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DETAINED

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

In the Matter of:	
K[redacted], A[redacted]	File No. **A** [redacted]
In Bond Proceedings.	

RESPONDENT'S MOTION TO RECONSIDER

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This is a Motion to Reconsider the Board's October 20, 2017 dismissal ("October 20 decision") of A[redacted] K[redacted]'s appeal from the Immigration Judge's ("IJ") denial of bond. The Board committed several legal and factual errors in concluding Mr. K[redacted] is a flight risk and finding his claims for immigration relief to be "speculative." In no precedential decision has the Board interpreted the *Guerra* factors the way it did in its October 20 decision. The Board failed to justify its reliance on certain *Guerra* factors over others and misanalysed the factors upon which it did rely. Moreover, the Board erred in failing to apply a *de novo* standard of review. For the reasons stated below, this Board should reconsider the October 20 decision, reverse the IJ's denial of bond, and remand to the IJ with direction to grant a reasonable bond in Respondent's case.

STANDARD OF REVIEW FOR A MOTION TO RECONSIDER

The purpose of a motion to reconsider is to "identify an error in law or fact in a prior BIA decision or identify a change in law that affects a prior BIA decision and asks the BIA to re-examine its ruling." *BIA Practice Manual,* Chapter 5.7(a). A motion to reconsider "shall state the

reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority." 8 C.F.R. § 1003.2(b)(1). The Board may reconsider any case in which it has rendered a decision. 8 C.F.R § 1003.2(a). A party seeking reconsideration requests "that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked." *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). In general, a respondent may file one motion to reconsider within 30 days of the date of a final order. *BIA Practice Manual,* Chapter 5.7(c).

ARGUMENT

I. THE BOARD ERRED BY FAILING TO APPLY A *DE NOVO* STANDARD OF REVIEW OR TO ENGAGE IN ANY MEANINGFUL ANALYSIS OF THE RESPONDENT'S CLAIMS FOR IMMIGRATION RELIEF.

The Board's failure to review *de novo* the strength of Mr. K[redacted]'s claims for immigration relief warrants reconsideration of its order dismissing the appeal. A respondent with a greater likelihood of relief from deportation is perceived to have a greater incentive to appear at future proceedings; therefore, a strong claim for immigration relief weighs in favor of the respondent's release. See *Matter of X-K,* 23 I&N Dec. 731, 736 (BIA 2005); *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987). On appeal from a denial of bond, the Board shall review an IJ's factual findings to determine if they are clearly erroneous. See 8 C.F.R. § 1003.1(d)(3)(i). All other issues, including issues of law, discretion, or judgment, shall be subject to *de novo* review. See 8 C.F.R. § 1003.1(d)(3)(ii).

The question of whether an applicant is likely to succeed on the merits of his claim for immigration relief necessarily raises questions of law. See *id.* Preliminary analysis of the strength of an applicant's merits claim may involve some fact finding; for example, "[A]n

Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact[.]" *Matter of Z-Z-O-*, 26 I&N Dec. 586 (2015). See also *Zhou Hua Zhu v. U.S. Atty. Gen.*, 703 F.3d 1303, 1308 (11th Cir. 2013) (holding likelihood that applicant would be mistreated if returned to country of origin is a question of fact); *Rosiles-Camarena v. Holder*, 735 F.3d 534, 537 (7th Cir. 2013); *Hui Lin Huang v. Holder*, 677 F. 3d 130 (2d. Cir. 2012); *Turkson v. Holder*, 667 F.3d 523 (4th Cir. 2012); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Kaplun v. Atty. Gen.*, 602 F.3d 260, 269-71 (3d. Cir. 2010); *En Hui Huang v. Atty. Gen.*, 620 F.3d 372, 381-87 (3d Cir. 2010). However, an IJ's finding that an adverse life event outside of legal proceedings is or is not likely to occur is very different from finding that a party to a legal proceeding is likely (or unlikely) to win his *legal* argument. See *Matter of Z-Z-O-*, 26 I&N Dec. 586 (2015) ("[W]hether an asylum applicant has established an objectively reasonable fear of persecution based on the events that the Immigration Judge found may occur upon the applicant's return to the country of removal is a legal determination that remains subject to *de novo* review."). *See also Hui Lin Huang v. Holder*, 677 F. 3d 130 (2d. Cir. 2012) (holding that *de novo* review applies to the ultimate question of whether applicant sustained her burden to establish that her subjective fear of persecution is objectively reasonable); *Turkson v. Holder*, 667 F.3d 523 (4th Cir. 2012) (holding that whether applicant's likely future mistreatment amounted to "torture" under CAT was a legal question); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012). Therefore, in assessing the strength of a detained applicant's claim for immigration relief as a bond factor, the Board is charged with independently applying the law to the facts of record and owes no deference to the IJ's legal findings. See *id.*

