

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NAVARATWAM KAMALTHAS,
Petitioner,

No. 99-71081

v.

I&NS No.
A73 436 759

IMMIGRATION AND NATURALIZATION
SERVICE,
Respondent.

OPINION

David W. Ogden, Acting Asst. Attorney General, Karen Fletcher Torstenson, Asst. Director, John S. Hogan, Attorney, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, for the respondent.

OPINION

B. FLETCHER, Circuit Judge:

Petitioner seeks review of a decision of the Board of Immigration Appeals ("BIA") denying his motion to reopen his exclusion proceedings under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading

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Treatment or Punishment ("Convention Against Torture" or "Convention"). We are asked to decide an issue of first impression in this circuit: whether an alien who has been found ineligible for political asylum necessarily fails to qualify for relief under the Convention Against Torture. The petitioner, Navaratnam Kamalathas, a 25 year-old Sri Lankan national, claims that as a Tamil male, he would face a substantial risk of torture if he were sent back to Sri Lanka. The BIA, which had previously found Kamalathas's account of past persecution to lack credibility in the context of his asylum application, denied the motion to reopen on the ground that Kamalathas submitted no new evidence to rebut the prior credibility determination, and that he thereby failed to present a prima facie case for relief under the Convention.

We find that in ruling as it did, the BIA impermissibly conflated the standards for granting relief in asylum and Convention cases. In particular, we find that the Board abused its discretion in failing to recognize that country conditions aludmnt a tion, and tief unam lahat eDegrasion of ingevr g thetu ofyylum

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Kamalthas arrived in the United States on December 17, 1996. While attempting to clear immigration at the Portland (Oregon) International Airport, he presented a false passport and requested permission to transit to Canada without a visa. Upon being detained by the INS, he applied for asylum and withholding of deportation. At his hearing before the Immigration Judge ("IJ"), Kamalthas testified that after graduating from college in Jaffna, Sri Lanka, he was a member of the Liberation Tigers of Tamil Eelam (LTTE) and was involved in the activities of the organization. He testified that he was a member of the LTTE from 1987 to 1994 and that he was involved in the activities of the organization during that time. He testified that he was a member of the LTTE and was involved in the activities of the organization during that time. He testified that he was a member of the LTTE and was involved in the activities of the organization during that time.

Khourassany v. INS, 208 F.3d 1096 (9th Cir. 2000), FARRA § 2242(d), in concert with regulations codified at 8 C.F.R. § 208.18(e) (2000), specifically provides for judicial review

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of the BIA's denials of motions to reopen under the Convention.² Id. at 1100 ("A denial from that motion is subject to judicial review limited to the BIA's decision on the motion to reopen.").

We review the BIA's denial of a motion to reopen for abuse of discretion. See Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996); see also Mansour v. INS

under the Convention Against Torture. We agree.

Under the implementing regulations for the Convention,
"[t]orture is defined as any act by which severe pain or suffering,
whether physical or mental, is intentionally inflicted on

tion. As required under this provision, Kamalthas filed his
Further to re-open before the Board. Such motions are sub-
ject to the Board's discretion under 8 C.F.R. §§ 3.2 and 3.23.3
Furthermore, under § 4e.18(b)(2), " motio[s]n to reopenshalls

where the BIA has plainly overrelied on its prior adverse credibility finding against Kamalthas and failed to consider evidence of the relevant country conditions in the record. Like the Mansour court, "[w]e are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim; especially when the prior adverse credibility determination is not necessarily significant in this situation." Id. at 908. Indeed, proper attention to relevant country conditions might lend credence to Kamalthas's assertions of torture and cause the BIA to view them in a different light. Although we are cognizant of the high bar to obtaining relief under the Convention on the merits, the BIA cannot deny a motion to reopen without recognizing the proper standard for establishing a prima facie case and giving weight to relevant country conditions.

In sum, in order to present a prima facie case for relief under the Convention, the burden of proof is on the petitioner "to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of

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removal." 8 C.F.R. § 208.16(c)(2). We hold that a petitioner carries this burden whenever he or she presents evidence establishing "sub Tw ihcy47 3 this rorelivzing that he[or sh]r would be indangverooofbezing"subjectved to torture"n in the cou-o try o (remova,") Tj738.2 0 TD -0.8072 Tc 0.8072 Tw U.N.e ConventionAagainstTtorture andO thur