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

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

———————————————————-X
:
[redacted], :
:
Respondent :
:
In Removal Proceedings :
———————————————————-X

RESPONDENT'S REPLY BRIEF

For the Respondent:

[redacted] (EOIR No. [redacted])
Capital Area Immigrants' Rights Coalition
1 North Charles Street, Suite 2305
Baltimore, MD 21201
Phone: [redacted]
Fax: [redacted]
[redacted]

[redacted]
[redacted]
[redacted]
[redacted]

I. Introduction

Respondent [redacted] files this Reply to the Department of Homeland Security's ("DHS") brief dated [redacted], 2020, pursuant to Chapter 4.6(h) of the BIA Practice Manual.

The Board is respectfully requested to consider this submission as a supplement to the Respondent's previously-filed brief. This Reply addresses certain arguments raised in the DHS opening brief that were not previously known due to the concurrent filing schedule.

II. Legal Argument

A. The IJ's credibility finding should not be disturbed.

In its brief, DHS argues that the Immigration Judge erred in relying on only one version of events (i.e. the respondent's testimony at the final hearing). DHS claims that in doing so, "the implicit suggestion is that the respondent was for some reason more competent, rendering him a more reliable reporter, at the last hearing than at all prior times." DHS at 13.

In reply, the Respondent cites to 8 C.F.R. § 1240.10(c), which states in part that "[t]he immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent…." Obviously, the same Immigration Judge may accept an admission of removability from the same respondent after a qualified representative has been assigned to represent them. The regulation does not imply that the respondent possesses a different mental state at the later hearing. The purpose of the regulation is to prohibit the court from relying on an incompetent respondent's testimony until the safeguard of representation has been put in place. *See Matter of M-A-M-*, 25 I&N Dec. 478, 481 (BIA 2011). The Immigration Judge applied this exact same principle to the testimony in support of relief.

In *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015), the Board held that where the reliability of a respondent's testimony may be affected by a mental health concern, the Immigration Judge should find a genuine subjective fear of persecution on the part of the respondent (even where others might not find the testimony believable). The Immigration Judge should then proceed to whether the record contains sufficient objective evidence to meet the burden of proof.

CAT claims do not specifically require the applicant to possess a genuine subjective fear of persecution. *See Li Fang Lin v. Mukasey*, 517 F.3d 685, 696 (4th Cir. 2008). The question in a CAT claim is simply whether the applicant is more likely than not to be tortured. However, this does not change the applicability of *J-R-R-A-* to the present case. Credibility determinations are no different in asylum and CAT cases. The Board correctly notes that while credibility determinations normally concern "whether an individual is presenting false information in an attempt to bolster or fabricate an application for relief," mental health issues complicate this inquiry. *J-R-R-A-*, *supra* at 611. "In such circumstances, the 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 mental illness or disability, rather than an attempt to deceive the Immigration Judge." *Id.*

In the accompanying footnote, the Board states: "while there are situations in which it may be appropriate for Immigration Judges to make adverse credibility findings in cases involving incompetent respondents, the better course in most instances would be for the Immigration Judge to accept the subjective belief of the respondent as genuine and proceed to the other requirements for the relief sought." *Id.* at 612, n. 1. This would seem to indicate that adverse credibility findings should be the unusual exception in cases involving an incompetent respondent.

DHS's argument to the contrary is difficult to follow. DHS points to the fact that the BIA prefaced its general rule to find incompetent respondents subjectively credible with the phrase "such scenarios need to be assessed on a case-by-case basis." DHS at 11 (citing *J-R-R-A-*, *supra* at 612). But the Immigration Judge here did make such determination on a case-by-case basis, having noticed indicia in the respondent's demeanor raising the possibility of incompetency, then asking follow-up questions, the answers to which further affirmed her suspicions. The Immigration Judge then held an *M-A-M-* hearing, resulting in a finding of incompetency and the designation of representation.