In the case at bar, Mr. K[redacted]'s likelihood of success on the merits of his claim is entitled to *de novo* review. The Immigration Judge did not engage in independent fact-finding for which

Mr. K[redacted] is seeking review. Conversely, the facts on which the Immigration Judge relied – those contained in his credible fear interview – were uncontested by either party. Accordingly, the Board failed to review Mr. K[redacted]'s legal arguments *de novo* and improperly concluded his claims for immigration relief are "speculative." October 20 Decision at 2. The Board's failure to apply a *de novo* standard in reviewing the likelihood of Mr. K[redacted]'s success on the merits runs afoul of its own precedent and the precedent of numerous federal appellate courts, See *Matter of Z-Z-O-*, 26 I&N Dec. 586; *Hui Lin Huang v. Holder*, 677 F. 3d 130; *Turkson v. Holder*, 667 F.3d 523; *Ridore v. Holder*, 696 F.3d 907. The Board failed to mention a single piece of evidence in support of its conclusion that Mr. K[redacted]'s claims to immigration relief are "speculative"; conversely, as the sole justification for its conclusion, the Board asserted generally that the IJ in a removal proceeding is not bound by an asylum officer's credible fear finding and that the IJ "evaluates other factors." October 20 Decision at 2. The Board made no attempt to identify the "other factors" to which it refers, nor did it make any attempt to evaluate them itself.

Additionally, the Immigration Judge's decision cannot be seen as reasonable. To adopt wholesale the decision of the Immigration Judge in its current form leads to the conclusion that so long as a claim for relief is unadjudicated, it is speculative. This conclusion essentially reads asylum seekers out of the class of individuals eligible for bond, legislating where Congress has not. *See Matter of Guerra* 23 I&N Dec. at 39 (stating that and Immigration Judge has authority to consider factors for bond "pending a decision *on asylum* or removal")(emphasis added).

Had the Board in fact reviewed Respondent's asylum claim *de novo*, it would have concluded that Respondent is, in fact, overwhelmingly likely to prevail. The Board has not spoken authoritatively on the depth of analysis an Immigration Judge should perform to determine whether a respondent has a likelihood of success on the merits of her claim.

Presumably, the Board did not wish to transform each bond hearing into a full hearing on the merits. However, even under a cursory inquiry of the undisputed facts, Mr. K[redacted] is likely to prevail on his asylum claim. Under The REAL ID Act, to show a "nexus" to a protected ground, the Respondent must prove that the protected ground was or will be "one central reason" for the persecution. P.L. 109-13. The Eleventh Circuit has provided little guidance on the application of the "one central reason" standard, but has stated that under this standard, the protect ground "need not be the sole reason" for the persecution. *Mohamed v. U.S. Atty Gen.*, 591 Fed.Appx. 804 (11th Cir. Dec. 1, 2014). The BIA has instructed that a protected ground is "one central reason" for the persecution where it is not it cannot be "incidental, tangential, superficial, or subordinate." *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007). The language of the "at least one central reason" test encompasses respondents who are persecuted for mixed motives, so long as *one* central reason for their persecution is a protected ground. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. at 213. This Board has looked with favor on a situation where a persecutor has been "motivated in meaningful part" by a respondent's asserted protected ground. *J-B-N- & S-M-*, 24 I&N Dec. at 214; *see also Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2012) (citing *Mustafa v. Holder*, 707 F.3d 743, 751 (7th Cir. 2013)).

Respondent in this case was shot at by the Pakistani Taliban, who explicitly told him that his perceived pro-Western views –inherently political in the Islamic Republic – were the reason they were trying to kill him. Bond Motion, Tab P. If an explicit statement by Respondent's persecutors that they were going to harm him because of his political opinion amounts to a "speculative" nexus, it would be difficult to imagine what would establish nexus in an asylum case.

