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

In the Matter of: File No. A[redacted]

[redacted],	:
Respondent	:
In Removal Proceedings	:

RESPONDENT'S BRIEF ON APPEAL

For the Respondent:

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I. Introduction

Respondent [redacted] files this brief in response to the Government's appeal from the [redacted], 2020 decision of the Immigration Judge granting his application for deferral of removal under Article III the U.N. Convention Against Torture ("CAT"), as implemented by 8 C.F.R. § 1208.17(a).

The Immigration Judge correctly considered all of the evidence of record in her detailed and well-reasoned decision. The decision contained no clear error as to its factual findings. The Immigration Judge applied the correct standards as to questions of law. For all of these reasons, the Government's appeal should be dismissed.

II. Facts

The respondent ("[redacted]") is a [redacted]-year-old male, native and citizen of Honduras. He entered the U.S. without inspection in [redacted] In [redacted], at the age of [redacted], [redacted] was deported to Mexico. [redacted] believes that his [redacted] were both granted asylum in the U.S. Both live in [redacted], TX. His [redacted] remains in Honduras.

[redacted] was found by the Immigration Judge to lack the competence to represent himself or to meaningfully participate in his own removal hearing pursuant to *Matter of M-A-M-*, 25 I&N Dec. 454 (BIA 2011). I.J. at 2. The Immigration Judge found that the respondent suffers from PTSD and personality disorder[redacted].

[redacted] came to the U.S. the first time because he was caught between a proverbial rock and a hard place (which in his instance were [redacted] and [redacted]) in his native country. [redacted] tried to recruit him, threatening to harm his [redacted] if he refused to join. [redacted], which

controlled the area where his girlfriend lived, wanted [redacted] to kill someone, beating him when he refused.

While living in the U.S. without lawful immigration status, [redacted] was arrested in [redacted] and was convicted of [redacted] for which he was sentenced to [redacted] years in prison in [redacted]. The respondent provided a false name, [redacted], a false date of birth, and a false nationality ([redacted]) to the [redacted] authorities. As a result, he was deported in [redacted] to Mexico.

[redacted] remained in Mexico until [redacted], when he returned to Honduras [redacted] While [redacted] was serving his prison sentence in the U.S., his [redacted] was killed in Honduras in [redacted]. [redacted]

Days after returning to Honduras [redacted], [redacted] confronted [redacted] gang members who were trying to recruit his [redacted]. [redacted]. [redacted] he was visited [redacted] by four uniformed police officers. One of the policemen asked [redacted] who was selling drugs [redacted] When [redacted] answered that no one was selling drugs, the policeman warned him that he would have to deal with the consequences. Soon after, [redacted] was threatened with harm by a member of [redacted] if [redacted] did not cooperate with the gang. Tr. at 135.

The same police officers returned [redacted] again in uniform and armed. They again warned [redacted] that he would have to deal with the consequences[redacted] The same police officers (still in uniform) later drove by the respondent's home while he was standing outside and began shooting at him. [redacted] was taken to a clinic, where it was

determined that one of the bullets hit a vein near his heart. [redacted].

To compound matters, [redacted] became involved in politics, campaigning for a neighbor and friend of his [redacted] who was running for local office as a candidate for the [redacted]. [redacted] campaigned openly on behalf of the [redacted] using his truck for this purpose, and he displayed the party's flag on his [redacted]'s house. As a result, he was threatened by the police and members of the ruling [redacted] who worked in tandem. Police and soldiers came to the [redacted]'s house, and a soldier pointed his gun at [redacted] and threatened to kill him if he did not remove the flag. [redacted] stopped his political activities at the urging of his [redacted], due to the danger.

After returning to the U.S., [redacted] was questioned by USCIS in a reasonable fear interview. He stated that he did not mention that it was the police who shot him during that interview out of fear of the consequences.

III. Legal standard of review

The Board reviews questions of law, discretion, and all other non-fact issues in appeals from decisions of immigration judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii). "[A]n Immigration

Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review." *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015). However, the determination as to whether such factual findings satisfy the burden of proof for the relief sought is a question of law subject to de novo review. *Ibid*; *Matter of A-S-B-*, 24 I&N Dec. 493, 497 (BIA 2008).

