Against Torture, where the record indicates that the respondent is HIV-positive, homosexual and mentally ill and upon removal to Egypt would most likely be detained on account of his homosexuality and HIV-positive status and where the erratic behavior associated with his mental illness would exacerbate the prison officials' treatment of him, thereby amounting to torture?

SUMMARY OF ARGUMENTS

Respondent suffers from several acute mental disabilities, including schizophrenia, seizures and extreme bipolar disorder, which rendered him unable to meaningfully participate in his own removal proceeding. The record shows that Respondent was denied a meaningful opportunity to be heard on account of his mental illness and the failure of the IJ to assess his competency or appoint a guardian or counsel.

By statute and regulation, Immigration Judges are obliged to protect the rights of respondents with mental disabilities. At a minimum, Immigration Judges must evaluate a respondent's competency at the outset of proceedings and take appropriate measures as

necessary. In Respondent's case, despite the fact that the Immigration Judge ("IJ") was put on notice that Respondent was mentally ill, the IJ did not request additional psychological evaluations, nor did he make any explicit finding regarding Respondent's competency to appear on his own behalf.

The record shows that the IJ was put on notice as to Respondent's mental illness. The IJ admitted into evidence several letters from Respondent's psychiatrist, psychologist and other health care providers which confirm that Respondent suffers from schizophrenia, bipolar disorder, extreme depression and seizures, in part as a result of physical and sexual abuse he endured as a child. Respondent was in fact unable to attend at least one Master Calendar hearing as he required extended hospitalization on account of his mental illness.

The record shows that Respondent was not able to meaningfully participate in his hearing and that therefore counsel or a guardian should have been appointed to safeguard Respondent's rights and privileges. This conclusion is supported in the statute and regulations, and also in the UNHCR Handbook on Procedures for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979) ("Handbook"). The Immigration Judge erred by accepting Respondent's application for asylum, withholding of removal and relief under the Convention Against Torture ("CAT") without first appointing a counsel or a guardian.

Furthermore, well-established principles of due process require that the IJ ensure a respondent is properly represented at his hearing where mental illness limits his ability to effectively represent himself. Here, the IJ was on notice that Respondent was mentally ill, as evidenced by the fact that he accepted into the record statements confirming Respondent's mental illness.

Respondent further contends that his conviction for the sale of cocaine did not constitute a particularly serious crime and therefore, it does not bar him from relief for withholding of removal pursuant to INA §241(b)(3). The Immigration Judge erred in failing to take into account Respondent's mental disability when examining his claims for relief. At Respondent's merits hearing, in which he appeared without representation, the IJ refused to consider his application for relief for withholding of removal. The IJ summarily concluded that Respondent's conviction for the sale of cocaine constituted a particularly serious crime without conducting an individualized review. The extraordinary and compelling circumstances surrounding Respondent's conviction overcome the presumption that his unlawful trafficking conviction is a particularly serious crime. *Matter of Y-L-, A-G-, R-S-R-,* 23 I&N Dec. 270 (A.G.2002). Moreover, Respondent's conviction does not constitute a particularly serious crime under the criteria established in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

Respondent also argues that he is entitled to withholding of removal and protection under the Convention Against Torture ("CAT") because he has proven that it is more likely than not that he will be persecuted and tortured by the Egyptian government on account of his homosexuality, HIV-positive status and severe mental illness. Documentary evidence accepted into the record establishes that Respondent is mentally ill and HIV-positive. In addition, Respondent credibly testified to his homosexual orientation. The U. S. State Department Country Reports acknowledges the poor state of Egypt's human rights records and states clearly in its introductory page that Egyptian officials, "continue to mistreat and torture prisoners, arbitrarily arrest and detain persons, hold detainees in prolonged pretrial detention and occasionally engage in mass arrests. Local police killed, tortured, and otherwise abused both criminal suspects and other persons. Police continued to arrest and detain homosexuals."

As an HIV-positive homosexual man, Respondent is particularly vulnerable to arbitrary arrest by local officials. Further, because he no longer has contact with any family members or friends in Egypt, in the event that he is arrested, Respondent would likely remain in prison indefinitely. Respondent's severe mental illness is also likely to exacerbate the deplorable conditions under which he would already be held. Prison guards, acting in their role as public officials, will likely intentionally inflict pain and suffering upon Respondent sufficient to amount to torture. Respondent's pain and suffering will not be pursuant to lawful sanctions. Singled-out because of his sexual orientation, denied treatment for his debilitating mental illness, and refused life-saving HIV/AIDS medications, Respondent would more likely than not be subject to torture if removed to Egypt.

FACTS AND PROCEDURAL HISTORY

Respondent is a sixty-year-old Egyptian national who has resided in the United States since 1978. As the record below clearly indicates, Respondent is mentally ill.

