U.S. Department of Justice
Executive Office for Immigration Review
Office of the Chief Immigration Judge

Chief Immigration Judge

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May 14, 1999

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Judicial Law Clerks
All Support Personnel

FROM: The Office of the Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum No. 99-5:
Implementation of Article 3 of the UN Convention Against Torture

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I. Introduction

On February 19, 1999, an interim regulation, implementing the obligations under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment as defined in 8 C.F.R. § 208.16 (c)(1) (hereinafter cited "Convention Against Torture") was published in the Federal Register. This regulation became effective on March 22, 1999. Article 3 of the Convention Against Torture states as follows:

1. No State party shall expel, return, ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

This interim regulation, based on section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (P.L. 105-277, Div. G, Oct. 21, 1998), will have a significant impact on the Immigration Court. It creates a new type of claim which is distinct from asylum under section 208 of the Immigration and Nationality Act (INA) and withholding of removal under section 241(b)(3) of the INA. While asylum officers have some screening functions,

Immigration Judges will have sole jurisdiction to adjudicate Convention Against Torture claims. A successful applicant under the Convention Against Torture will be granted withholding of removal or deferral of removal. Additionally, this regulation creates a new type of proceeding to adjudicate applications for withholding of removal under section 241(b)(3) of the INA and under the Convention Against Torture, for aliens who have received INS administrative removal orders under sections 238 and 241(a)(5) of the INA. Also, this regulation, at 8 C.F.R. § 208.18(a), identifies the criteria by which to determine if an act constitutes torture under Article 3 of the Convention Against Torture.

II. Convention Against Torture Claims in Removal/Deportation/Exclusion Proceedings

The overall hearing process is not changed by the Convention Against Torture. However, the Convention Against Torture adds a form of protection from removal and results in additional considerations for the Immigration Court.

A. Initiating a Convention Against Torture Claim

A Convention Against Torture claim is triggered if the alien either: 1) requests consideration under the Convention Against Torture; or 2) presents evidence, including his or her testimony and information contained in a Form I-589, which indicates that he or she may be tortured in the country of removal. See 8 C.F.R. § 208.13 (c)(1).

Convention Against Torture claims must be asserted by filing Form I-589, Application for Asylum or Withholding of Removal. Question 7 in part C of Form I-589 asks: "Do you fear being subject to torture in your home country?" There are supplemental instructions attached to Form I-589 which discuss Convention Against Torture claims.

B. Conduct of the Proceedings

A Convention Against Torture claim will be adjudicated in conjunction with all claims for relief in the removal/deportation/exclusion proceedings. There is no separate hearing to consider a torture claim.

It must be noted, however, that the 180-day clock does not apply to applications for withholding of removal under section 241(b)(3) of the INA or the Torture Convention. A finding that the alien filed a frivolous asylum application does not preclude an alien from being granted withholding of removal under section 241(b)(3) of the INA or the Torture Convention. See 8 C.F.R. § 208.19.

C. Deciding a Convention Against Torture Claim

In considering the Convention Against Torture claim, the Immigration Judge must first determine whether the alien has established that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. See 8 C.F.R. § 208.16(c)(4). The "more likely than not" standard is the same standard as withholding of removal under section 241(b)(3) of the INA and withholding of deportation under the former section

243(h) of the INA.

Once the Immigration Judge determines that the alien is entitled to Convention Against Torture protection, he or she must then decide whether the alien is subject to mandatory denial under one of the bars contained in section 241(b)(3)(B) of the INA. See 8 C.F.R. §§ 208.16(c)(4); 208.16(d)(2).

If an Immigration Judge decides that the alien has met his or her burden of proof and that the alien is not subject to the bars contained in section 241(b)(3)(B) of the INA, the Immigration Judge must grant the alien withholding of removal. A grant of withholding of removal under the Convention Against Torture has the same consequences as a grant of withholding of removal under section 241(b)(3) of the INA, i.e., the alien may not be removed to a country where it has been determined that it is more likely than not that he or she would be tortured. The INS or the alien may appeal the Immigration Judge's decision to the Board of Immigration Appeals (BIA).

