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DETAINED

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

In the Matter of:	
G B	**File No.: A 000-000-000**
In removal proceedings	

RESPONDENT'S BRIEF IN SUPPORT OF APPEAL

I. Introduction

G B ("Mr. B") became politically active in his home country, the Democratic Republic of the Congo ("DRC"), in 2006 when he was just eighteen years old. Later, he studied at a university known for its political activism and became a student activist. Throughout the years, Mr. B observed DRC officials forcefully suppress peaceful activism, at times with lethal force. One night in 2011, while wearing a t-shirt bearing the name of the Congo Liberation Movement ("MLC"), an opposition party, Mr. B was stopped, detained, and tortured by the National Police, who repeatedly questioned him about funding and support for the MLC´s presidential candidate and about student marches and strikes. It appeared other prisoners were being killed and their bodies dumped. After five days, he was able to escape. With the help of his family, Mr. B fled for Brazil, where he continued his activism against the DRC government from afar. When it became clear he was not safe in Brazil, he made the treacherous journey to the United States and now seeks asylum here. In the meantime, ongoing DRC human rights abuses, similar to those suffered by Mr. B, continue to be documented by the United States and international observers. The Immigration Judge found Mr. B's testimony was credible and corroborated. Yet she denied his claim based on sparse analysis that flies in the face of established precedent, and her findings must be reversed.

II. Statement of the Case

Mr. B applied for asylum and withholding of removal under the Immigration and Nationality Act ("INA") and protection under the United Nations Convention Against Torture ("CAT") on November 15, 2019. In support of his application, Mr. B submitted forty-three exhibits spanning over 670 pages, and on January 9, 2020, testified before the Immigration Judge. Following the hearing, Immigration Judge Pallavi S. Shirole issued an oral decision. The

Judge found that Mr. B had "testified credibly" and that his claim was "sufficiently corroborated" by supporting evidence. I.J. at 2. Nevertheless, she denied Mr. B's applications on three grounds. ***First,*** the Judge found the harm Mr. B suffered did not "rise to the level of harm required under the definition of persecution." I.J. at 5. ***Second,*** the Judge found "insufficient evidence to show that the reason that the respondent was targeted was on account of his political opinion." *Id*. at 5-6 ***Third***, she found Mr. B had not met his burden to show a probability of future persecution and had not met "his burden" to show it would be unreasonable for him to internally locate, notwithstanding his fear of persecution by the national government. I.J. at 6-7. The Judge additionally found Mr. B had failed to establish his eligibility for withholding of removal under the INA or CAT. I.J. at 7-8. Mr. B timely appeals from the January 9, 2020, decision.

III. Statement of the Facts

A. Persecution for support of the Congo Liberation Part ("MLC")

Mr. B was born Date year, in Kinshasa, DRC. Exh. 4, Tabs A-1 at 1, B-7 at 27. At the age of eighteen, he began to actively support Jean Pierre Bemba, the founder of the Congo Liberation Movement ('MLC"), in his campaign for president against incumbent Joseph Kabila. Mr. B joined a large group of supporters gathered to greet Bemba at the airport and hear Bemba speak. After authorities forced the gathering to change location, the police attacked the crowd with tear gas and bullets, wounding and killing people in the crowd. Mr. B saw one body in the river. Tr. at 35-37; Exh. 4, Tab. B-7 at 27.

Later in 2006, President Joseph Kabila ("Kabila") and his party, the People's Party for Reconstruction and Democracy ("PPRD"), won reelection despite popular support for Bemba. Tr. at 37-38; Exh. 4, Tab B-7 at 27. Kabila and the PPRD continued to persecute their political

opposition. In 2009, while studying at a well-known University of Architecture in Kinshasa, DRC, Mr. B joined a multi-university group of students organizing and peacefully protesting an increase in academic fees. Tr. at 38-40; Exh. B-7 at 27-28. Authorities beat and even killed some of the student protesters. Tr. at 40.

Over the years, Mr. B continued to attend student meetings supporting the MLC party. Tr. at 40-41. All of the protests he attended or organized were peaceful. Exh. 4, Tab B-7 at 31, ¶55. On February 20, 2011, while walking home at night from one such student meeting, Mr. B was stopped by three uniformed police officers in a marked police Jeep. Tr. at 41-42; Exh. 4, Tab B-7 at 28. Because of their uniform and their marked vehicle, Mr. B recognized the police officers as members of the National Police, or "PNC." Tr. at 41, 69-70; Exh. 4, Tab B-7 at 28. Initially speaking in Mr. B's native language of Lingala, the officers asked Mr. B why he was wearing an MLC party t-shirt and requested identification. Tr. at 41-43; Exh. 4, Tab B-7 at 28. When he presented his student identification card, the police officers began threatening, beating, and punching him. *Id.* They started speaking languages he did not understand. *Id.* The three, armed officers forcibly threw him in their marked police vehicle. *Id.* Once in the vehicle, the officers, guns in hand, pushed Mr. B to the vehicle floor and stepped on him in transit. Tr. at 42-3, 69.