> Record, Ex. 8: Dr. Dennis Sandrock confirms that at the time of his removal proceedings, Respondent was treated for psychiatric problems and that, "he requires continued treatment and monitoring to manage his serious mental illness."
>
> Record, Ex. 8: Dr. Fang, Respondent's treating psychiatrist in detention, confirmed that Respondent was diagnosed with Schizoaffective Disorder, Bipolar Type.
>
> Record, Ex. 8: Respondent describes himself as, "a psychological sick man" and explains how he was easily induced into purchasing drugs for two strangers. He explains in a separate letter that he suffered severe emotional, sexual and physical abuse as a child.
>
> Record, Ex. 8: Case Manager Doreen Gonzalez, of the Bowery Residents' Committee, Inc. confirms that Respondent resided at BRC's Los Vecinos Community Residence prior to his incarceration. The Los Vecinos Community Residence is a residential treatment program serving formerly homeless and mentally-ill persons.
>
> Record, Ex. 11: Respondent's clinical psychologist confirms that he has been treated for a form of schizophrenia, "a serious mental illness."

Record, Ex.12: Respondent's notice to the Court explaining that he was hospitalized on account of his mental illness from May 21, 2005 – June 19, 2005.

In addition to the above documentary evidence of Respondent's mental illness, the record below demonstrates that (1) Respondent did not understand his immigration status or the potential relief available to him; (2) Respondent was not able to fully understand the nature of the proceedings and therefore could not participate meaningfully in them; and (3) the IJ failed to render any meaningful assistance to Respondent in his efforts to obtain representation or to present his case.

April 13, 2005

At his initial master hearing on April 13, 2005, Respondent attempted to deny the government's allegation that he had not obtained lawful permanent residence status in the United States, but the IJ quickly dismissed his claim without further inquiry. According to the record, Respondent informed the IJ that he had obtained a green card through amnesty. (Tr. at 1, line 25). Despite this fact, the IJ failed to pursue the issue of whether Respondent – who had been living in the U.S. since 1978 and would have been eligible for amnesty – had obtained lawful permanent residence through the amnesty program.

April 27, 2005

At his next master hearing on April 27, 2005, Respondent demonstrated to the IJ that he had made efforts to find legal representation but was unable to obtain any. Despite knowledge that Respondent was indigent, detained and suffering from mental illness, the IJ's assistance throughout Respondent's proceedings consisted solely of providing him with a list of pro bono organizations and additional time to find a person willing and able to represent him.

May 11, 2005

At Respondent's next master hearing on May 11, 2005, the government introduced a new charge and submitted a record of a criminal conviction for the sale of cocaine. The information

on the transcript suggests that a conversation took place among the IJ, the government attorney and Respondent prior to going on record. The transcript further reflects that Respondent failed in his attempts to explain the circumstances surrounding his conviction because he was disoriented and felt pressured to comply with the IJ's desire for expediency, even at the expense of defending himself. Consider the following exchange:

> IJ: Okay. And if you want to you can take another copy of that list of free and low cost legal representatives as well as the written notice of your appeal rights. It's right on the table in front of you and since we're adjourning the case for two weeks, you'll have a little more time to --- to try to get a lawyer or legal representative.
> R: Thanks a lot, Your Honor.
> IJ: Anything else you want to tell me before we adjourn.
> R: Thank you --- yes, can I talk about myself (indiscernible).
> IJ: I'm sorry.
> R: Can I talk about myself (indiscernible). I'm able to talk, speak about the new charges?
> IJ: No, you know why --- wait for the two weeks and –
> R: Okay. I'll ---
> IJ: We'll talk about that at another time.
> R: You got it Your Honor. Thank you very much.
>
> Tr. At 8.

May 25, 2005

Although the IJ scheduled a master hearing for Respondent on May 25, 2005, no record exists of that hearing. A letter from Respondent to the IJ, included in the Record, at Ex. 12, indicates that Respondent had to be hospitalized for psychiatric problems from May 21 – June 19, 2005. In his letter to the IJ, Respondent explains that he was taken to two separate hospitals and had to be examined by "mental doctors" and prescribed several medications. His extended stay at the hospital rendered him physically incapable of attending his hearing, but it should also have clearly indicated to the IJ that Respondent was not competent to represent himself in his removal proceedings.

June 15, 2005

Respondent's letter contained in the Record, at Ex. 12, indicates the he remained hospitalized for acute mental illness through June 19, 2005. The IJ did not, however, make any mention of Respondent's continued hospitalization at his next master hearing on June 15, 2005. Nevertheless, the IJ must have been aware of the reasons for Respondent's failure to appear at the May 25th hearing or else he would have issued an *In Absentia* Order of Removal. Moreover, Respondent's description of the reasons for and length of his hospitalization was accepted into evidence as Exhibit #12. It should be noted that the contents of Respondent's letter were never contested, either by the IJ or the government. The letter states that Respondent continued to be hospitalized through June 19, 2005. One must conclude therefore that Respondent was still technically hospitalized during his June 15th hearing, but had been taken from the hospital to the court that day. Despite his knowledge that Respondent continued to be hospitalized for mental instability, the IJ scheduled Respondent's next hearing for less than 10 days later. Further, the IJ did not make any attempt to assist Respondent in obtaining any representation. The following reflects the *entire* record for the June 15th hearing, which was extremely short:

> IJ: Today is June 15, 2005, Immigration Judge Daniel Meisner, Newark, New Jersey. This is a removal proceeding in the case of R H-.
> R: H-.
> IJ: H-. Sorry.
> IJ: A91 312 652. It's removal proceeding. The language is English. The Government is represented by Ana Maria Candela, Esquire, Assistant Chief Counsel and the respondent is pro se.
> IJ: What is your name, please?
> R: R H-. R H-.
> IJ: And do you speak and understand English?
> R: Yes, sir.
> IJ: Do you have an attorney?
> R: No, Your Honor.
> IJ: All right. You ready to do your case and finish it?
> R: Yes, Your Honor.
> IJ: Okay. Go ahead. I'm going to do your case and finish it up on June 24th at 9:30 in the morning.