Under the clearly erroneous standard of review, "[a] factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." *Matter of R--S-H-,* 23 I&N Dec. 629, 637 (BIA 2003). Rather, for a finding to be "clearly erroneous", the reviewing court on the entire evidence must be "left with the definite and firm conviction that a mistake has been committed." *Id.* (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In other words, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

In order to warrant the protection of deferral of removal pursuant to CAT, an applicant must establish that it is more likely than not that he will suffer torture if returned to his country of nationality. 8 C.F.R. § 1208.16(c)(2). The torture must be inflicted by, or with the acquiescence of, of public official. *Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002). The Board has recently held that such torturous conduct must be committed by a public official acting under color of law, and not as a "rogue" official. *Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019).

IV. Legal argument

It bears noting that although this brief is filed in response to ICE's appeal, the BIA set the same filing deadline for both parties. The respondent therefore has not seen the government's

brief, and can only surmise its reasons for appeal from its statement in support of its EOIR-26, Notice of Appeal.

A. The IJ's credibility finding was not clearly erroneous.

In its notice of appeal, ICE questioned the Immigration Judge's credibility finding. After listening to [redacted] testify at length, the Immigration Judge indicated at the [redacted] 2019 hearing that "based on what the respondent has stated about having seen a psychologist and watching his demeanor as he was discussing some of these issues. The Court finds that there are indicia of incompetency here." Tr. at 83. The attorney representing ICE at the hearing at which such observation occurred was [redacted]. [redacted] represented ICE at the [redacted] *M-A-M-* competency hearing. At that hearing, the respondent testified that he did not know what an attorney would do to assist him in his hearing, and did not understand the role of the ICE attorney. When asked if he understood the judge's role, he answered "[redacted] In making her competency ruling, the Immigration Judge stated at the hearing that the extensive medical documentation in the record indicated that [redacted] may have a personality disorder, and characterized his concentration, ability to think abstractly, insight, and judgment as "poor." Tr. at 104.

At the final merits hearing, ICE was represented by [redacted]. And it is this last attorney who asserted in the EOIR-26 Notice of Appeal that the Immigration Judge misapplied the Board's decision in *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015) because (apparently in the

ICE attorney's view) the respondent's competency issues did not affect the reliability of his testimony.[1]

The determination as to whether the respondent's competency issues affected the reliability of his testimony is a factual one, subject to the Board's clear error review. The Immigration Judge based her finding in part on her observation of [redacted]'s demeanor while testifying. The ICE attorney challenging such finding was not present at the hearing in question, and therefore did not observe the demeanor in question.

While ICE may of course disagree with the determination, the Board may not reverse such factual determination based on its alternative point of view; rather it must uphold the determination as long as it was reasonable. Based on the Immigration Judge's own demeanor observations, the respondent's psychological history, the medical documentation of record, and the respondent's own testimony admitting to auditory hallucinations, and indicating his lack of understanding of the roles of a lawyer and prosecutor in his case, the Immigration Judge's determination was reasonable and should not be reversed on appeal.

Pursuant to such competency finding, the respondent was properly not penalized for his prior statements based on the likelihood that discrepancies contained therein could be credited to the impact of his mental incompetency on his ability to testify. *Matter of J-R-R-A-* was intended as a safeguard, and was applied as one by the Immigration Judge. In that case, the Board noted that in instances in which the asylum seeker has been diagnosed with mental illness, "factors that would otherwise point to a lack of honesty in a witness—including inconsistencies, implausibility, inaccuracy of details, inappropriate demeanor, and nonresponsiveness—may be reflective of a

[1] Such conclusion is drawn from the fact that ICE highlighted that language on the EOIR-26.

mental illness or disability, rather than an attempt to deceive the Immigration Judge." *Matter of J-R-R-A-*, *supra* at 611.

Here, [redacted] testified on direct examination that he hears his late [redacted] asking him for help, and that he sees [redacted] He said that he is given medication for his condition at the detention facility. [redacted] Yet ICE argues that the mental illness responsible for such hallucinations and incoherent answers somehow did not impact the reliability of [redacted]'s answers. The decision to the contrary to apply the safeguards of *J-R-R-A-* does not lead to the clear belief that a mistake has been made based on this record.

ICE nevertheless on cross-examination questioned [redacted] regarding information contained in the asylum officer notes from his credible fear interview. In response to ICE's question whether he had trouble understanding the questions he was asked, [redacted] responded: [redacted]

The Immigration Judge was clearly correct not to give weight to any resulting discrepancies in light of the respondent's answer and the conclusions already reached regarding his competency. It also bears noting that the Board has recognized reasons for discounting misstatements made under similar circumstances even where no competency issues exist. In *Matter of J-C-H-F-*, 27 I&N Dec. 211 (BIA 2018), the Board adopted the criteria for weighing the reliability of border or airport interviews laid out by the U.S. Court of Appeals for Second Circuit in *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004). The Second Circuit has held "that credible fear interviews

are more similar to airport interviews than asylum interviews and therefore warrant the close examination called for by *Ramsameachire*." *Zhang v. Holder*, 585 F.3d 715, 724 (2nd Cir. 2009). Thus, a credible fear interview should properly be subjected to the same inquiry.

