NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

(b)(6)

Applicant

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ON BEHALF OF APPLICANT: Eleni R. Bakst, Esquire

ON BEHALF OF DHS: Jorge L. Montesino, Deputy Chief Counsel

IN WITHHOLDING ONLY PROCEEDINGS
On Appeal from a Decision of the Immigration Court, Annandale, VA

Before: Malphrus, Chief Appellate Immigration Judge; Mullane, Appellate Immigration Judge; Goodwin, Appellate Immigration Judge

Opinion by Chief Appellate Immigration Judge Malphrus

MALPHRUS, Chief Appellate Immigration Judge

This matter was last before us on August 3, 2023, when we remanded the record to the Immigration Judge. The Department of Homeland Security ("DHS") appeals from the Immigration Judge's decision dated March 19, 2024, granting the applicant's request for deferral of removal under the regulations implementing the Convention Against Torture ("CAT").[1] The applicant, a native and citizen of El Salvador, opposes the appeal. The record will again be remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review 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)(ii).

This case involves a substantial procedural history. On April 3, 2020, the Immigration Judge granted the application for deferral of removal. DHS filed an appeal from that decision, which we sustained on January 19, 2021. In our decision, we found that the Immigration Judge's positive credibility finding was clearly erroneous and remanded the record to the Immigration Judge to consider the likelihood of future torture aggregated from all sources. On April 12, 2021, the Immigration Judge again granted deferral of removal. DHS appealed, and, on December 21, 2021, we remanded the record to the Immigration Judge to consider DHS' argument that, contrary to the

[1] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). 8 C.F.R. §§ 1208.16(c)-1208.18.

applicant's testimony, he was still a member of a gang, and assess his likelihood of future torture in light of the Immigration Judge's conclusion as to that issue. In a decision dated February 7, 2022, the Immigration Judge made an adverse credibility finding and denied the application for deferral of removal. The applicant appealed, and we remanded the record on August 3, 2023. We affirmed the adverse credibility finding, but remanded the case to the Immigration Judge to consider all record evidence to determine the likelihood of future torture. On March 19, 2024, the Immigration Judge granted the applicant's request for deferral of removal under the CAT. DHS has appealed from that decision.

We will again remand the record for further analysis of the applicant's eligibility for deferral of removal under the CAT. *See Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (stating that the Board has limited fact-finding authority). The applicant fears torture under the Salvadoran government's state of exception policy, claiming that he will be imprisoned and tortured by public officials, gang members, and extermination squads (IJ at 19). The Immigration Judge found that, more likely than not, the applicant would be immediately imprisoned and tortured by government actors (IJ at 19 n.11). In so finding, the Immigration Judge relied heavily on the testimony of the applicant's purported expert, Dr. (b)(6) (IJ at 6-13).

We agree with DHS' argument that the Immigration Judge erred in his treatment of Dr. (b)(6) as an expert witness (IJ at 6-13; DHS' Br. at 8). The Immigration Judge found that Dr. (b)(6) was an expert in general country conditions but that she was not an expert on prison conditions in El Salvador (IJ at 9-10). However, the majority of Dr. (b)(6) testimony concerned prison conditions, not general country conditions in El Salvador (IJ at 3-5; Tr. at 30-43). Therefore, we conclude that it was error for the Immigration Judge to consider Dr. (b)(6) testimony as to her opinion of prison conditions in El Salvador. *See Matter of J-G-T-*, 28 I&N Dec. 97, 101 (BIA 2020) ("An expert witness may testify in the form of an opinion or otherwise if his or her "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.") (internal citation omitted).

Additionally, DHS has identified other issues with Dr. (b)(6) testimony (DHS' Br. at 8-14). On remand, the Immigration Judge should further consider and clearly determine what weight to accord the witness when reassessing the applicant's eligibility for deferral of removal.

The parties dispute whether the applicant established that he is more likely than not to be tortured by a Salvadoran public official (IJ at 19 n.11; DHS' Br. at 18-28; Applicant's Br. at 19-36). The Immigration Judge found that the conditions documented in Salvadoran prisons, including overcrowding, unsanitary conditions, and access to limited medical staff and care, constitute torture with the requisite specific intent (IJ at 20; Exh. 12 at 533, 581, 587, 607, 665). The Immigration Judge acknowledged the lack of quantitative evidence about mistreatment in Salvadoran prisons but found that the applicant met his burden of proof because he was similarly situated to the type of individuals that the Salvadoran government intentionally places in severe conditions (IJ at 23-25). The Immigration Judge concluded that the adverse prison conditions were created by public officials with the specific intent to torture inmates based on

statements and photos and videos posted by Salvadoran officials on social media (IJ at 20-23; Exh. 11 at 2, 47; Exh. 12).

The Immigration Judge should reassess whether the applicant is more likely than not to be tortured by a Salvadoran public official with the requisite specific intent. The Immigration Judge's findings about the adverse Salvadoran prison conditions in this case are similar to the conditions the Board addressed in *Matter of A-A-R-*, 29 I&N Dec. 38, 43-45 (BIA 2025), which was issued during the pendency of this appeal. In that case, we explained that anecdotal reports of some criminal deportees being indefinitely detained in torturous conditions in Salvadoran prisons are insufficient to establish that an applicant is more likely than not to have that experience. *See id.* at 41-42; *see also Matter of J-R-G-P-*, 27 I&N Dec. 482, 486 (BIA 2018). We further held that statements from Salvadoran officials suggesting that they believe gang members deserve the adverse conditions they experience reflect the officials' moral judgment about gang members, rather than a specific intent to torture. *See Matter of A-A-R-*, 29 I&N Dec. at 43-44 (holding that "[t]he correlation between public officials' disdain for gang members and the harsh prison conditions . . . does not necessarily indicate intent. We should not simply assume that elected officials have a specific intent to torture based solely on disparaging comments about gang members."); *see also Matter of R-A-F-*, 27 I&N Dec. 778, 780 (A.G. 2020) (discussing specific intent); *Matter of J-E-*, 23 I&N Dec. 291, 300-01 (BIA 2002). On remand, the Immigration Judge should reassess the applicant's CAT claim in light of *Matter of A-A-R-* and related precedent.

In granting the applicant's CAT claim, the Immigration Judge did not address his risk of torture from gang members or extermination groups because he found that the applicant was more likely than not to be tortured in prison by a Salvadoran public official (IJ at 19 n.11). The Immigration Judge should assess the applicant's aggregate risk of torture from all feared sources – government officials, gangs, and extermination groups – as appropriate on remand. *See Lopez-Sorto v. Garland*, 103 F.4th 242, 254 (4th Cir. 2024).[2]

Accordingly, the following order will be entered.

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

[2] In assessing the risk of torture to the applicant, the Immigration Judge cited to the applicant's written closing arguments (IJ at 20). Closing arguments are not evidence, and the Immigration Judge erred in treating them as such. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (unsupported statements by attorneys in briefs are not evidence).