R: All right, Your Honor.
IJ: Okay. That gives you time --- that's next Friday, June 24th, you have all your witnesses, all your documents, all your evidence, everything, right?
R: You got it, Your Honor.
IJ: And one way or another you'll get an answer on your claim. June 24th, 9:30 in the morning.
R: Thank you very much, Your Honor.
IJ: You're welcome. Let me give you the hearing notice for the date and time.

Although the IJ was fully aware of Respondent's recent hospitalization for mental illness, he failed to make any assessment of Respondent's competency. The IJ also erred in failing to appoint a guardian or counsel before the merits hearing.

June 24, 2005

The IJ scheduled a hearing for Respondent on June 24, 2005, just five (5) days after he had been released from mandatory hospitalization at a mental health facility. Respondent appeared, again, without a guardian or counsel. At the hearing, the IJ accepted Respondent's pleas to the government's charges without making any finding as to Respondent's mental capacity to make a plea. Tr. at 12 - 21. Although the IJ was aware of Respondent's significant mental problems (see Record, Ex. 12 and Tr. at 20, lines 11- 13) and acknowledged difficulties in communicating with him (Tr. at 20, lines 9 -11), the IJ made no evaluation of Respondent's mental state, nor did he appoint a guardian or counsel. Further, the IJ dismissed every attempt made by Respondent to respond substantively to the government's charges:

IJ: Did you remain in the United States beyond your authorized stay without permission?
R: Yes, Your Honor, but also I got married. My wife's she (indiscernible) and September 1978 I received letter from Immigration and I went there, you know you have six months, you know, like to review your case like if you want to stay legally, like (indiscernible) school or get married, so I got married and I went to Immigration and I got work permission through my wife, she's American born.
IJ: When did you get married?
R: 1979, 1980.
IJ: When did you get married, sir?
R: 1979.
IJ: When?

R: The month?
IJ: Yes.
R: I forgot Your Honor.
IJ: Is it true that you were convicted in the criminal court of the City of New York on July 11, 2002 of the crime of petty larceny?
R: What happened, Your Honor.
IJ: Just tell me
R: Yes, Your Honor.
IJ: If you were convicted.
R: Yes, Your Honor.

Tr. at 14.

The next few pages of the transcript demonstrate that Respondent repeatedly attempted to explain his legal status to the IJ as well as the special circumstances surrounding his criminal convictions, but the IJ insisted upon "yes" and "no" answers. Respondent was not provided with a meaningful opportunity to respond to the government's charges against him or its submissions of evidence. Tr. at 15 – 16; Tr. at 17 (lines 9 – 12); Tr. at 18 (lines 9 – 16); and Tr. at 18-19 (lines 21 -7).

August 12, 2005

The IJ's sole inquiry into Respondent's mental competency did not come until the day of his merits hearing. It consisted of a single query to Respondent as to whether he had taken his medication on the day of his merits hearing on August 12, 2005 (Tr. at 25, line 20). Satisfied with Respondent's response that he had taken his medications, the IJ proceeded with a merits hearing to consider Respondent's *pro se* application for relief for asylum, withholding of removal and protection under the CAT. As the letters which had been submitted by Respondent's psychiatrist and psychologist and allowed into evidence indicate, *continued* medication and monitoring are necessary to manage his debilitating mental illness. Even when Respondent was presumably receiving his medications on a regular basis while detained, his condition became so acute he required several weeks of hospitalization. The IJ's query as to whether Respondent took his medications the day of his merits hearing falls far short of the

meaningful analysis of Respondent's mental status required by statute, regulations and Due Process. Further evidence of the IJ's rushed and hasty treatment of the case is evidenced by the fact that, after having completed six (6) prior hearings and taking Respondent's pleas in English, the IJ proceeded with Respondent's merits hearing through an Arabic interpreter.

Respondent's testimony consisted primarily of brief responses to questions by the government attorney and the IJ. Both the government attorney and the IJ appeared to focus on Respondent's experiences in Egypt, dating more than three decades back into the 1970s. Neither the IJ or the government attorney made any meaningful inquiry into the circumstances of Respondent's conviction for the sale of cocaine. On the contrary, every attempt made by Respondent to explain the special circumstances surrounding his conviction were quickly dismissed or ignored by the IJ. Tr. 8, 14 and Record, Ex. 8 (Respondent's letter dated 05/14/05).

