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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia 22041**

IN THE MATTER OF:)
)
 [NAME OF RESPONDENT],)
) **File No.: A 123-456-789**
 Respondent.)
)
 In Removal Proceedings.)

RESPONDENT’S APPEAL FROM A DECISION BY
THE UNITED STATES IMMIGRATION JUDGE

BRIEF OF RESPONDENT

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SUMMARY DISMISSAL IS NOT APPROPRIATE

Summary dismissal pursuant to § 1003.1(d)(2)(i) is not appropriate because: (1) Respondent has specified the reasons for the appeal; (2) the appeal does not rely on facts or conclusions of law that were previously conceded; (3) the order below did not grant Respondent the relief that she requested; (4) the appeal is not filed for an improper purpose and it is not frivolous; (5) the appeal lies within the jurisdiction of the BIA; (6) it is timely filed and it is not barred by any waiver of the right of appeal; and (7) the appeal meets essential statutory or regulatory requirements and is not expressly excluded by statute or regulation.

A THREE MEMBER PANEL IS APPROPRIATE

Pursuant to 8 C.F.R. § 1003.1(e)(6), this appeal should be reviewed by a three-member panel because the Immigration Judge (“IJ”) erred when he found that Respondent failed to meet an exception to the one-year filing requirement for asylum. For this reason, Respondent respectfully requests a three Member panel for her appeal.

STATEMENT OF FACTS

I. Testimony and Evidence

The Immigration Judge (“IJ”) found Respondent credible. Opinion (“Op.”) 6. He noted that her testimony was “forthright” and that her responses to questions were “detailed, internally consistent, and consistent with documentary evidence in the record.” Op. 6.

Respondent is a native and citizen of Russia. Transcript (“Tr.”) 17. Respondent is a lesbian. Tr. 18. She realized that she was attracted to other women when she was in

high school. Exhibit 3-A, ¶ 10.¹ After she finished high school, Respondent had a romantic relationship with her friend Jane. Exhibit 3-A, ¶¶ 12-13. The two women kept the relationship secret. Exhibit 3-A, ¶ 15.

In the summer of 2006, Respondent came to the United States on a J-1 visa to work as a seasonal worker. Exhibit 3-A, ¶ 16. She returned to Russia after the summer was over. *Id.* Respondent also worked in the U.S. during the summers of 2007 and 2008. *Id.* She returned to Russia after each visit. Exhibit 3-A, ¶ 16 & 18.

In March 2009, Jane visited Respondent in Respondent's home city (Moscow). Exhibit 3-A, ¶ 19. The two women went out drinking. *Id.* Afterwards, they went walking by the river. *Id.* It was around 1:30 or 2:00 AM. *Id.*

The women thought they were alone, and they were holding hands and kissing. Exhibit 3-A, ¶¶ 21 & 22. A group of five men saw them. *Id.* The men insulted Respondent and her girlfriend, kicked them, and slapped them. *Id.* The men then took Respondent and Jane in their car to an isolated area. Exhibit 3-A, ¶¶ 23-25. The men gang raped Respondent and Jane. Exhibit 3-A, ¶ 25. Afterward, the men left. Exhibit 3-A, ¶ 26.

Respondent and her friend were traumatized and upset. Exhibit 3-A, ¶ 27. They went to the police for help. Exhibit 3-A, ¶¶ 27-28. They told the police what happened, including that they were kissing each other before the attack. Exhibit 3-A, ¶ 28.² The police officers blamed Respondent and Jane for the attack. *Id.* They said that the women had provoked their attackers. *Id.* The police said that it was right what happened to the

¹ Based on an agreement with DHS prior to trial, Respondent's testimony was largely limited to the one-year asylum filing issue. Tr. 16. For this reason, this brief will rely on Respondent's affidavit, Exhibit 3-A, to set forth the facts of the case.