The officers locked Mr. B in a bad-smelling, dark room (approximately seven feet by seven feet) in a building that looked like a house. Tr. at 43; Exh. 4, Tab B-7 at 28. There, they confined and tortured him for five days. Tr. at 43-46; Exh. 4, Tab B-7 at 28. Specifically, the police officers dragged him around, stepped on him, kicked him; beat him "with everything they could find" (including boots, a baton, and a police belt); and burned his forearms with cigarettes. *Id.* He sustained blows on his whole body including his knees, back, thorax, and face. Tr. at 43;

Exh. 4, Tab B-7 at 28. Mr. B testified that he was "severely injured" in the tibia, shoulder and back and had pain "all over the place." Tr. at 44, 73. Mr. B was provided only small quantities of bread and water for sustenance during his five days of detention. Tr. at 43; Exh. 4, Tab B-7 at 28. He had no access to a toilet; instead, he had to "use the bathroom" on the floor of the small room—the same floor on which he tried to sleep. Tr. at 44; Exh. 4, Tab B-7 at 28, ¶21.

Throughout his confinement and torture, the police officers continually asked Mr. B whether Bemba was paying the student activists to protest the government, and they appeared to be "waiting" to hear that presidential candidate Bemba was paying the student activists to demonstrate against the government of Kabila. Tr. at 43-44; Exh. 4, Tab B-7 at 28. Mr. B said he had not received money or bribes from politicians and could not give them names of anyone who had, and the officers beat him "even more." *Id.*

During his confinement, Mr. B looked out through small holes and observed police officers smoking, drinking, and playing music. Tr. at 45; Exh. 4, Tab B-7 at 28. While detained in the locked room, Mr. B heard others screaming loudly. Tr. at 44. One day the officers turned down the music, mentioned a planned operation in Maluku, and threw a sack that appeared to contain human bodies into their vehicle. *Id.* Mr. B was terrified, knowing Maluku to be "the place where they go dump dead bodies." Tr. at 46. Fearing he would be next and realizing it was "then or never," Mr. B mustered his strength and broke the doors in the house with his foot and the weight of his body. Tr. at 45-46, 74-75; Exh. 4, Tab B-7 at 28-29. When asked how he was able to break the doors given his injuries and "lack of food and water," Mr. B explained, "My life was in danger. If I didn't do anything, I was going to die there." Tr. at 74-75. He took advantage of a moment when the police officers were not present and kicked the wood doors. *Id.*

He jumped over a fence, asked passers-by to help him, and found a ride to his grandmother's house. Tr. at 75-76; Exh. 4, Tab B-7 at 29.

The next day, Mr. B was treated for the wounds stemming from the five days of torture by a local medical center. Tr. at 46; Exh. 4, Tabs B-7 at 2, B-10 at 63. Eight years later, he still bears the scars of this encounter. Exh. 4, Tab B-9 at 46-50. On November 19, 2019, Joseph Truglio, M.D., a board-certified internal medicine physician, assistant professor and program director at Mount Sinai in New York, conducted a physical and psychiatric examination of Mr. B while he was in immigration detention. Exh. 4, Tab B-9 at 46. Dr. Truglio observed and took pictures of hyperpigmented lesions on multiple parts of Mr. B's body and found that they were consistent with being dragged across the floor, hit with a belt or baton, burned with cigarettes, and kicked with boots. Exh. 4, Tab B-9 at 48 and 51-60. Dr. Truglio also found Mr. B's psychological symptoms, including symptoms of clinically significant Post-Traumatic Stress Disorder as well as anxiety and depression, were consistent with the trauma he experienced in the DRC. *Id.*

B. Fleeing to Brazil, ongoing activism related to and problems in the DRC, a serious death threat without police protection in Brazil, and applying for asylum in the United States

Mr. B's parents decided he should leave the country immediately to avoid being killed by the authorities. They worked with a travel agent to arrange a student visa to Brazil in short order and bribed an official to allow him to leave. Mr. B left the DRC for Brazil on February 28, 2011. Tr. at 46-47, 72; Exh. 4, Tab B-7 at 29.