On account of his numerous mental disabilities, Respondent was unable to clearly present evidence that demonstrated the extraordinary circumstances surrounding his conviction. He was similarly unable to clearly and persuasively present his claim for relief under withholding of removal and the CAT. Despite the IJ's knowledge of Respondent's mental illness, the record below demonstrates that the IJ failed to provide assistance, and as a result, Respondent was not able to meaningfully participate in his own removal proceeding.

STANDARD OF REVIEW

The Board of Immigration Appeals (the Board) applies a clearly erroneous standard of review to all factual findings made by an Immigration Judge. *See, Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003); 8 C.F.R. §1003.1(d)(3)(i). The Board reviews all questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(i-ii).

RESPONDENT'S CASE IS NOT SUBJECT TO SUMMARY AFFIRMANCE

This appeal is not appropriate for affirmance without opinion because the result reached by the Immigration Judge (the IJ) was incorrect, because the errors of the IJ were neither harmless nor immaterial, and because the IJ's opinion raises substantial legal problems. 8 C.F.R. §1003.1(e)(4).

The result reached by the IJ was incorrect for the reasons stated in this brief. Most significantly, the hearing violated Respondent's right to due process as he was incompetent to participate in and could not understand, the proceedings before the IJ. The IJ also failed to adequately develop the record in Respondent's case.

The errors of the IJ were material and harmful. Additionally, the legal questions raised by the IJ's decision are "so substantial" that the case warrants the issuance of an opinion. 8 C.F.R. §1003.1(e)(4)(i)(B). The IJ committed substantial legal errors in failing to recognize that the Respondent was not mentally competent to participate in the proceedings, violating the Respondent's right to due process and a fair hearing. Respondent should have been granted the relief requested.

RESPONDENT'S CASE WARRANTS A THREE-JUDGE PANEL

This appeal is appropriate for a three-judge panel pursuant to 8 C.F.R. §1003.1(e)(6) because the decision of the IJ is not in conformity with the law for the reasons cited above, particularly because the hearing violated the Respondent's right to due process and a fair hearing. *See*, Previous Section. Because the errors of law the IJ committed were substantial and were not harmless or immaterial, the decision of the IJ must be reversed or, at the very least, this case remanded for further proceedings consistent with this brief.

ARGUMENT

I. THE RESPONDENT DID NOT RECEIVE A FAIR HEARING BECAUSE OF HIS MENTAL ILLNESS

A. Immigration Judges Have Constitutional, Statutory and Regulatory Obligations to Protect the Rights of Respondents Suffering from Mental Disabilities

1. The Constitution Mandates that Respondents Suffering from Mental Disabilities are Provided Adequate Procedural Protections

The Fifth Amendment provides that "no person shall…be deprived of life, liberty, or property without due process of law." Due process guarantees that the government will not deprive individuals of a liberty or property interest without ensuring that adequate procedural protections are established to guard against the erroneous deprivation of those liberty or property interests. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Due process protections apply to all persons, including noncitizens in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (noting that it is "well-established that Fifth Amendment entitles noncitizens to due process of law in deportation proceedings).

Recognizing that the mental illness or disability of a party may affect the integrity of the judicial process, courts have long ruled that due process mandates significant protections for individuals with mental disabilities who are party to judicial proceedings. For example, due process is violated if a competency hearing is not held when a court is presented with sufficient doubt regarding a criminal defendant's mental competency. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). Similarly, defendants who suffer from mental illness or disability may no longer be executed because, due to "their disabilities in the areas of reasoning, judgment, and control of their impulses . . . they do not act with the same level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

Although immigration hearings are civil proceedings, the private or liberty interest at stake is exceptionally weighty. As recognized by the Supreme Court, removal "visits a great hardship on the individual and deprives him of the right to stay and working in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Removal has been called "a drastic measure…at times equivalent to banishment or exile." *Tan v. Phelan*, 333 U.S. 6, 10 (1948) *quoted in Giambanco v. INS*, 531 F.2d 141, 148 (3d Cir. 1976).

Because Respondent seeks withholding of removal and protection under the CAT, the liberty interest is of much greater significance. *See Matter of [name unknown]- El Paso*, A-- --- --- (BIA Feb. 19, 2002) (unpublished), attached as Exh. A (noting the BIA's concern over the "high stakes" involved in torture claims). For him, removal will likely result in physical harm or even death, since Respondent will be persecuted and tortured if removed to Egypt.

Unrepresented respondents seeking deferral of removal face additional hurdles. Applicants may rely on the credibility of their testimony alone to establish the veracity of their claims. 8 C.F.R. § 1208.16(c)(2) ("[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration"). But individuals with mental illnesses like Respondent are "typically poor witnesses." *Atkins*, 536 U.S. at 321. Furthermore, recent Board precedents emphasize the importance of corroborating evidence in asylum claims. *See, e.g., Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). Applicants who have mental disabilities have difficulty both determining what evidence will support their claims and obtaining that evidence.