If an Immigration Judge decides that the alien has met his or her burden of proof for Convention Against Torture protection, but is subject to the bars contained in section 241(b)(3)(B) of the INA, i.e., the alien is a persecutor of others, a security threat, or has been convicted for a particularly serious crime, the Immigration Judge must deny the alien of withholding of removal under the Convention Against Torture and grant the alien deferral of removal under 8 C.F.R. § 208.17. See 8 C.F.R. § 208.16(c)(4).

D. Warnings Necessary upon a Grant of Deferral of Removal under the Convention Against Torture

If an Immigration Judge grants deferral of removal under the Convention Against Torture, he or she must inform the alien that:

1. Deferral of removal does not confer any lawful or permanent immigration status on the alien;
2. If the alien is detained, he or she may not necessarily be released by the INS;
3. Deferral of removal is effective only until terminated;
4. Deferral of removal may be terminated based upon the alien's request or a motion from the INS;
5. Deferral of removal only precludes the INS from removing the alien to a particular country or countries in which it has been determined that the alien is likely to be tortured; the alien may be removed at any time to another country.

See 8 C.F.R. § 208.17(b).

E. The Effect of a Grant of Deferral of Removal under the Convention Against Torture

The INS may not remove an alien who has been granted deferral of removal to a country in which it is more likely than not that he or she would be tortured. A grant of deferral of removal is similar to a grant of withholding of removal, in that it precludes the INS from removing the alien to a specific country. See 8 C.F.R. § 208.17(a). The INS may, however, detain an alien granted deferral of removal and may request the Immigration Court, at any time, based on relevant evidence that was not presented at the previous hearing, to review whether the alien should continue to have protection under the Convention Against Torture. See 8 C.F.R. §§ 208.17(c); 208.17(d); part VII of this OPPM. The INS or the alien may appeal the Immigration Judge's decision to the BIA.

F. Motions to Reopen

Aliens with final orders may move to reopen their proceedings in order to apply for withholding of removal under the Convention Against Torture. Specifically, the regulation addresses two groups of aliens who may file motions to reopen: 1) aliens with final orders who have not previously sought protection under the Convention Against Torture; and 2) aliens with final orders who have previously filed claims for Convention Against Torture protection with the INS.

1. Aliens with Final Orders Issued by the Immigration Court

Aliens with final orders of removal, deportation, or exclusion may file a motion to reopen for the sole purpose of asserting a claim for protection under the Convention Against Torture. The interim regulation provides for an exception to the time and numerical limitations on motions to reopen for aliens who have a final order and seek to reopen their cases for the purpose of making a Convention Against Torture claim. The specific requirements are found at 8 C.F.R. § 208.18(b)(2). This motion to reopen must meet the motion to reopen requirements as set forth in 8 C.F.R. § 3.23, and 1) be filed on or before June 21, 1999, and 2) show that the alien is prima facie eligible for Convention Against Torture protection. See 8 C.F.R. § 208.18(b)(2). There is no fee for the filing of this motion.

2. Aliens with Final Orders who have Pending Convention Against Torture Claims with the INS

Before the issuance of the interim regulation, the INS had an administrative procedure in which aliens with final orders could request a stay of deportation or removal pursuant to Article 3 of the Convention Against Torture. Aliens who made a Convention Against Torture claim with the INS on or before March 22, 1999, and whose claim was not finally decided on or before March 22, 1999, will receive a notice from the INS. See 8 C.F.R. § 208.18(b)(3)(ii).

The interim regulation provides that an alien who applied with the INS under its administrative process shall have his or her case reopened, based on evidence that he or she applied with the INS for Convention Against Torture protection on or before March 22, 1999, and the INS had not made a final decision. See 8 C.F.R. § 208.18(b)(3)(ii)(A). If the alien provides a copy of the notice (see Attachment A) or other convincing evidence showing that he or she has a request for Convention Against Torture protection pending with the INS, the interim regulation requires that the motion to reopen be granted. For this group of aliens, the regulation does not specify a deadline by which the motion to reopen must be filed.