In Brazil, Mr. B worked in restaurants and bars to pay his bills; continued his studies, this time in Industrial Design; played music and engaged in visual and theatrical arts; and had two daughters. Tr. at 51-52; Exh. 4, Tab B-7 at 29. In 2016, his mother had a heart problem, and he

looked into whether he could return to the DRC to visit her. Because his uncle had recently been detained and disappeared by the Congolese police, his parents told him it would not be safe to return. *Id.* Mr. B explained that his uncle, who was Mr. B's age, was a community leader and was also a member of the MLC who was "well known because of his activities." Tr. at 52-53, 64-65.[1]

While he was living in Brazil, Mr. B continued his political activism against the DRC government, "using [his] social media to deplore and denounce the situation of what is transpiring in Congo." Tr. at 54. He also worked with the theater group Teatro Sao Paulo to create a play called Babylon Without Borders. Tr. at 54-55. Through that play, Mr. B denounced the lack of democracy, genocide and other human rights violations in the DRC. *Id.* His social media had followers in the DRC. Tr. at 55-56; Exh. 4, Tab B-7 at 30, 32; *see also* Exh. 4, Tabs C-18 – C-22 at 103-140 (exhibits related to social media postings and theatrical production).

One day, Mr. B had a telephone conversation with his ex-girlfriend and the mother of his first child. Mr. B feared she was being abused by her current boyfriend, who was an armed drug dealer. Mr. B encouraged his ex-girlfriend to report the abuse to the police. Tr. at 57-58; Exh. 4, Tab B-7 at 30. The boyfriend learned of the conversation and sent a message to Mr. B stating: "I know that I can find you. I will find you and then I will dilute your race. Whether you run northward, southward, eastward, westward, just know that I will find you and kill you." Tr. at 58-59; Exh. 4, Tab B-7 at 31. Mr. B did not go to the police to report this threat, because African immigrants are "not protected by the police," and he had witnessed situations in which African immigrants were murdered with impunity and without protection by the police. Tr. at 59-61;

[1] Due to everything that has transpired in the family, Mr. B's four siblings have chosen to have no political affiliation. Tr. at 66. Another uncle lives in South Africa because he opposes the government. Tr. at 65-66.

Exh. 4, Tab B-7 at 30-31; *see also* Exh. 4, Tabs C-18 at 103, C-25 at 149, E-40 –45 at 635-676 (exhibits related to country conditions in Brazil).[2]

Fearing for his life, Mr. B fled Brazil for the United States immediately. Tr. at 59-61; Exh. 4, Tab B-7 at 30-31. Following a treacherous journey, Mr. B entered the United States on June 7, 2019. Exh. 1; Exh. 4, Tab B-7 at 31. One month later, an asylum officer found Mr. B had a credible fear of persecution on the basis of his political opinion. Exh. 1. Mr. B applied for asylum and withholding of removal under the INA and CAT on November 15, 2019.

C. The political situation in the DRC

President Joseph Kabila, who took power following his father's assassination in 2001, held onto the presidency for nearly two decades. Exh. 4, Tab D-32 at 387. Following a December 2018 election, Felix Tshisekedi ("Tshisekedi") assumed the presidency, while Kabila became "Senator for Life." *Id.* at 382, 384, 388. Kabila's coalition "won sweeping majorities in simultaneous legislative and provincial-level elections, ensuring enduring influence for the former president and his supporters." *Id.* Two-thirds of Tshisekedi's cabinet positions were given to members of Kabila's coalition. Exh. 4, Tab D-39 at 621, ¶15.

Mr. B testified that "Kabila put Tshisekedi into power for his own security, and so that he can stay in Congo." Tr. at 86. A Congressional Research Service Report backs up that assertion, citing evidence that Tshisekedi did not in fact win the majority of the votes in the election. Exh. 4, Tab D-32 at 381, 384, 388-389, 397, 401. The *Financial Times* concluded, "The results of the

[2] At trial, Mr. B presented written and oral arguments that he was never firmly resettled as defined by 8 C.F.R. § 208.15 and is not barred from asylum pursuant to INA §208(b)(2)(A)(vi). Respondent's Prehearing Brief at 9-11; Tr. at 89-90. Trial counsel for the Department of Homeland Security did not dispute the issue and the Judge did not find that Mr. B is subject to any statutory bar to asylum. Tr. at 91-93; I.J. at 1-7. As such, the question whether Mr. B was firmly resettled in Brazil is not in dispute and is not at issue in these proceedings.

election were almost certainly rigged. Mr. Tshisekedi did not win at all, according to most impartial analysis." Exh. 4, Tab D-39 at 609; *see also* Exh. 4, Tab D-39 at 620, ¶ 14. Additionally, per the Congressional Report, "many observers" have "speculate[d] that the official election results reflected a power-sharing deal between Tshisekedi and Kabila" Exh. 4, Tab D-32 at 384. In its concluding paragraph, the Report notes, "If President Tshisekedi owes his political survival to former president Kabila, and his electoral victory to flawed political institutions, he may be unlikely or unable to confront these problems." *Id.* at 401. In addition to Kabila´s "Senator-for-Life" designation and legislative majorities, "[t]wo thirds of the posts [in Tshisekedi's cabinet] went to Kabila's coalition, especially in key sectors like security, mining and finance." Exh. 4, Tab D-39 at 621, ¶15. Tshekedi's human rights record remains troubling, and any improvement is "very modest . . . given the substantial number of violations that still occurred." Exh. 4, Tab D-39 at 626, ¶28. Letters in the record from individuals in the DRC confirm ongoing human rights abuses. Exh. 4, Tabs B-11 at 70-71, B-14 at 83, B-16 at 92.