2. Statutory and Regulatory Requirements Mandate that Respondents Suffering from Mental Disabilities are Provided Adequate Procedural Protections

The rights of noncitizens seeking withholding or deferral of removal are protected by both the INA and administrative regulations. These provisions dictate special requirements for

protecting the rights of aliens with mental disabilities in removal proceedings. For example, the Attorney General must employ a suitable person to accompany and care for a noncitizen with mental health issues during removal proceedings. INA § 241(f)(1), 8 U.S.C. § 1231(f)(1). Furthermore, if a noncitizen's mental disability makes it impractical for the individual to be present at a proceeding, the Attorney General must "prescribe safeguards to protect the rights and privileges of the alien." INA § 240(b)(3), 8 U.S.C. § 1229(b)(3). Immigration authorities must also ensure that an individual being served with a Notice to Appear for removal proceedings is "competent" to accept such service. 8 C.F.R. § 103.5a(c)(ii). Finally, regulations forbid IJs from accepting pleadings from incompetent individuals. 8 C.F.R. § 1240.10(c).

The IJ's failure to comply with statutory and regulatory requirements in Respondent's case constitutes another violation of Respondent's constitutional right to due process. Several courts have recognized that the denial of a statutory right, if prejudicial, violates due process. *See Campos-Asencio v. INS*, 822 F.2d 506, 509-10 (5th Cir. 1987) (denying statutory right to counsel could prejudice respondent by rendering hearing fundamentally unfair). In this sense, prejudice means that the alleged violation of a statute "potentially [affected] the outcome of the proceedings." *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000). The IJ's failure to protect Respondent's statutory right to counsel was indeed prejudicial, since it prohibited him from presenting evidence sufficient to establish his claim of relief for withholding of removal and protection under the CAT.

Furthermore, Respondent's right to counsel and to present evidence in his case must be considered fundamental rights. *Waldron v. INS*, 17 F.3d 511, 517-18 (2d Cir. 1994) (noting that "when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the INS fails to adhere to it, the challenged deportation proceeding is

invalid and a remand to the agency is required"). As such, the IJ's failure to comply with these regulations in Respondent's case establishes yet another violation of Respondent's constitutional guarantee of due process.

B. The IJ Erred As a Matter of Law by Failing to Make an Evaluation of Respondent's Mental Health Before Proceeding With His Removal Hearing

The above provisions create a regime that requires IJs to evaluate the mental health of a noncitizen appearing before them before beginning removal proceedings. The requirement in these provisions that a mentally disabled respondent be protected cannot be accomplished unless a determination of that respondent's mental competency is made at the beginning of the removal process.

In this case, the IJ should not have proceeded with Respondent's hearing without first evaluating his mental status. As set forth above, the IJ clearly was on notice of Respondent's diminished mental capacity, even noting it on the record. Nevertheless, the IJ failed to conduct any colloquy with Respondent or anyone else about the nature of his conditions and the limits it may have imposed on the presentation of his case. Despite having failed to conduct any substantive evaluation into Respondent's mental status, the IJ declares *after* the proceedings have concluded that, "respondent appeared totally lucid and competent before me, even though the respondent has not been represented by counsel and has not been able to secure an attorney. I find the respondent's mental illness did not render the respondent incompetent to represent himself in these proceedings." IJ at 3. Rather than demonstrating competency, the transcript reveals that Respondent was clearly intimidated by the IJ and the proceedings and that he capitulated every time the IJ seemed impatient with his efforts to explain circumstances surrounding his conviction or his fears of return to Egypt.

Recent unpublished decisions of this Board confirm that the IJ should have ordered a competency evaluation when he was aware that the respondent suffered from mental illness. *Matter of [name unknown]- El Paso*, A-- --- --- (BIA Feb. 19, 2002) (unpublished), attached as Ex. A (noting that under circumstances where the IJ was aware of the respondent's mental illness and the respondent was represented pro se, the IJ should have made a threshold assessment of the respondent's mental competency "before proceeding with the merits of the hearing"). This Board has also ruled that where an IJ finds that a mentally ill respondent is not accompanied by a guardian, relative or friend, "the DHS must assign an attorney to represent him." *Matter of A-R-C* San Pedro, A-- --- 253 (BIA Dec. 8, 2003)(unpublished), attached as Ex. B; *Matter of [name unknown]- El Paso*, A-- --- --- (BIA Feb. 19, 2002) (unpublished), attached as Ex. A.

C. The IJ Erred as a Matter of Law by Failing to Appoint a Representative to Assist Respondent at His Removal Hearing

The regulations require that in Respondent's case, an appointed guardian was needed to satisfy INA §240(b)(3). 8 C.F.R. §1240.4. *See also, Nelson v. INS,* 232 F.3d 258, 262 (1st Cir. 2000)(recognizing that 8 C.F.R. §240.4 provides for custodial or other representation of incompetent respondents). Section 1240.4 of 8 C.F.R. states:

> When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend, who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonable be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

8 C.F.R. §1240.4

Because Respondent was unable to retain counsel, does not have a guardian and did not have family or friends willing or able to appear at the proceedings, the regulations mandate that

the IJ should have required Respondent's custodian to appear. 8 C.F.R. §1240.4; *see Matter of Stoytcheff*, 11 I&N Dec. 329, 330-332 (BIA 1965). The IJ's failure to require Respondent's custodian to appear, or in the alternative to appoint a guardian to appear on Respondent's behalf, is the functional equivalent of providing Respondent with no hearing at all, because his mental disabilities, his hospitalization and his incarceration prevented him from presenting relevant evidence on his own behalf.