The Board also erred in failing to analyze *de novo* the strength of Respondent's application for withholding of removal and protection under the CAT. Unlike the asylum statute, which requires that a protected characteristic be "at least one central reason" for persecution, the withholding statute requires only that an applicant demonstrate that their "'life or freedom would be threatened for *a reason* described in subparagraph (A) [race, religion, political opinion, etc.].'" *Barajas-Romero v. Lynch*, No. 13-70520 at 14 (9th Cir. 2017) (quoting 8 U.S.C. § 1231(b)(3)(C)) (emphasis added). For CAT protection, there is no nexus requirement to a protected ground as there is with asylum and withholding under the Act. 8 C.F.R. § 1208.16(c)(2); *Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002). For these reasons, even if it were appropriate for the Board to agree with the IJ's findings on Respondent's asylum claim with regard to its nexus to a protected ground, the Board erred in its conclusory dismissal of Respondent's other claims for relief in the absence of any supportive reasoning.

Because the Board erred in failing to review *de novo* or engage in any meaningful analysis of Respondent's three separate claims for immigration relief, it must reconsider its October 20 decision and grant the relief herein requested.

II. THE BOARD ERRED IN AFFIRMING RELIANCE ON FACTORS THAT PROLONG RESPONDENT'S DETENTION BASED ON HIS STATUS AS AN ASYLUM-SEEKER

Contrary to the Board's finding, Mr. K[redacted]'s ties to the United States are not "minimal," Respondent's length of time in the United States should not weigh against a grant of bond , and these do not provide a reasonable basis on which to deny bond. *See Matter of Guerra*, 23 I&N Dec. at 40 ("The Immigration Judge may choose to give greater weight to one factor over others, *as long as the decision is reasonable*.")(emphasis added). Unfortunately, the factors that the Immigration Judge chose to weigh most heavily amount to

a denial on bond for being a recently-arrived asylum seeker. As recently-arrived asylum seekers have never been exempt by statute from custody review, it is *unreasonable* for the Immigration Judge to weigh specific factors in a way that would effectively do so. *See* 8 C.F.R. § 1003.19(h).

Mr. K[redacted] has significant ties to the United States. Mr. K[redacted]'s cousin, A[redacted] Kh[redacted], is a United States citizen and government contractor who has attested that he will support Mr. K[redacted] upon his release from detention. Bond Motion, Tab I. Additional family members living in the United States include Mr. K[redacted]'s cousins S[redacted] and S[redacted] Kh[redacted] and his cousin-in-law, K[redacted] Kh[redacted]. *Id.* "Even the strongest affection for one's family does not *assure* appearance at trial, but the judge is supposed to consider probabilities." *U.S. v. Torres*, 929 F.2d 291, 291 (1991) (reversing pretrial detention order and reinstating bail) (emphasis in original). See also *U.S. v. Xulam*, 84 F.3d 441, 442 (finding applicant for bail was a "prime candidate for release" even though he had no family ties to the United States; applicant, a national human rights worker who faced possible deportation to Turkey, "ha[d] no criminal record or record of failure to appear; was employed and ha[d] a wide circle of respected acquaintances and close friends in the community who testified as to his 'spiritual' and 'intellectual' integrity; and the government acknowledged that he posed no threat to the community.") Respondent submits that his family ties to the United States are significant enough to constitute a positive factor in his bond analysis, notwithstanding the fact that his claims for immigration relief are based on other circumstances.

Moreover, Mr. K[redacted]'s recent arrival is an unreasonable basis for denying bond. Respondent entered the United States in order to seek refuge from persecution and torture in Pakistan. These facts distinguish the present case from *Guerra*, which involved a citizen of the

Dominican Republic who was admitted to the United States as a nonimmigrant visitor and was charged with removability for remaining in this country longer than his period of authorized stay. 24 I&N Dec.at 37. It cannot have been the Board's intent, nor the intent of Congress in Section 236(a), that Immigration Courts *de facto* exclude recently-arrived asylum seekers from the opportunity to pursue their cases in a non-detained posture, especially when the length of these cases can extend well past a reasonable length of time in detention and Congress is bound by the Constitutional prohibition on indefinite detention. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *see also Denmore v. Kim*,538 U.S. 510, 513 ("Congress . . . may require that persons . . . be detained for the brief period necessary for their removal proceedings"); *see also Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016) (finding a temporal limitation contained within the statute authorizing detention of "criminal aliens" as a matter of Constitutional avoidance).

CONCLUSION

For all of the aforementioned reasons, Respondent respectfully moves this Board to GRANT the instant motion and RECONSIDER its October 20, 2017 dismissal of his bond appeal. Respondent poses no flight risk and should be granted a reasonable bond.

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