The DRC has long had laws prohibiting torture, however, in 2019, experts from the United Nations Committee Against Torture ("UNCAT") spoke out against "the deteriorating human rights situation in the Democratic Republic of the Congo and the fact that 63 per cent of the numerous human rights violations were committed by State agents." Exh. 4, Tab D-33 at 405-413. "The suppression of and crack down on human rights defenders, journalists, and political opposition throughout the country was a serious concern, as was the use of force to repress protests and demonstrations." *Id.* The UNCAT experts also expressed concern about "widespread" and "arbitrary" detention in "secret detention centres" "in which torture and cruel and degrading treatment was practiced." *Id*.

Dr. Ashley Leinweber, Ph.D., an expert on country conditions in the DRC, reviewed a United Nations Security Council report issued in October 2019 ("2019 UN report") that "analyzed the extent to which the human rights and political situation has changed under the newly elected president." Exh. 4, Tab D-39 at 626, ¶29. The 2019 UN report included the following observations regarding Kabila's ongoing control in the DRC:

> Mr. Tshisekedi's limited control of the levers of power and the political tightrope he has to walk are judged to be the first political challenges. Both houses of Parliament, most provincial governorships and most provincial legislatures are controlled by the coalition of former President Kabila [FCC] The new President is also limited by the reportedly uncertain loyalty of the State defense and security forces and the influence FCC has on many State officials in various ministries, agencies, courts and State-owned companies.

Id. Dr. Leinweber wrote, "In conclusion, given that President Tshisekedi does not have control of the security forces, we can expect the number of human rights abuses, such as arbitrary detentions and torture of political activists, to continue." *Id.*

As part of his preparation for his asylum hearing, Mr. B discovered that the DRC had issued a warrant for his arrest as recently as 2018. Tr. at 48; Exh. 4, Tab B-17. In his declaration, Mr. B testified that "members of the government security forces are on the lookout at the airport for returning activists." Exh. 4, Tab B-7 at 33. This conclusion is supported by Dr. Leinweber, who wrote that the DRC has "specifically targeted" and tortured failed asylum seekers upon their return to the country. *Id.* at 627, ¶31-32. Applying her expert knowledge of conditions in the DRC, and after reviewing Mr. B's declaration, the 2019 medical report from Dr. Truglio, and other documents, including Country Reports on Human Rights by the United States Department of State, Dr. Leinweber concluded that Mr. B "would be in danger of further persecution were he to return to the Congo." *Id*. at 618 ¶6 and 627 ¶33.[3]

[3] Dr. Leinweber refers to the Respondent, G B, as "Mr. Bolele," while this brief refers to him as "Mr. B."

IV. Issues Presented for Review

This appeal presents the following issues for consideration:

A. Whether the Immigration Judge erred when she concluded that repeated beatings with boots, a baton, and a belt; cigarette burns; and detention with scant food in a tiny room where Mr. B was forced to sleep in his own urine did not constitute persecution, especially when such acts were perpetrated by a police force known for murdering opponents and critics of the government, contrary to firmly established Third Circuit precedent.

B. Whether the Immigration Judge erred in finding that Mr. B was not persecuted on account of his political opinion after he was kidnapped and tortured by National Police on his way home from a political meeting while wearing a shirt from a political opposition group, and where the National Police learned of his student status at an activist university and political affiliation with an opposition candidate for president prior to detaining him and subsequently questioned him about his political activities while beating him.

C. Whether the Judge's analysis of future persecution is fundamentally flawed because she 1) required Mr. B to show a "clear probability" of future persecution, 2) failed to consider extensive country conditions evidence that despite a change in president, the same actors who tortured Mr. B retain power, 3) failed to consider where there is a pattern or practice of persecuting political activists and government critics in DRC, and 4) placed the burden of proof on Mr. B to show he could not reasonably internally relocate, even though his persecution was at the hands of the national government.

D. Whether the Immigration Judge erred in denying Mr. B's applications for withholding of removal under the INA and CAT without undertaking the requisite legal analysis and without considering the totality of the evidence supporting those applications.