But it appears that DHS cites to the case-by-case basis language to support its argument that the Immigration Judge should have considered testimony (including that provided in the reasonable fear interview) that preceded the incompetency finding on the ground that it might not all have been impacted by the Respondent's mental health issues. DHS seems to be arguing that the Immigration Judge must assess each past statement to determine its reliability, in light of the facts that mental health issues are not static. Such argument overlooks the facts that (1) immigration judges are not mental health professionals; and (2) they further lack the ability to go back in time to determine the respondent's mental state at the time of those prior statements. As noted in the Respondent's prior brief, the reasonable fear interview was conducted by phone, depriving the USCIS asylum officer conducting it of the ability to make the same demeanor observations that led the Immigration Judge to question the Respondent's competency. DHS provides no guidance of how the selective determination it proposes as to whether or not to credit the prior testimony would be made. Frankly, its proposal does not seem possible.

This is precisely the reason for the Board's imposition of safeguards. When DHS questions why the Immigration Judge should be able to credit only the testimony offered after the

Respondent was found incompetent and assigned counsel, the answer is the same as to why the regulations require the Immigration Judge to only accept an admission of removability after counsel is assigned: because there is presumably a greater likelihood of reliability where competent counsel is assisting.

As the Immigration Judge's crediting of only the testimony offered after the incompetency finding and designation of counsel is entirely consistent with all applicable law, and was not clearly erroneous, the factual findings should not be disturbed. *See U.S. v. Weathers*, 854 F.2d 1318 (4th Cir. 1988) (unpublished) (holding in the criminal context that it is "within the discretion of the trial judge to determine whether the evidence should be received" where a witness has been ruled incompetent). The Immigration Judge here offered specific, cogent reasons for not considering the Respondent's conflicting statements. I.J. at 4-5. Such determination thus satisfied the requirements of Fourth Circuit case law. *See Ai Hua Chen v. Holder*, 742 F.3d 171, 179 (4th Cir. 2014) (requiring an IJ to "offer a specific, cogent reason for rejecting evidence").

Additionally, DHS offers arguments later in its brief regarding its own interpretation of the likelihood of future torture. DHS at 19-20. Those arguments constitute the type of alternative weighing of evidence that case law has ruled insufficient to establish clear error. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) (holding that the fact-finder's choice between two permissible views of the evidence cannot be clearly erroneous); *Matter of R--S-H-,* 23 I&N Dec. 629, 637 (BIA 2003).

B. The Respondent established a likelihood of torture pursuant to case law

DHS also discussed in its brief the requirements of *Matter of J-G-R-P-*, 27 I&N Dec. 482 (BIA 2018), and *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) that a CAT applicant bears

the burden of establishing that "each link in a 'hypothetical chain of events is more likely than not to happen.'" DHS at 15-16. However, this holding is not relevant to the case at hand.

Both *J-G-R-P-* and *J-F-F-* involved CAT claims that were speculative, based on a series of hypothetical suppositions. Neither respondent had suffered torture in the past in their country, or been threatened with torture by public officials. The holdings in these cases are meant to address situations where a CAT claim is constructed as, e.g., if the Respondent is removed to country X, he might not be able to obtain his medication there; in which case, he might behave erratically; in which case, he might come to the attention of the police; in which case, he might be imprisoned; in which case, he might suffer torture. The holdings in *J-G-R-P-* and *J-F-F-* establish that a CAT applicant relying on such a string of suppositions must prove the likelihood of each step in order to meet their burden of proof.

By contrast, the Fourth Circuit made clear in *Rodriguez-Arias* that, where a respondent is not attempting to prove a single hypothetical string of events, but rather fears torture from multiple separate entities, the proper inquiry is to aggregate the risk of torture from each entity. *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 973 (4th Cir. 2019). In reaching its conclusion, the Fourth Circuit explicitly rejected the argument that the respondent, who feared torture by police, gangs and vigilante groups, was required to prove a string of events:

> . . . [W]ithout citing to or describing any of Rodriguez's evidence, the BIA simply stated: "[Rodriguez] has not shown that his hypothetical chain of events is more likely than not to happen." A.R. 008. But Rodriguez never attempted to prove a string of events. Instead, he has consistently asserted that due to his tattoos, he fears torture from three separate entities: police, gangs, and vigilante groups. The proper response to Rodriguez's fears is to add the amount of risk that each group poses to him and then determine whether that sum is greater than 50%. The BIA failed to do that analysis here, necessitating remand.