III. Convention Against Torture Claims in Expedited Removal Proceedings (Credible Fear Determinations)

A. Initiating a Convention Against Torture Claim in Credible Fear Review Proceedings

The interim regulation allows an alien to raise a Convention Against Torture claim through the established credible fear process in expedited removal proceedings. See 8 C.F.R. §§ 208.30; 3.42. The credible fear procedures are essentially unchanged. See OPPM 97-3: Procedures for Credible Fear and Claimed Status Reviews. However, pursuant to the interim regulations, the Immigration Judge and the asylum officer must now also consider whether

the alien has a credible fear of persecution and/or torture. A credible fear review proceeding is initiated when the INS files Form I-863 with either block "1" or block "2" checked with the Immigration Court.

B. Conduct of Credible Fear Review Proceedings

As noted above, considering Convention Against Torture claims in credible fear review proceedings does not change the process. The procedures and policies described in OPPM 97-3: Procedures for Credible Fear and Claimed Status Reviews remain in effect and cover all credible fear review proceedings, including those when the alien claims a credible fear of torture.

C. Deciding a Convention Against Torture Claim in Credible Fear Review Proceedings

The Immigration Judge shall make a de novo determination of whether the alien has a credible fear of persecution and/or torture. If it is determined that the alien has a credible fear of persecution or torture, the Immigration Judge will vacate the INS's expedited removal order. Alternatively, if it is determined that the alien does not have a credible fear of persecution or torture, the Immigration Judge will affirm the asylum officer's determination and remand the case to the INS for execution of removal. See 8 C.F.R. §§ 3.42(d); 3.42(f).

IV. Convention Against Torture Claims in Administrative Deportation or Reinstatement Proceedings (Reasonable Fear Determinations)

The interim regulation creates a new type of proceeding called a "reasonable fear review proceeding" which is modeled on the credible fear process. Reasonable fear review proceedings will be available to aliens who have been ordered removed by the INS under section 238 of the INA (covering aliens who are not lawful permanent residents and have been convicted of an aggravated felony) and under section 241(a)(5) of the INA (reinstatement of removal orders). This proceeding was created to consider whether such an alien is eligible for withholding of removal under either 241(b)(3) of the INA or the Convention Against Torture.

Under this process, an alien who has been ordered removed by the INS and expresses a fear of persecution or torture will have his or her claim screened by an asylum officer. See 8 C.F.R. §§ 238.1(f)(3); 241.8(d); 208.31(b). The asylum officer must use the "reasonable possibility" of torture or persecution standard. See 8 C.F.R. § 208.31(c). As defined in the regulation, this standard is, in effect, equivalent to the standard used to adjudicate asylum applications. See 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999). This standard is higher than the "credible fear" standard.

If the asylum officer finds that the alien has a "reasonable fear" of persecution or torture, the alien will be referred to the Immigration Court for a withholding-only proceeding. See 8 C.F.R. § 208.31(e); part V of this OPPM. If the asylum officer determines that the alien does not have a reasonable fear of persecution or torture, the alien may request an Immigration Judge to review the asylum officer's negative determination in a reasonable fear review proceeding. See 8 C.F.R. § 208.31(g). This request triggers a reasonable fear review proceeding.

A. Initiating Reasonable Fear Review Proceedings

A reasonable fear review proceeding is initiated when the INS files with the Immigration Court a Form I-863 with block "5" checked. Along with Form I-863, the INS shall also provide the record of determination, including copies of the asylum officer's notes, the summary of the material facts, and other materials upon which the asylum officer reached his or her determinations. See 8 C.F.R. § 208.31(g). It is likely that aliens who request a reasonable fear review are detained either by the INS or at a Federal, State, or local jail or prison. If the distance from the Immigration Court renders it impractical for the INS to file Form I-863 in person, the Court Administrator shall also allow the filing of Form I-863 by fax, based on the same procedure set forth in OPPM 97-3, Procedures for Credible Fear and Claimed Status Reviews, part III. Filing by fax shall be limited to reasonable fear review, credible fear review, and claimed status review proceedings.