This Board has impliedly held that mentally incompetent aliens are considered protected under the aforementioned statutory and regulatory requirements *only* where the alien is represented by counsel or another appropriate representative. *See, e.g.*, *Matter of Estrella-Martinez*, File No. A14 340 742 (BIA Dec. 4, 2003) (unpublished), attached as Exh. C (finding that a mentally disabled alien satisfied the requirements of due process and the aforementioned regulations where his "accredited representative appeared on his behalf at all merits hearings before the IJ and had a full opportunity to challenge the factual and legal bases for . . . removability").

Respondent's mental illness *did* prevent him from presenting a strong case as to the merits of his claim for relief for withholding of removal and protection under the CAT. No one was present to guide Respondent's testimony or to testify on his behalf to help him establish the necessary elements of his torture claim. The brief testimony that he did give cannot not be considered a full opportunity to present his case, especially when his capacities are limited by mental illness. As such, Respondent's hearing before the IJ was exactly the converse of the above mentioned case, since he did not have a representative present to help him articulate the merits of his claim. Since Respondent's hearing before the IJ was so fundamentally different

than the mentally ill individuals in the *Matter of Estrella-Martinez*, this Board should not consider his hearing to be "fundamentally fair."

II. THE IJ ERRED AS A MATTER OF LAW BY FAILING TO CONDUCT AN INDIVIDUALIZED REVIEW TO DETERMINE WHETHER THE CIRCUMSTANCES OF RESPONDENT'S CONVICTION FOR THE SALE OF COCAINE WERE SUFFICIENTLY COMPELLING TO OVERCOME THE PRESUMPTION THAT IT CONSTITUTED A PARTICULARLY SERIOUS CRIME

The IJ summarily dismissed Respondent's application for withholding of removal because he had been convicted for the sale of cocaine in the fourth degree under New York law. Without any meaningful analysis or review of the circumstances of Respondent's conviction, the IJ simply held that because the crime constituted an aggravated felony it was a particularly serious crime. IJ at 5. In fact, the circumstances surrounding Respondent's conviction were sufficiently extraordinary and compelling to overcome the presumption that it constituted a particularly serious crime under *Matter of Y-L-, A-G-, R-S-R-,* 23 I&N Dec. 270 (A.G. 2002). Further, Respondent's conviction does not meet the criteria in *Matter of Frentescu*, 18 I&N Dec. 244, to constitute a particularly serious crime.

A. Respondent's Conviction for the Sale of an Illegal Substance Did Not Constitute a Particularly Serious Crime under *Matter of Y-L-, A-G-, R-S-R-,* 23 I&N Dec. 458 (BIA 1999).

Under INA §241(b)(3)(B)(ii), a respondent is barred from withholding of removal if he has been convicted of a particularly serious crime. The Attorney General has held that an aggravated felony involving unlawful trafficking in a controlled substance *presumptively* constitutes a particularly serious crime **unless** extraordinary and compelling circumstances can overcome such presumption. *Matter of Y-L-, A-G-, R-S-R-,* 23 I&N Dec. 458 (BIA 1999). The Attorney General then suggests six criteria that would be necessary to overcome the presumption. Accordingly, the IJ must conduct an individualized review of respondent's

conviction to determine whether he has satisfied the criteria. *Ford v. Bureau of Immigration and Customs Enforcement*, 294 F.Supp.2d 655, 659-63 (M.D. Pa. 2003). The six criteria are:

1) a very small quantity of controlled substance;
2) a very modest amount of money paid for the drugs;
3) merely peripheral involvement by the alien;
4) the absence of any violence or threat of violence;
5) the absence of any organized crime or terrorist organization;
6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Matter of Y-L-, A-G-, R-S-R- at 277.

Respondent presented sufficient evidence to satisfy all six criteria established under *Matter of Y-L-, A-G-, R-S-R-*. The IJ erred as a matter of law by dismissing attempts by Respondent to explain the nature of his conviction (Tr. at 8, lines 14-19; Tr. at 15, lines 4-12) and by failing to consider or further investigate Respondent's statement of facts concerning his arrest and conviction (Record, Ex. 8, p. 3).

Respondent testified to facts sufficient to meet the above criteria. Specifically, in his May 14, 2005 statement, he explains:

> On the day of me arrest, while walking in Pitt St. Manhattan NY, I was approached by two men who asked me to go buy them some drugs. I refused, but they kept asking me to do it, which annoyed me and made me do it to get rid of them, especially since I suffer from schizophrenia and I am not stable psychologically. After I bought $20 worth drug, they arrested me declaring that they are undercover! I want to stress here that first, I never had any intention to buy any drugs, especially since I had only $3 in my pockets (Which proved after they searched me). Second, I never made any profit out of them, which proves that I am not, and never was, selling drugs.
>
> When I went to Criminal Court the Judge believed my story and gave me $500 bail. He also mentioned that I never made any profit from them which shows that I didn't mean to sell anything.
>
> Record, Ex. 8, p. 3.