V. Request for Adjudication by a Three Member Panel

Under most circumstances, the Board must assign an appeal to a three-member panel for adjudication. 8 C.F.R. § 1003.1(e)(6); *Purveegiin v. Gonzales*, 448 F.3d 684, 693 (3d Cir. 2006). Single-member review is permissible only for "disposition of cases that do not present substantial questions of fact or law." *See Purveegiin*, 448 F.3d at 693. For instance, a single-member panel may reverse the decision of an immigration judge only where "reversal is plainly consistent with and required by intervening" legal authority. *Id.* at 692 (quoting 8 C.F.R. §

1003.1(e)(5)). This appeal requires assignment to a three-member panel because the Immigration Judge's analysis of Mr. B's eligibility for asylum, withholding of removal, and deferral under the Convention Against Torture is "not in conformity with the law or with applicable precedents" of the Board and the Third Circuit. 8 C.F.R. § 1003.1(e)(6)(iii). Also, the Immigration Judge's numerous omissions and misconstructions of the facts in the record resulted in several "clearly erroneous factual determination[s]" that require this Board's intervention. *Id.* at § 1003.1(e)(6)(v). Finally, for the foregoing reasons—and others detailed in this brief—the Board must reverse the Immigration Judge's decision on the basis of pre-existing legal authority. *Id.* at § 1003.1(e)(6)(vi). Therefore, only a three-member panel of this Board may consider this appeal and correct the Immigration Judge's errors of fact and law. *See id.* at § 1003.1(e)(6).

VI. Standard of Review

This Board reviews an immigration judge's findings of fact for "clear error." 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S–H–*, 23 I&N Dec. 462, 464 (BIA 2002). Under the "clearly erroneous" standard, the Board must reverse any factual determination where it is "left with the definite and firm conviction that a mistake has been committed." *Matter of R–S–H–*, 23 I&N Dec. 629, 637 (BIA 2003) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Although deferential, clear-error review permits the Board "to consider whether there is enough evidence in the record to support the factual findings" and thus requires meaningful scrutiny on appeal. *United States v. Igbonwa*, 120 F.3d 437, 441 (3d Cir. 1997).

The Board reviews *de novo* questions of law, discretion, or judgment. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of R–K–K–*, 26 I&N Dec. 658, 659 n.1 (BIA 2015). An immigration judge's application of a legal standard to the facts of the case is reviewed *de novo* as an issue of law. *See Myrie v. Att'y Gen.,* 855 F.3d 509, 516 (3d Cir. 2017) (stating that in cases involving

mixed questions, "the Board should review without deference the ultimate conclusion that the findings of fact do not meet the legal standard"); *En Hui Huang v. Attorney Gen. of the United States*, 620 F.3d 372 (3d Cir. 2010) (holding that, in connection with an analysis of fear of future persecution, the question of whether particular events meet "the legal definition of persecution" must be reviewed *de novo* "because it is plainly an issue of law"). This includes whether the facts in the case "give rise to a well-founded fear of persecution." *Sheriff v. Att'y Gen.*, 587 F. 3d. 584, 592-3 (3d. Cir. 2009). Under *de novo* review, the Board simply substitutes its own judgment for that of the immigration judge. *Fen Yong Chen v. Bureau of Citizenship & Immigr. Servs.*, 470 F.3d 509, 514 (2d Cir. 2006).

VII. Argument

A. Mr. B's repeated beatings with boots, a baton, and a belt; cigarette burns; and detention with scant food in a tiny room where Mr. Ilnde was forced to sleep in his own urine, perpetrated by a National Police force known for murdering political opponents and critics of the government constituted persecution, such that the Judge's ruling to the contrary is inconsistent with Third Circuit precedent.

Mr. B's kidnapping, beating, and five-day detention by the national police far exceed the standard an asylum seeker must meet to prove past persecution. Persecution "generally includes treatment like death threats, involuntary confinement, torture, and other severe affronts to the life or freedom of the applicant." *Gomez-Zuluaga v.* Att'y Gen. of U.S., 527 F.3d 330, 341 (3d Cir. 2008). In determining whether an incident constitutes past persecution, the courts should not "simply evaluate the applicant's claim 'against a generic checklist.'" *Irasoc v. Mukasey*, 522 F.3d 727 (7th Cir. 2008) (internal citations omitted). Rather, incidents must be "'weigh[ed] . . . in conjunction with . . . prior incidents' . . . and 'assessed within the' overall trajectory of the harassment." *Herrera-Reyes v. Att'y Gen. of the United States*, 952 F.3d 101, 107 (3d Cir. 2020).

It is "legal error" to "fail[] to give the proper weight to the cumulative effect of [an applicant's] experience. *Id.* at 12-13. A single incident may be sufficient to constitute persecution, and permanent injuries are not a prerequisite. *Doe v. Attorney Gen. of the United States,* No. 18-1342, 2020 WL 1886282, at *7 (3d Cir. Apr. 16, 2020)[4] *accord Herrera-Reyes,* 952 F.3d at 110 ("We have never . . . suggested that physical violence—or any other single type of mistreatment—is a required element of the past persecution determination. Instead, we have approached asylum claims on a case-by-case basis and engaged in a fact-specific analysis to determine whether a petitioner's cumulative experience amounts to a 'severe affront[] to [that petitioner's] life or freedom'").