B. Scheduling Reasonable Fear Review Proceedings

The reasonable fear determination was designed to provide for a fair resolution of withholding of deportation or removal claims either under section 241(b)(3) of the INA or the Convention Against Torture without disrupting the operation of administrative removal and reinstatement of removal proceedings. See 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999). In the absence of exceptional circumstances, a reasonable fear review proceeding shall be conducted within 10 days of the filing of Form I-863 with the Immigration Court. See 8 C.F.R. § 208.31(g)(as corrected at 64 FR 13881 (March 23, 1999).

A hearing notice entitled "Notice of Review of Reasonable Fear Hearing" has been created in ANSIR for these cases. See Attachment B (notice T9). The hearing notice must be sent to the alien, in care of his or her custodial authority, and his or her attorney, if any, via an appropriate overnight courier. Service of the copy of the hearing notice shall be sent to the INS via regular mail. See Interim OPPM 97-2: Notices of Immigration Judge Hearings, part II, B, 2.

C. Conduct of Reasonable Fear Review Proceedings

The interim regulations do not describe how reasonable fear review proceedings will be conducted. However, as these proceedings resemble credible fear review proceedings, much of their conduct will be modeled after credible fear review proceedings. See 8 C.F.R. § 3.42; OPPM 97-3: Procedures for Credible Fear and Claimed Status Reviews. A Record of Proceeding (ROP) will be created for each reasonable fear review determination proceeding. The red ROP jacket used for credible fear review determinations should be used for these cases. The ROP should be organized with the left side of the ROP containing the Immigration Judge worksheet (administrative side), and the right side containing Form I-863, any submissions filed along with Form I-863, any written hearing notice(s) and the tape envelope. See OPPM 97-3: Procedures for Credible Fear and Claimed Status Reviews, part IV.

The Immigration Judge must tape record the reasonable fear review proceeding. The tape(s) must be labeled so that they are distinguishable from other types of proceedings (e.g., "Reasonable Fear Review"). Although the tape(s) will not normally be transcribed, the tape will remain in the ROP.

The Immigration Judge may conduct proceedings by video conference (see 8 C.F.R. § 3.25 (c)); however, the interim regulations, unlike the regulations governing credible fear proceedings at 8 C.F.R. § 3.42, do not address whether a reasonable fear review may be conducted telephonically without the consent of the alien. Therefore, in

the absence of any regulations specifically governing the conduct of these proceedings, it is left to the discretion of the Immigration Judge to determine the issue.

If an interpreter is necessary, the Immigration Court must provide one. If a staff or a contract interpreter is not available for the hearing, the Berlitz Unscheduled Telephonic Interpreter (UT Service) should be used. If the UT Service is unable to assist, the AT&T Language Line may be used.

With regard to representation in reasonable fear review proceedings, the interim regulations are again silent. However, the interim regulations specify that the alien may be represented by counsel in the asylum officer's reasonable fear interview. See 8 C.F.R. § 208.31(c). See also 8 C.F.R. §§ 3.16(b) (governing the right to representation generally); 3.42(c) (the right to consult prior to credible fear review). Since there is no specific regulatory guidance on this point, the issue is left to the discretion of the Immigration Judge.

D. Deciding the Claim in Reasonable Fear Review Proceedings

The Immigration Judge must make a de novo determination of whether the alien has established a reasonable fear of persecution and/or torture. As noted previously, the "reasonable fear" of torture or persecution standard is higher than the "credible fear" standard and is the standard used to adjudicate asylum applications. See 8 C.F.R. § 208.31(c); 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999). A special order for reasonable hear review proceedings has been established in ANSIR. See Attachment B (order X8). If the Immigration Judge finds that the alien has established a reasonable fear of persecution and/or torture, the Immigration Judge shall render an order stating that finding. The order includes a notice that, by operation of regulation, the alien is placed into withholding-only proceedings. During the new withholding-only proceedings, the Immigration Judge shall allow the alien to submit Form I-589. See 8 C.F.R. § 208.31(g)(2); part V of this OPPM. If the Immigration Judge finds that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to the INS for removal of the alien.