Id.

As in *Rodriguez-Arias*, the Respondent in the instant case did not rely on a string of hypotheticals. The Respondent's CAT claim is based on his fear of torture from multiple entities, including the police, [redacted] members of the ruling [redacted] and others who would harm him for his political beliefs or mental illness. Aggregating the risk of torture from each source, the Immigration Judge was only required to find whether it is more likely than not that the Respondent will be tortured, rather than evaluate whether any specific chain of events or any link in a chain of events independently meets the 50% threshold. *See Rodriguez-Arias*, 915 F.3d at 973.

Moreover, regarding his fear of torture based on his refusal [redacted] the Respondent was actually shot by police officers, after being threatened by same police officers. Although past torture does not create a presumption of future torture, it is considered by the regulations as relevant to the inquiry, along with "evidence of 'gross, flagrant or mass violations of human rights,' the country's conditions, and whether the applicant could relocate to a part of the country where he or she is unlikely to be tortured. 8 C.F.R. § 1208.16(c)(3)." *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245 (4th Cir. 2013). All of these factors were addressed in detail in the Immigration Judge's decision. I.J. at 7-11. *See also* Respondent's prior brief at 11-12.

Regarding the Respondent's fear of torture based on his political activity, he again does not rely on a string of hypotheticals. To the contrary, he was actually threatened and harmed by government officials in the past. The respondent also intervened to prevent [redacted] members from recruiting his [redacted] causing him to fear repercussions. Again, this fear does not arise from a string of hypotheticals. And applicable case law requires all bases of fear to be considered cumulatively in determining the likelihood of torture. *Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 973 (4th Cir. 2019). Only one additional basis of such fear, based on the Respondent's mental illness, is based on a chain of hypotheticals. While it is argued that each link in the chain has met

the requirements of *J-G-R-P-*, it is alternatively argued that the burden of proof has been satisfied cumulatively by the three other grounds not based on hypotheticals.

C. The police officers who shot the Respondent were acting "under color of law."

DHS also questioned on p. 10 of its brief whether the Respondent's attackers were police officers, and if so, whether they were acting under color of law, as addressed in *Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019).

The Supreme Court has held "[i]t is clear that under 'color' of law means under 'pretense' of law…. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea." *Screws v. U.S.*, 325 U.S. 91, 111 (1945).

In *U.S. v. Tarpley*, 945 F.3d 806 (5th Cir. 1991), the U.S. Court of Appeals for the Fifth Circuit concluded that a police officer acted under color of law when he lured his wife's lover to his home and beat him, put his service revolver in the lover's mouth, and said "I'll kill you. I'm a cop. I can." He also involved a fellow police officer, who was present as an ally. The court found that the "presence of police and the air of official authority pervaded the entire incident." *Id*. at 809. It is important to note that the police officer in *Tarpley* was acting based on a purely personal motive, and the incident occurred in his own home.

The present case involved police officers acting with a similar air of official authority. DHS has not demonstrated that the Immigration Judge's factual finding that the attackers were police officers was clearly erroneous. As noted in the Respondent's prior brief, the officers were uniformed, armed, and on at least one incident, driving an official police car. Multiple police officers were involved on multiple occasions. The police officers also shut down the Respondent's business (I.J. at 3), an action that only police officers would be authorized to undertake, and which

thus involves "an air of official authority." The Respondent raises these points in addition to the arguments contained in his prior brief.

III. Conclusion

For all of the above-stated reasons, the Board is respectfully requested to dismiss the appeal.

Respectfully submitted,

/s/ [redacted]
[redacted]
Qualified Representative for Respondent
Capital Area Immigrants' Rights Coalition
1 North Charles Street, Suite 2305
Baltimore, MD 21201
Phone: [redacted]
Fax: [redacted]
[redacted]

[redacted]

[redacted] 2020

CERTIFICATE OF SERVICE

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

/s/ [redacted]

[redacted]
Qualified Representative for Respondent
Capital Area Immigrants' Rights Coalition
1 North Charles St., Suite 2305
Baltimore, MD 21201
[redacted]