² Respondent and her friend were very upset, and did not think before telling the police that they had been kissing. Exhibit 3-A, ¶ 28.

women, and they refused to take a report. *Id.* The women tried to talk to someone else at the police station, but there was no one else, so after some time, they left. *Id.* They each went to their respective home, and Respondent did not see Jane again after that (Jane left Russia). Exhibit 3-A, ¶29.

When Respondent got home, she woke her parents and asked her mother to treat her injuries. Exhibit 3-A, ¶ 29.³ Respondent told her parents what happened, including that she had been kissing Jane. *Id.* After that, her relationship with her parents was distant, and her parents were disappointed and ashamed. Exhibit 3-A, ¶ 30. Her mother was hostile. *Id.*

After the rape, Respondent was afraid to go anywhere in Russia. Exhibit 3-A, ¶ 31. Sometimes people would make rude comments to her about her sexual orientation. *Id.* This made her upset and frightened. *Id.* She also became more aware of anti-gay graffiti in Russia, and this made her feel insecure. Exhibit 3-A, ¶ 32.

Also after the rape, Respondent was concerned about sexually transmitted diseases, but she did not go to a doctor because she did not want to think about what had happened to her. Tr. 45-46. Also, she did not have insurance to go to a doctor. Tr. 45.

Respondent obtained an H2B visa and came to the United States on July 12, 2009. Exhibit 3-A, ¶¶ 33 & 34. She remained in the United States after her authorized stay expired. Exhibit 3-A, ¶ 35.

At one job, she met a woman who wanted to “help” Respondent change her sexual orientation. Exhibit 3-A, ¶ 36. Respondent also wanted to change her nature. *Id.* She felt bad about what she “did” to her family (by being a lesbian) and she thought her family might accept her again if she changed. Tr. 33. The woman introduced Respondent

³ Respondent’s mother is a nurse. Exhibit 3-A, ¶ 29.

to her brother, John. *Id.* Respondent and John were married on December 1, 2010. Exhibit 3-A, ¶ 37. However, they never had a physical relationship, and the marriage ended with an annulment on December 21, 2011. Exhibit 3-A, ¶ 38. John never filed any immigration paperwork for Respondent. *Id.*⁴

Respondent filed for asylum in May 2011, about two years after she came to the United States. Tr. 18. Respondent did not file for asylum during her first year in the United States because she was very afraid to discuss her sexual orientation publicly. Exhibit 3-A, ¶ 39.⁵ She felt humiliated by the rape and did not want to think about it or talk about it. *Id.*; Tr. 18. She talked about the rape with friends very rarely, and she did not talk about it with her family. Tr. 22.

The rape changed Respondent's life "completely." Tr. 19. She was more concerned for herself and she was afraid. Tr. 19. She became more closed to other people and did not trust anyone. Tr. 19. After the rape, Respondent did not continue her education. Tr. 20.

After she learned about asylum, she tried to apply, but it was a hard thing to do, "going through what happened to me again." Tr. 22.

Eventually (after she applied for asylum), Respondent began receiving therapy. Exhibit 3-G.⁶ She presented symptoms of post-traumatic stress disorder. *Id.* Respondent found the counseling helpful. Tr. 23.⁷

⁴ The IJ specifically found that Respondent "testified candidly about her desire to change her sexual orientation and her reasons for marrying a man. The Court found her explanation plausible and does not find that this marriage undermines her testimony regarding her sexual orientation." Op. 6.

⁵ Also, she did not know about the asylum process until she learned about it from a friend. Exhibit 3-A, ¶ 40.

⁶ It took Respondent several months to find a therapist who would see her. Tr. 24. She was unable to get help earlier because she did not have health insurance. Tr. 26.

⁷ The DHS attorney incorrectly characterized the psychologist's report. The report quotes Respondent, as stating: "I feel like a new, free and different person here [in the United States]." The DHS attorney states

II. Decision of the Immigration Judge

The Immigration Judge (“IJ”) found that Respondent was credible. Opinion (“Op.”) 6.

A. Respondent’s Application for Asylum

The IJ denied Respondent’s application for asylum. The IJ found that Respondent did not file her application for asylum until nearly two years after she arrived in the United States. Op. 6.