The Third Circuit has already found that circumstances similar to those suffered by Mr. B rise to the level of persecution. *See Gomez-Zuluaga v. Att'y Gen. of U.S.,* 527 F.3d 330, 341 (3d Cir. 2008). The asylum seeker in *Gomez-Zuluaga* case was held for days in a house, where she was blindfolded, chained to the bed except to use the toilet, and subjected to terrible threats until her captors eventually released her. *Id.* at 337.

Mr. B suffered even more severe persecution at the hands of the National Police in his country. While the asylum-seeker in *Gomez-Zuluaga* was not "physically injured," *Gomez-Zuluaga.*, 527 F.3d at 341, Mr. B was subject to repeated and harsh physical assaults and burns. Tr. at 40-46; Exh. 4, Tab B-7 at 28. The Congolese National Police kidnapped Mr. B, stepped on him, detained him for five days in a very small room, kicked and beat him with boots, a baton, and a police belt, burned him with cigarettes, fed him scant amounts of bread and water, and forced him to sleep in his own excretions on the floor. Tr. at 41-46, 69-70; Exh. 4, Tab B-7 at 28.

[4] The *Doe* case was initially issued without a pseudonym on March 31, 2020; the Third Circuit vacated that decision and reissued it on April 16, 2020 under the pseudonym *Doe*.

Mr. B's observations led him to believe he was subject to an imminent threat of death, particularly in light of known DRC police murders of peaceful protesters. Tr. at 37, 40, 44-46; *see also* Exh. 4, Tabs B-26 and B-27 (contemporaneous DRC country conditions reports). While the *Gomez-Zuluaga* asylum-seeker was released voluntarily by her captors, Mr. B was forced to break doors and run for his life. *Gomez-Zuluaga*, 527 F.3d at 337; Tr. at 44, 74-76. He knew that if he stayed in detention any longer, the National Police officers would kill him and "do as they did to those people that they were throwing in the Jeep." Tr. at 46. He required medical attention the day after his escape, and more than eight years later, his physical and psychological scars remained. Tr. at 46; Exh. 4, Tab B-7 at 29; Exh. 4, Tab B-10 at 63; Exh. 4, Tab B-9 at 46-60. The depth of the terror Mr. B experienced during his five days of torture and detention was still greater in light of his prior experiences with DRC police. From the moment Mr. B became active in politics in 2006 at age eighteen, he observed that the police force was willing to resort to lethal force to put down peaceful protests. Tr. at 37, 40.

In her oral ruling, the Immigration Judge offered no analysis to support her summary conclusion that Mr. B did not suffer past persecution, stating simply: "While the court is sympathetic to the harm that the respondent suffered, the court does not find that these instances rise to the level of harm required under the definition of persecution." I.J. at 5. Going well beyond the minor clerical corrections permitted by the BIA,[5] the Judge later added the only substantive analysis in her decision regarding the key issue of past persecution: "The respondent did not suffer any severe injuries, and despite being detained for five days with minimal food and

[5] *See* BIA Practice Manual at 52 (an immigration judge may make ¨minor, clerical corrections to the [oral] decision"); *see also* 8 C.F.R. 1240.13(b) ("An oral decision shall be stated by the immigration judge in the presence of the respondent and the Service counsel, if any, at the conclusion of the hearing").

water. was able to use his own strength to break down a door and escape." I.J. at 5. This thin analysis, added by the Judge after the fact, flies in the face of both the facts in the record and the Third Circuit's standards. The *Doe* decision issued by the Third Circuit this month reversed a denial of asylum relying on precisely the type of flawed analysis set forth in the Judge´s amended decision. *See Doe,* 2020 WL 1886282 at *6-7.

First, the Immigration Judge's finding that Mr. B did not suffer persecution because he was not seriously injured is both legally and factually erroneous. In Mr. B's testimony, which the Judge found credible, he explained that he was in fact "severely injured" in the tibia, shoulder and back and had pain "all over the place." Tr. at 73. Following his escape, he was treated at a medical clinic, and more than eight years later, he exhibited documented physical and psychological scars from his persecution. Tr. at 46; Exh. 4, Tab B-7 at 29; Exh. 4, Tab B-10 at 63; Exh. 4, Tab B-9 at 46-60. Mr. B made a clear showing of severe injury. Assuming *arguendo* that Mr. B did not, the severity of injury does not determine whether past persecution occurred. The *Doe* Court explained, it is "legal error" to find that a "single beating without severe physical injury" is dispositive on the question of past persecution *See Doe,* 2020 WL 1886282 at *7. Indeed, the Third Circuit has long held that physical harm is not necessary to constitute persecution. *See e.g. Chavarria v. Gonzales*, 446 F. 3d. 508, 519-520 (3d. Cir. 2006). And, as noted above, the *Gomez-Zuluaga* asylum seeker was not "physically injured," *Gomez*-Zuluaga, 527 F.3d at 337. Where mere threats to a petitioner are so abhorrent and menacing that they "severely curtailed [his] liberty," they constitute persecution regardless of any ensuing injury. *Doe,* 2020 WL 1886282, at *5 (*citing Herrera-Reyes*, 952 F.3d at 108). Similarly, Mr. B's treatment in this case constitutes persecution.