There is no appeal from an Immigration Judge's decision in a reasonable fear determination by either the alien or the INS. See 8 C.F.R. § 208.31(g)(1).

V. Withholding-Only Proceedings

Under the interim regulations, aliens in administrative removal proceedings under section 238 of the INA and aliens subject to reinstatement of removal under section 241(a)(5) of the INA will now be able to apply for withholding of removal under section 241(b)(3) of the INA, as well as the Convention Against Torture, after a screening process by an asylum officer described in Part IV above.

A. Initiating Withholding-Only Proceedings

A withholding-only proceeding may be initiated in two ways:

1) when an asylum officer finds that the alien established a reasonable fear of persecution or torture, and the INS files Form I-863 with block "6" checked with the Immigration Court; or,

2) when an Immigration Judge determines that the alien has a reasonable fear of persecution or torture in a reasonable fear review proceeding. The INS does not need to file another Form I-863 to begin withholding-only proceedings. The Immigration Judge's finding of reasonable fear triggers the commencement of withholding-only proceedings. See 8 C.F.R. § 208.31(g)(2).

In a withholding-only proceeding, an Immigration Judge may only consider the alien's application for withholding of removal under section 241(b)(3) of the INA and the Convention Against Torture. The process is similar to an asylum-only hearing pursuant to 8 C.F.R. § 208.2(b).

B. Scheduling Withholding-Only Proceedings

Withholding-only proceedings, like the credible fear and reasonable fear proceedings, will likely involve detained

without the consent of the alien. Therefore, in the absence of any regulations specifically governing the conduct of these proceedings, it is left to the discretion of the Immigration Judge to determine the issue.

If an interpreter is necessary, the Immigration Court must provide one. If a staff or a contract interpreter is not available for the hearing, the UT Service should be used. If the UT Service is unable to assist, the AT&T Language Line may be used.

D. Deciding the Claim in Withholding-Only Proceedings

In the withholding-only hearing, the scope of the Immigration Judge's adjudication is limited to consideration of the alien's withholding of removal application under 8 C.F.R. § 208.16. See 8 C.F.R. §§ 208.31(e); 208.31(g)(2)(i). The Immigration Judge shall rule on whether the alien is eligible for withholding of removal under section 241(b)(3) of the INA or whether the alien is eligible for withholding of removal under the Convention Against Torture. A standard order has been generated in ANSIR for withholding-only proceedings. See Attachment B (order Q5). Pursuant to 8 C.F.R. § 208.16(c)(4), if the Immigration Judge determines that the alien is more likely than not to be tortured in the country of removal, he or she must either grant withholding of removal or deferral of removal, depending on whether the alien is subject to the bars in section 241(b)(3)(B) of the INA.

Both the alien and the INS may appeal the Immigration Judge's decision to the BIA. See 8 C.F.R. §§ 208.31(e);(g)(2)(ii).

VI. Asylum-Only Hearings

Under 8 C.F.R. § 208.2(b), Immigration Judges have jurisdiction over asylum applications filed by certain aliens who are not in removal, deportation, or exclusion proceedings. Since a Convention Against Torture claim is considered an "asylum application" for purposes of section 208 of the regulations (see 8 C.F.R. § 208.1(a)), an alien who is in asylum-only proceedings pursuant to 8 C.F.R. § 208.2(b), may also apply for withholding of removal under the Convention Against Torture. In an asylum-only proceeding, block "3" on Form I-863 must be checked.