The four *Ramsameachire* factors adopted by the Board in *J-C-H-F-* include determining whether the noncitizen "appears to have been reluctant to reveal information to the interviewer because of prior interrogation sessions or other coercive experiences in his or her home country." *Matter of J-C-H-F-*, *supra* at 214. The respondent's answer to ICE evinced that this reluctance existed in his case. While the Board held in *J-C-H-F-* that adjudicators should consider the totality of the circumstances, rather than relying on any one factor in assessing the reliability of such statements, the totality of the circumstances here involves a respondent who had been threatened and actually shot by government officials in his country, and who was talking to U.S. government officials immediately upon arrival in the U.S. and while detained and facing the prospect of return to Honduras, and who had also been found incompetent for mental reasons by an Immigration Judge.

Here, the reliability of [redacted]'s answers during the credible fear interview were further impacted by his mental health issues. Whereas the Immigration Judge was able to glean from observing [redacted]'s demeanor that a competency issue might exist, the credible fear interview was conducted by phone, depriving the asylum officer of the opportunity to make a similar observation. On this record, both the invocation of *J-R-R-A-* and the credibility finding should not be disturbed.

B. The Respondent established that he was likely to suffer torture

8 C.F.R. § 1208.16(c)(3) states that in assessing the likelihood of a CAT applicant suffering torture in their home country, adjudicators should consider evidence of past torture inflicted upon

the applicant; evidence of whether the applicant could safely relocate within the country; evidence of human rights violations within the country; and other relevant information regarding conditions within that country.

In the instant case, [redacted] was the recipient of extreme torture in the past. He was shot multiple times by uniformed police officers, which nearly killed him, and required a year for him to recover. He still suffers the psychological effects of such torture. He was also threatened multiple times by the police, and has reasons to fear [redacted], which operates largely with impunity in Honduras, and by officials of the ruling [redacted], who he testified work in tandem with the police.

Regarding internal relocation, as the fear was of the police, as well as of an international criminal enterprise with reach throughout the country, and of the [redacted] party, the Immigration Judge correctly concluded that the threat to [redacted] extends throughout the country. I.J. at 10. Furthermore, [redacted]'s [redacted] stated that "many people have come to threaten" her, [redacted], and his [redacted]. I.J. at 9; Declaration of [redacted] at ¶ 7.

The Fourth Circuit's decision in *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 973 (4th Cir. 2019) further requires the Immigration Judge to consider the risk of torture from all sources in calculating the likelihood of torture. [redacted] claims to fear harm from the police, who have already shot and nearly killed him; who on a separate occasion years later pushed him and hit him in the stomach with a rifle butt while he was counting election ballots; and who warned him and threatened to kill him on numerous occasions. He also claims to fear [redacted], because he intervened to prevent its members from recruiting his [redacted]. He also testified that he killed an [redacted] member armed with a machete in order to save his [redacted]. Tr. at 149. [redacted] also fears members of the ruling [redacted], who he said work in tandem with the police, because of his active

involvement with the opposition [redacted] Party. And the Immigration Judge also properly considered any likelihood of harm resulting from [redacted]'s mental illness. I.J. at 9-10.

In considering the different sources for his risk of torture, the Immigration Judge also properly considered the evidence of record concerning the degree of entanglement between the Honduran police and [redacted]. I.J. at 8. *See Alvarez-Lagos v. Barr*, 927 F.3d 236, 256 (4th Cir. 2019) (citing the failure to consider the legal import of evidence of collusion between the police and [redacted] in the IJ's CAT analysis). The court in *Alvarez-Lagos* specifically rejected the IJ's reliance in that case on the type of generalized country conditions reports submitted by ICE in the instant case (Exh. 3).

Regarding human rights violations in Honduras, the 2018 Department of State Country Report on Human Rights Practices for Honduras that is in evidence begins by stating that "civilian authorities at times did not maintain effective control over the security forces." Exh. 7, Tab D at 70. The report also summarized human rights issues that include "reports of arbitrary and unlawful killings," torture, and widespread government corruption. Id. While the report mentions government steps to prosecute officials who committed abuses, it mentioned that many enjoyed impunity, as there were few convictions. Id. The report also mentions killings and other abuses committed by organized criminal elements, including [redacted]. Id. at 72.