Respondent argued that she qualifies for an exception for “extraordinary circumstances” because “she was unable to file earlier because she was suffering from post-traumatic stress disorder (PTSD) and was unable to talk about the incident.” Op. 6.

The IJ found that a report from a licensed psychologist who diagnosed Respondent with PTSD, “did not indicate that these conditions prevented the respondent from filing for asylum during the year after her arrival in the United States.” Op. 7. “The report does not contain evidence that these conditions interfered with her ability to plan, reason, or accomplish tasks.” Op. 7.

The IJ acknowledges “that it is possible that the respondent’s symptoms of PTSD were initially severe and debilitating, preventing her from filing, but decreased over time.” But, he stated, “the only evidence before the Court specifically about her functioning during the first year [in the U.S.] is her testimony that it was difficult to talk about the attack and the evidence that she was able to successfully complete other tasks, such as securing a visa and multiple jobs.” Op. 7.

that this is how Respondent felt in 2009. Tr. 38. However, the report does not say that Respondent felt like a new, free, and different person in 2009. Rather, it states that this is how she felt at the time of the report (November 2012). Thus, the DHS attorney’s assertion that she was a new, free, and different person in 2009, and that she could have filed for asylum at that time, is not supported by the record.

According to the IJ, record evidence indicates that “she was certainly suffering the consequences from the attack during the first year after her arrival, but it does not show that symptoms of PTSD interfered with her functioning to such an extent that she was unable to file for asylum during the first year after her arrival in the United States.”

Op. 7. “In fact, the Respondent testified that the catalyst for filing in 2011 was not a reduction in her PTSD symptoms, but the encouragement of a friend from work who had filed for asylum.” Op. 7. The IJ concluded that Respondent “did not establish that her PTSD symptoms were directly related to her failure to file within one year.” Op. 7.

Accordingly, the IJ denied (pretermitted) the application for asylum.

B. Respondent’s Application for Withholding of Removal

The IJ granted Withholding of Removal pursuant to INA § 241(b)(3). Op. 8.⁸ The IJ found that Respondent was beaten and raped on account of her particular social group, lesbians from Russia. Op. 8 (citing *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (homosexuality may be a particular social group)). The IJ found that the attack was past persecution. Op. 8. He further found that the police were unwilling to protect Respondent. Op. 8. Accordingly, the IJ granted Respondent’s application for Withholding of Removal pursuant to INA § 241(b)(3).⁹

Respondent filed a timely appeal.

⁸ DHS accepted that Respondent is a lesbian and that she was harmed in Russia. DHS also accepted that the government was unable and unwilling to protect Respondent. For these reasons, at the beginning of the hearing, DHS offered Respondent Withholding of Removal under INA § 241(b)(3). Tr. 10. While she was grateful for this offer, Respondent declined to accept Withholding, due to the various limitations on that type of immigration status. Tr. 11

⁹ Since he granted Withholding, the IJ found that there was no reason to review the application for relief under the Torture Convention. Op. 8.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the IJ erred when he found that Respondent did not establish “extraordinary circumstances” for failing to file for asylum within one year of her arrival in the United States, given that Respondent was gang raped in her country, she credibly testified that she could not talk about the painful events forming the basis for her asylum, and she was diagnosed with PTSD.

SUMMARY OF THE ARGUMENT

The IJ denied Respondent’s application for asylum because she failed to file her application within one year of arrival in the United States. The IJ granted Respondent’s application for Withholding of Removal pursuant to INA § 241(b)(3). He concluded that she had been persecuted in the past on account of her sexual orientation, and that it was more likely than not that she would be persecuted if she returned to Russia. The IJ further concluded that the government of Russia was unwilling to protect Respondent.

The IJ erred when he found that Respondent did not qualify for an exception to the one-year asylum filing deadline. Respondent credibly testified that she was unable to file for asylum during her first year in the United States because she was unable to discuss the trauma related to her gang rape and other persecution in Russia. Respondent presented evidence that she was suffering from post-traumatic stress disorder caused by her persecution.