Second, the Immigration Judge erred by finding that the ability to escape indicated that Mr. B had not been subject to persecution. The Third Circuit's recent *Doe* decision also held that a finding of persecution is not conditioned on whether a victim was "too hurt to escape his aggressors," because the fact that a victim of persecution has the strength to escape does not "diminish the risk he faced or the severity of his injuries." *Id.* at *6-7.

"***To the contrary, [that the victim has the strength to escape] is a testament to the extreme fear he felt and to the sheer human will to survive the most dangerous of situations."*** *Id.* So too, in the instant case, Mr. B's escape from five days of detention and torture should not bear on a finding of persecution and instead is a "testament" to his "extreme fear" and "sheer human will to survive the most dangerous of situations." *Compare* I.J. at 5 *with Doe,* 2020 WL 1886282, at *7.

Indeed, this is precisely what Mr. B articulated at his hearing. When asked how he was able to break the doors given his injuries and "lack of food and water," Mr. B explained, "My life was in danger. If I didn't do anything, I was going to die there." Tr. at 74.

Importantly, after considering Mr. B's "demeanor, candor, and responsiveness to the questions, as well as the inherent plausibility of his account of events," the Judge found that he "testified credibly," and that his documentary evidence corroborated his testimony. Tr. at 2. Yet, she then discounted or ignored his testimony and evidence regarding his serious physical injuries without providing any explanation. She also relied on factors specifically rejected by the Third Circuit to find Mr. B did not suffer past persecution, instead of considering the "involuntary confinement, torture, and other severe affronts to the life or freedom" that Mr. B suffered. *See Gomez-Zuluaga v.* Att'y Gen. of U.S., 527 F.3d 330, 341 (3d Cir. 2008). This Board should reverse and find that Mr. B established past persecution.

B. Mr. B was persecuted on account of his political opinion, and only by ignoring longstanding legal precedent did the Judge find otherwise.

The Judge's finding on the question of nexus between Mr. B's political opinion and his persecution was also made in error. Though the factual determination of what events occurred is reviewed under the clearly erroneous standard, whether those events were on account of a protected ground is a question of law that is subject to *de novo* review. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Third Circuit has long recognized that "'it would be patently absurd to expect an applicant ... to produce [ ] documentary evidence' of a persecutor's motives . . . since 'persecutors are hardly likely to submit declarations explaining exactly what motivated them to act.'" *Espinosa-Cortez v. Attorney Gen.*, 607 F.3d 101, 109 (3d Cir. 2010) (internal citations omitted). Direct proof of a persecutor's motives is not required; instead, an asylum-seeker must provide "***some*** evidence of [motive], direct or circumstantial." *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (emphasis in the original). In the context of a political struggle, connection to or work with an opposing political faction has been deemed to be circumstantial evidence of political motivation. *See Espinosa-Cortez v. Att'y Gen.*, 607 F. 3d. 101, 111-112 (3d. Cir. 2010) (finding that the asylum seekers close association with the military and government made him a target of guerilla groups); *Chavarria,* 446 F.3d. at 513 (finding that even a tangential relationship to an anti-government human rights group was indicative of politically motivated persecution when government agents attacked the asylum seeker). Additionally, the Third Circuit has found there was sufficient evidence of a political opinion nexus where a political group targets a member of an opposing political group for information or recruitment. *See Espinosa-Cortez*, 607 F. 3d. at 111-112.

The Immigration Judge in the instant case erred as a matter of law on the question of nexus, and Judge ignored both direct and circumstantial evidence that Mr. B was persecuted on account of his political opinion. The Judge's amended analysis of the question of nexus reads as follow:

> The respondent testified that during the time of his detention, the police officers were asking specifically about whether or not he was getting paid to participate in marches and about Jean Bemba himself. Based on the evidence. the court finds that the officers wanted more information about the candidate- Bemba- and about how he was garnering support. ~~Therefore the court finds that i~~ The court does not find that there is sufficient evidence to prove that the ~~t is unclear as to whether the~~ motive of the officers was to overcome the respondent's political beliefs. Rather it seems to be ~~or~~ to gain more information about the ongoing strikes and marches that were occurring amongst the student population in Kinshasa.