VII. Termination of Deferral of Removal

A. Introduction

One of the differences between being granted withholding of removal and deferral of removal under 8 C.F.R. § 208.17, is the process for termination. A grant of withholding of removal under either section 241(b)(3) of the INA or the Convention Against Torture may be terminated through a motion to reopen. See 8 C.F.R. § 208.22(e). By contrast, the process to terminate deferral of removal does not involve a motion to reopen; rather, the INS must file a motion to schedule a hearing to consider the termination of deferral of removal with the Immigration Court. This motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred that was not presented at the previous hearing. The INS motion need not meet the ordinary motion to reopen requirements. See 8 C.F.R. § 208.17(d)(1).

If an Immigration Judge grants INS' motion to schedule a hearing to consider the termination of the deferral of removal, he or she shall then conduct a hearing based on the record of proceeding and any new evidence presented by either the INS or the alien and shall make a de novo determination of whether it is more likely than not that the alien would be tortured in the country of removal. See 8 C.F.R. § 208.17(d)(3).

An alien may make a written request to terminate his or her deferral of removal. See 8 C.F.R. § 208.17(e). The Immigration Judge may hold a hearing to determine whether the alien's request was knowing and voluntary. However, if the Immigration Judge is able to determine that the request was knowing and voluntary on the basis of the written submission, a hearing is not necessary. See 8 C.F.R. § 208.17(e).

B. Proper Venue and Jurisdiction

The INS's motion to schedule a hearing to consider the termination of deferral of removal or the alien's request to terminate deferral of removal must be filed with the Immigration Court whicW

the alien or the INS. The burden is on the alien to establish that it is more likely than not that he or she will be tortured in the country which removal has been deferred. See 8 C.F.R. § 208.17(d)(3).

F. Deciding the Termination of Deferral of Removal Hearing

The Immigration Judge must determine whether the alien has met his or her burden of showing that it is more likely than not that he or she will be tortured in the country to which removal has been deferred. See 8 C.F.R. § 208.17(d)(4). If the Immigration Judge determines that the alien has not met his or her burden of showing that it is more likely than not that he or she will be tortured in the country to which removal has been deferred, the Immigration Judge shall terminate the deferral of removal. If the Immigration Judge determines that the alien has met his or her burden of showing that it is more likely than not that he or she will be tortured in the country to which removal has been deferred, the Immigration Judge shall order that the deferral of removal remain in place. See 8 C.F.R. § 208.17(d)(4).

Both the alien and the INS may appeal the Immigration Judge's decision to the BIA. See 8 C.F.R. §208.17(d)(4).

VIII.. Diplomatic Assurances Process

The interim regulation provides for a process called diplomatic assurances against torture. See 8 C.F.R. § 208.18(c). In the event that the Attorney General, the Deputy Attorney General, or the INS Commissioner has determined that the diplomatic assurances are sufficiently reliable to allow the alien's removal to a country where he or she fears torture, an Immigration Judge may no longer consider the alien's Convention Against Torture claim. See 8 C.F.R. § 208.18(c)(3). The Immigration Judge may, however, adjudicate any other pending applications, including asylum and withholding of deportation or removal.

If there are any questions concerning this OPPM, the interim regulation, or the Convention Against Torture, please contact Michael Straus at (703) 305-1247.

Michael J. Creppy
Chief Immigration Judge

Appendix

ATTACHMENT A

Notice to aliens who requested Torture Convention Protection from the INS whose request has not been adjudicated

ATTACHMENT B

Torture Convention Notices, Orders, and State Department Letters

1. Letter SS-Request for State Department Advisory Opinion on an Asylum Application
2. Notice T9-Notice of Review of Reasonable Fear Hearing
3. Order X8-Order of the Immigration Judge in Reasonable Fear Review Proceedings
4. Notice T8-Notice of Withholding-Only Hearing
5. Order Q5-Order of the Immigration Judge in Withholding-Only Proceedings
6. Order U8-Order of the Immigration Judge in Asylum-Only Proceedings
7. Letter S8-Request for State Department Advisory Opinion for a Hearing to Terminate Deferral of Removal
8. Notice X9-Notice of Hearing to Terminate Deferral of Removal