The IJ incorrectly concluded that Respondent could have filed for asylum within one year, since she was able function in other ways—like obtaining a visa and working. This conclusion is incorrect and ignores the reality of Respondent’s condition. She was able to function, but—as she credibly testified—she was not able to discuss the trauma

that she suffered, or to think about that trauma in order to prepare an application for asylum.

The conclusion of the IJ regarding the one-year filing deadline was erroneous. We respectfully suggest that the matter should be remanded, and that Respondent's application for asylum should be granted.

ARGUMENT

I. The Immigration Judge Erred When He Found that Respondent Did Not Establish "Extraordinary Circumstances" Excusing the Failure to File Within One Year of Arrival.

An alien who fails to file for asylum within one year of her arrival in the United States is ineligible for asylum, unless she meets one of two exceptions. *See* INA § 208(a). The exception relevant here is "extraordinary circumstances." If the alien demonstrates "extraordinary circumstances relating to the delay in filing the application," the failure to file within one year of arrival in the U.S. can be excused, and the alien can qualify for asylum. *See* INA § 208(a)(2)(D).¹⁰ "Extraordinary circumstances" include "mental or physical disability, including any effect of persecution or violent harm suffered in the past, during the one-year period after arrival." 8 C.F.R. § 1208.4(a)(5)(i).

In the instant matter, Respondent did not file for asylum within one year of her arrival in the United States. Op. 6.

A. Respondent's Credible Testimony Is Sufficient to Support a Finding of "Extraordinary Circumstances."

It is long established that an asylum applicant's credible testimony, "if plausible in light of general conditions in his or her country of nationality or last habitual residence,

¹⁰ The other exception is for "changed circumstances." INA § 208(a)(2)(D). Respondent does not contend that there are changed circumstances in her case.

may be sufficient to sustain the burden of proof without corroboration.” *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *see also Matter of Dass*, 20 I&N Dec. 120 (BIA 1989). Further, after the applicant “has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements... [It] is hardly possible for a refugee to ‘prove’ every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.” *See Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997) (citing UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 203 (Geneva 1992)).

While the above precepts of asylum law generally apply to the applicant’s testimony about her past persecution and history, they could equally be applied to testimony about other facets of the alien’s case—here, her psychological state at the time she entered the United States. The only real way to know a person’s psychological state is to ask that person. While it is possible to obtain a psychological report, such reports are only indirect evidence of the person’s state of mind.¹¹ Thus, as with other uncorroborated (and uncorroborate-able) testimony, the fact finder must rely on the alien’s testimony. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The fact finder should also give the alien the benefit of the doubt. *See Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997).

In the instant matter, the IJ found that Respondent was credible. Op. 6.

According to her credible written and oral testimony, Respondent did not file for asylum during her first year in the United States because she was very afraid to discuss her sexual orientation publicly. Exhibit 3-A, ¶ 39. In addition, she felt humiliated by the

¹¹ Respondent did obtain such a report, which is discussed below.

rape and did not want to think about it or talk about it. *Id.*; Tr. 18. After she learned more about asylum, Respondent tried to apply, but it was a hard thing to do, “going through what happened to me again.” Tr. 22.

Thus, according to Respondent’s own testimony, she delayed filing for asylum because she did not want to think about her persecution and being gang raped.

In addition to her direct testimony about failing to file for asylum during her first year in the U.S., Respondent testified about other problems she suffered as a result of the persecution and gang rape. For example, after the rape, Respondent did not continue her education. Tr. 20. Also, even though Respondent was concerned about sexually transmitted diseases as a result of the rape, she did not go to a doctor because she did not want to have to think about what happened to her. Tr. 45-46. The fact that Respondent could not discuss the rape in other areas of her life supports her contention that she could not talk about the rape for purposes of an asylum case.