The Human Rights Watch 2018 Report on Honduras, also contained in the record, mentioned police corruption so problematic that more than 5,000 of the 10,000 police officers evaluated by a police reform commission were removed. Id. at 98.

Considering the past infliction of severe torture, the multiple ongoing threats, the multiple sources of harm, and the evidence of collusion between such sources, the Immigration Judge's

determination that the respondent established the required likelihood of torture if returned to Honduras should be upheld on appeal.

C. The feared torture is from public officials acting under color of law

The respondent suffered torture in the past carried out by public officials acting under color of law, as defined by the BIA in *Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019). While the record wasn't clear as to what means the public officials used to locate [redacted], they appeared shortly after [redacted] threaten him. [redacted]

[redacted] testified that four police officers appeared [redacted] wearing uniforms with insignias. Tr. at 134. The police officers returned [redacted] again in uniform, and carrying weapons. Tr. at 139. [redacted] testified that on that occasion, they left in a police patrol car. Tr. at 163-64. He also testified that they were in uniform when they shot him (although they were no longer in the patrol car). Tr. at 164-65.

The Board has noted that whether the public official was acting under color of law "is a fact intensive inquiry." *Matter of O-F-A-S-*, *supra* at 717. The factual findings of the Immigration Judge relating to such inquiry may only be reversed by the Board if clearly erroneous. As the Immigration Judge's detailed discussion of this issue accurately recounts the facts of record and interprets such facts reasonably, the findings of fact should not be reversed on appeal. *See Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 889-92 (4th Cir. 2019) (holding that the Immigration Judge's predictive finding of how the government would likely react to a respondent's feared harm is a finding of fact subject to the Board's clear error review, whereas whether such response constitutes acquiescence is a question of law that the Board may review de novo).

While the Board may review de novo the application of the correct legal standard to such facts, the Board is asked to be mindful in doing so of a point not reached in *O-F-A-S-*, namely, that even were the Board to conclude that the public official's actions were not taken under color of law, the alternate likelihood that the rogue official's actions occurred with government acquiescence. In *O-F-A-S-*, the Immigration Judge was not persuaded that the uniformed offenders were in fact public officials. Furthermore, aspects of their behavior (including the fact that the fled immediately upon learning that an official police car was en route to the scene) undermined the likelihood of acquiescence.

Here, the evidence establishes, and the Immigration Judge reasonably found, that the individuals in question were actually police officers. Among the various facts stated in support of the Immigration Judge's color of law finding was [redacted]'s testimony that even though he was shot several times near the police station, when he passed that station en route to the hospital, there was no activity of the type to be expected when police are responding to a shooting. The Immigration Judge in her decision credited the respondent's testimony that the police would have heard the shooting and commotion, but that there were no sirens or lights when he passed the police station, and that the police did not respond at all to the shooting. [redacted].

While the Immigration Judge correctly and reasonably considered the police's non-reaction as supporting the fact that the officers who were involved in shooting [redacted] were acting under color of law, such inaction by the entire police station would also support an alternative finding of acquiescence (which has been defined to include "willful blindness") by the police. *See, e.g.*, *Cruz-Quintanilla*, 914 F.3d at 886-87. Furthermore, although the Immigration Judge found the

evidence inconclusive as to whether the armed and uniformed police officers were on duty at the time they shot [redacted], at least one circuit has held that that an off-duty official inflicting pain or suffering qualifies as an acquiescing public official. *See Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017).

V. Conclusion

For all of the above-stated reasons, the Immigration Judge committed no clear error in her factual findings, which included her credibility findings and her prediction as to the risk of the respondent suffering torture at the hands of the government or with government acquiescence if returned to Honduras. Furthermore, the Immigration Judge applied the correct legal standards as interpreted by the BIA and the Fourth Circuit to the facts of the case.

Conversely, ICE's presumed arguments to hold the respondent accountable for inconsistencies likely resulting from mental incompetency, and to rely on general reports of country conditions over more specific and localized evidence of record is at odds with both BIA and Fourth Circuit case law, as detailed above. The Board is therefore respectfully requested to dismiss the Government's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On [redacted] 2020, I, [redacted], electronically served a copy of the foregoing Brief on Appeal on the DHS/ICE Office of Chief Counsel at 1901 S. Bell Street, Suite 900, Arlington, VA 22202.

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