The substance of Respondent's statement indicates that, (1) a very small amount of controlled substance was involved; (2) a very modest amount of money ($20) was paid for the

drugs; (3) Respondent's involvement was peripheral in that he had not even intended to buy the drugs but instead had been persuaded to do so by two persistent strangers; (4) there was no violence; (5) the incident was situational rather than organized; and (6) no harm resulted and no juveniles were involved.

B. Respondent's Conviction for the Sale of an Illegal Substance Did Not Constitute a Particularly Serious Crime under *Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982).

This Board, in conducting an analysis under *Matter of Frentescu,* 18 I&N Dec. 244 (BIA 1982), must determine whether the respondent has committed a serious crime sufficient to bar him from relief for withholding of removal, by reviewing, on a case-by-case basis, the facts of each case. *See Yousefi v. INS*, 260 F.3d 318, 327-30 (4th Cir.2001)(reversed BIA and IJ decisions as abuse of discretion where neither tried to apply the *Frentescu* decision to the case); *Steinhouse v. Ashcroft* 247 F.Supp. 2d 201 (D.Conn.2003)(following *Yousefi*). In the instant case, the IJ failed to make any such analysis.

The criteria established by the Board in *Matter of Frentescu* are:

1) the nature of the conviction;
2) the circumstances underlying facts of the conviction;
3) the type of sentence imposed;
4) whether the type and circumstances of the crime indicate that the respondent is a danger to the community.

Had the IJ evaluated the circumstances underlying Respondent's conviction, he likely would have recognized that Respondent's conviction did not represent a particularly serious or dangerous crime. Although the conviction involved a sale of drugs, Respondent's credible testimony reveals that his involvement was peripheral and not completely intentional. The record indicates that Respondent was suffering from mental illness at the time the incident

occurred and that his decision to comply with two strangers' instructions to buy cocaine for them was more a reflection of his mental frailty than a depraved criminal intent.

Further, Respondent's light sentence (6 months) indicates that the Criminal Court Judge did not find Respondent's criminal activity particularly serious. The fact that the Judge released Respondent on $500 bail indicates that he did not find Respondent to be particularly dangerous.

Had the IJ conducted the required analysis of the facts underlying Respondent's conviction, he would have been forced to recognize that Respondent's conviction did not constitute a particularly serious crime.

III. THE BOARD OF IMMIGRATION APPEALS SHOULD GRANT RESPONDENT WITHHOLDING OF REMOVAL OR, IN THE ALTERNATIVE, RELIEF UNDER THE CONVENTION AGAINST TORTURE ACT

Respondent's credible testimony established his sincere fear of returning to Egypt for fear of persecution. Further, the U.S. Department of State, *2004 Country Report on Egypt* (Feb. 25, 2004), (Record, Ex. 7) demonstrates that Respondent's fear is reasonable and that he would more likely than not face persecution and torture by the Egyptian government on account of his perceived sexual orientation, HIV-positive status and mental illness.

The Supreme Court has interpreted the "more likely than not" standard to mean a chance greater than fifty percent, or a "preponderance of the evidence." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). This standard can be met in several ways, including, on the credible testimony of the applicant alone, *see* 8 C.F.R. §§ 208.16(c)(2), 1208.16(c)(2), or "upon the presentation of gross, flagrant or mass violations of human rights within the country of removal ... and other relevant information regarding conditions in the country of removal." 8 C.F.R. §§

208.16(c)(3)(iii-iv), 1208.16(c)(3)(iii-iv). Relief from removal is mandatory once an applicant satisfies all requirements; there are no exceptions. 8 C.F.R. §§ 208.16, 208.17.

A. Respondent Qualifies for Withholding of Removal and Relief Under the Convention Against Torture

The most recent U.S. State Department Country Report on Egypt clearly indicates that the Egyptian government's human rights record remains poor:

> The security forces continued to mistreat and torture prisoners, arbitrarily arrest and detain persons, hold detainees in prolonged pretrial detention and occasionally engage in mass arrests. Local police killed, tortured and otherwise abused both criminal suspects and other persons. Police continued to arrest and detain homosexuals.
> (Record, Ex. 7).

The report further noted that "In 2002, three domestic human rights associations, as well as two international organizations, presented their allegations and findings to the U.N. committee Against Torture (the Committee), a subcommittee of the U.N. Commission on Human Rights. The Committee's report expressed concerns about the continued implementation of the state of emergency; consistent reports of torture and ill treatment; abuse of juveniles and homosexuals." (*Id*. at 4). The report also confirmed that Egyptian officials used "Emergency Courts" to prosecute homosexuals (*Id*. at 7) and that persons suspected of being homosexual are arrested and, "regularly reported being subject to humiliation and abuse while in custody" (*Id.* at 19).

Had Respondent been properly represented, additional reports of the Egyptian government's abuse of those suspected of being homosexual would have been submitted to further enlighten the court. Examples of reports include:

- **"In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct," Human Rights Watch (2004):**

This report details the many cases of man arrested and tortured on account of their perceived sexual orientation. This report is referenced in the US State Department's *2004 Country Report on Egypt* at 19. Attached as Ex. F.