While the IJ acknowledged that Respondent’s symptoms of PTSD may initially have been “severe and debilitating, preventing her from filing,” he found that “the only evidence before the Court specifically about her functioning during the first year [in the U.S.] is her testimony that it was difficult to talk about the attack and the evidence that she was able to successfully complete other tasks, such as securing a visa and multiple jobs.” Op. 7. First, the fact that Respondent could secure a visa and work in a job, does not demonstrate that she had the ability to talk about being gang raped. Many American soldiers who served in Iraq and Afghanistan are able to hold jobs and function in society, but they may not be able to talk about the traumas they suffered during their time in combat.

Second, given that it is only really possible to know a person's psychological state through that person's own testimony, and given that the IJ found Respondent credible, the IJ should have given her the "benefit of the doubt" and accepted her explanation for failing to file during her first year in the United States. *See Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997).

For all these reasons, the IJ should have accepted Respondent's explanation for her failure to file within one year, and he should have granted her application for asylum.

B. A Report from a Licensed Psychiatrist Indicates that Respondent Was Suffering from PTSD and that She Repressed Memories of Her Rape.

Respondent obtained indirect evidence of her mental state—a report from a licensed psychiatrist. *See* Exhibit 3-G.

The report concludes that Respondent was suffering from post-traumatic stress disorder ("PTSD"). Exhibit 3-G. The psychiatrist noted that Respondent was "emotionally coping with her PTSD symptoms by over-utilizing the defense mechanisms of emotional insulation and repression...." *Id.* He states that Respondent "is in need of psychotropic medication and psychotherapy for her PTSD emotional disorder with agitative and depressive features." *Id.*

Prior to obtaining help from the psychiatrist, Respondent had to deal with her PTSD by herself—she had no medicine or psychological support.¹² She did this, among other ways, through the coping method of "repression." *See* Exhibit 3-G. By repressing her memories about the gang rape and the other persecution, Respondent survived, but this coping method caused her to delay filing for asylum.

¹² Since Respondent obtained health insurance, she has been attempting to receive additional treatment. Tr. 43-44.

The IJ noted that Respondent “was certainly suffering the consequences from the attack during the first year after her arrival,” but he concluded that she did not show that “symptoms of PTSD interfered with her functioning to such an extent that she was unable to file for asylum during the first year after her arrival in the United States.” Op. 7. This is incorrect—Respondent provided credible testimony that she was unable to talk about the trauma of her gang rape. She also provided the psychiatric report indicating that she coped with her PTSD by repressing memories of her persecution.

Further, given that we are discussing Respondent’s mental state—and that the only direct of evidence of a person’s mental state is their own testimony—there was no other evidence available to Respondent. Under these circumstances, it was unfair for the IJ to require additional evidence. *See Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997).

A licensed psychiatrist concluded that Respondent suffers from PTSD and that she has repressed memories of her persecution. In addition, Respondent credibly testified that she could not talk about her trauma.¹³ Respondent also testified that she did not undergo testing for sexually transmitted diseases after her rape because she did not want to re-live the trauma. Respondent’s testimony plus the psychiatrist’s report was sufficient to demonstrate an exception to the one year filing requirement. The IJ’s conclusion to the contrary was erroneous and should be reversed.

CONCLUSION

The IJ erred when he found that Respondent failed to meet an exception to the one-year asylum filing deadline. Respondent’s credible and plausible testimony,

¹³ Further, there is no issue of plausibility here. It is completely plausible that a victim of gang rape would have trouble discussing her persecution.

supported by the psychiatric report, indicates that she was unable to file for asylum because she was unable to discuss the persecution she suffered in Russia. Accordingly, we respectfully suggest that this matter be remanded and Respondent's application for asylum be granted.¹⁴

Respectfully Submitted,

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Certificate of Service

I hereby certify that on June 9, 2014, I served a copy of this Brief by first class mail, postage pre-paid, upon the following:

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¹⁴ Given that Respondent has met the higher burden for Withholding of Removal, if the Board concludes that the IJ erred when he pretermitted Respondent's asylum application, the application should be granted on remand.