- **"Torture and imprisonment for actual or perceived sexual orientation," Amnesty International:**

"CIS Resource Information Center, *Haiti: Information on Conditions in Haitian Prisons and Treatment of Criminal Deportees (2d Response)* (Feb. 12, 2002), *at* http://uscis.gov/graphics/services/asylum /ric/documentation/HTI02001.htm (last visited Mar. 9, 2004). Attached as Ex. G.

- **2004 Amnesty International Annual Report: Egypt**

Dozens of men suffered discrimination, persecution and imprisonment solely in connection with their actual or perceived sexual orientation. Many of those arrested alleged that they were tortured or ill-treated in detention. Although same-sex relations are not explicitly prohibited under Egyptian law, men continued to be sentenced to the charge of habitual debauchery" which is applied to consensual sexual relations between adult men. Attached as Ex. H.

An IJ must consider "all evidence relevant to the possibility of future torture." 8 C.F.R. §§ 208.16(c)(3), 1208.16(c)(3). The plain reading of this regulation makes it clear that an IJ must look at the cumulative effect of all evidence, not each act in isolation. *See Matter of J-E-*, 23 I&N Dec. at 309 (Schmidt, dissenting).

As an HIV-positive homosexual man, Respondent would be particularly vulnerable to arbitrary arrest by local officials. The record in this case contains clear, substantial and uncontroverted evidence that persons perceived as homosexual are intentionally unlawfully detained for an indefinite period of time and subject to torture and humiliation. Further, because he no longer has contact with any family members or friends in Egypt, Respondent would likely remain in prison indefinitely under conditions tantamount to torture. Targeted because of his sexual orientation, denied treatment for his debilitating mental illness, and refused life-saving HIV/AIDS medications, Respondent would more likely than not be subject to torture if removed to Egypt.

This evidence, viewed in totality, is unquestionably sufficient to show that Respondent, who additionally suffers from mental illness, is likely to experience "severe pain and suffering, both mental and physical" if deported to Egypt.

Respondent has thus established that upon his removal to Egypt, he will likely be detained and will more likely than not suffer from intentionally inflicted pain and suffering sufficient to qualify under both INA §241(b)(3) and the CAT. This pain and suffering will not be pursuant to lawful sanctions.

B. Recent BIA Decisions Recognize that a Respondent's Mental Illness Renders Him Particularly Vulnerable to Abuse

Two recent BIA decisions support Respondent's claim. In *Matter of [name unknown]*, A-- --- --- (BIA Mar. 18, 2003) (unpublished), attached as Exh. D, the BIA granted relief under the CAT to a mentally ill Haitian. The BIA stated:

> We note that the behavior of mentally ill individuals can be extremely erratic or eccentric at times. In the respondent's condition, his ability to conform to prison discipline requirements may be limited, especially if his medication is not provided. We believe that the existence of the respondent's mental condition makes it more likely than not that he would be severely punished for non-standard behavior, and may likely result in a longer period of incarceration.

Id. at 2. Similarly, in *Matter of Pascal Gaston*, A31 121 003 (BIA July 8, 2003) (unpublished), attached as Exh. E, the BIA granted relief to a Haitian man who had "diminished physical and mental capabilities." *Id*. at 2. Based on these diminished capabilities, the Board believed it was more likely than not that the respondent would be imprisoned and tortured once returned to Haiti.

Like the respondents in the two BIA cases just mentioned, Respondent would likely behave erratically – as he has recently in the US - and fail to abide by the culturally conservative norms of Egyptian society. Egyptian officials would likely see this as rogue behavior and punish him accordingly.

Once the BIA begins a line of cases, they must follow the precedent they have created in future cases with parallel facts. *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994). Though the BIA may refine or reverse their line of reasoning in the future, they must "confront the issue squarely and explain why the departure is reasonable." *Id*. The fact that the two recent BIA decisions regarding mentally ill Haitian deportees discussed above are unpublished does not allow the Board to rule differently in a similar case without explaining why it is doing so. *See id*. at 5-6 ("Put bluntly, we see no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases, without explaining why it is doing so").

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Board reverse the decision of the IJ and grant his application for withholding of removal or in the alternative, Article 3 deferral of removal under the CAT, or, alternatively, grant his motion to reopen and remand the case back to the IJ for a new hearing.

Respectfully Submitted,

____

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Exhibits

Matter of [name unknown]- El Paso, A-- --- --- (BIA Feb. 19, 2002)……………...Exh. A
Matter of A-R-C San Pedro, A-- --- 253 (BIA Dec. 8, 2003)(unpublished)………...Exh. B
Matter of Estrella-Martinez, File No. A14 340 742 (BIA Dec. 4, 2003)…………...Exh. C
Matter of [name unknown], A-- --- --- (BIA Mar. 18, 2003)………………………Exh. D
Matter of Pascal Gaston, A31 121 003 (BIA July 8, 2003)(unpublished)…………Exh. E
"In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct," Human Rights Watch (2004)……………………………………………………..Exh. F
"Torture and imprisonment for actual or perceived sexual orientation," Amnesty International………………………………………………………………………Exh. G
2004 Amnesty International Annual Report: Egypt………………………………...Exh. H