I.J. at 5-6. In other words, the Judge concludes that because the police officers who detained and tortured Mr. B wanted information about the opposition presidential candidate Bemba and student activism, the officers were not seeking to "overcome the respondent's political belief." This analysis is contrary to law, as a persecutor need not have only one motive for his actions. An asylum seeker need not establish that political opinion or other enumerated ground is the only reason for his or her persecution; instead, he need only show that one of the enumerated grounds (as relevant here, political opinion) was ***at least one central reason*** for persecuting the applicant. 8 U.S.C. 1158(b)(1)(B)(i). That is, "[a] persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, ***at least in part***, by one of the enumerated grounds." *Lukwago v Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) (emphasis added). A protected ground need not be the "dominant" ground; in other words, even a "subordinate" motivation may establish nexus, so long as the protected motivation is "more than incidental, tangential, or superficial." *Ndayshimiye v. Att'y Gen. of U.S*, 557 F.3d 124, 129-130 (3d Cir. 2009). Where asylum seekers who hold opposition political opinions have been

detained, beaten, and questioned about their opposition political opinions, the Board has readily found that the persecutor may have both a motive to gather information and to punish the applicant for their political opinion and that they therefore meet the standard for asylum: "Although there was an interrogation and an attempt to gain information in each case, an additional underlying reason for the abuse was the belief that the victim held political views opposed to the government." *In re S-P-*, 21 I & N, Dec. 486, 497 (BIA 1996); *Matter of B-*, Interim Decision 3251 (BIA 1995). And to understand the mixed motives of persecutors, courts must also look at the context of what is happening in the country. *In re S-P-*, 21 I & N Dec. at 492-5 (considering the ongoing political conflict in Sri Lanka in determining that the Respondent warranted asylum).

The very evidence and analysis relied upon by the Judge points to a nexus based on Mr. B's political opinion. That is, the National Police officers' focus on obtaining information "about the candidate Bemba and about how he was garnering support' and "about the ongoing strikes and marches that were occurring amongst the student population in Kinshasa" in and of themselves demonstrate that the police officers were hostile to and motivated at least in part by Mr. B's political opinion. *See* I.J at 5-6; *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) ("A persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds.")

Like the Respondent in *Espinosa-Cortez*, it was only Mr. B's "long-standing, close association" with their political opponent that evoked the interest of Mr. B's persecutors. 607 F. 3d. at 112. When the National Police initially stopped him, Mr. B was on his way back from a meeting with students and members of the MLC, and he was wearing an MLC t-shirt actively displaying his political opinion. Tr. at 41; Exh. 4, Tab B-7 at 28. The National Police officers

specifically asked him why he was wearing the MLC party t-shirt. Tr. at 42; Exh. 4, Tab B-7 at 28. The police officers' anger at Mr. B increased when he exhibited his student identification card; notably, the university he attended was well-known for its political activism. Tr. at 38, 42; Exh. 4, Tab B-7 at 27-28. And during his detention, the officers repeatedly questioned him on matters relating to support for student activism and the political opposition. Tr. at 43-44; Exh. 4, Tab B-7 at 28. In other words, he was identified, then kidnapped and beaten for his publicly expressed political opinion. The fact that he came to the attention of his persecutors because of his political opinion, and refused to provide them the information they wanted only underscores the obvious conclusion that their persecution was motivated both by their desire for knowledge *and* their desire to punish political opposition. *Id.* at 114.

As the Judge correctly acknowledged, in political opinion asylum cases, it is the victim's political opinion (or imputed political opinion) that matters, not that of the perpetrator. *See Elias-Zacarias*, 502 U.S. at 482. Mr. B's political opinion aligns precisely with the issues that the Judge found were animating his persecutors. For well over a decade, he has opposed Kabila and his party; he supported an opposition presidential candidate; he has been an active member of the MLC party; he has actively opposed Kabila's policies; he attended a university well-known for its political activism; and over the years he was actively involved in presidential politics and student activism in furtherance of his beliefs. Tr. at 35-42; Exh. 4, Tab B-7 at 27-28. Mr. B continued to express these beliefs from abroad for years following his escape from the DRC. Tr. at 54-57; Exh. 4, Tab B-7 at 30; Exh. 4, Tabs C-18 – C-22.

This direct evidence of the persecutors' motivation is corroborated by ample evidence establishing that, at the time of Mr. B's detention and torture (and continuing through today), the DRC was known to kill, disappear, and detain political opponents, members of opposition

political parties, and perceived opponents and critics of the government. *See* Exh. 4, Tab D. The United States Department of State's DRC country conditions report for 2011 explains that the National Police (Mr. B's persecutors) are part of the State Security Forces. *See* Exh. 4, Tab D-26 at 176.[6] The Department of State report notes that security personnel "arrested and detained without charge perceived opponents and critics of the government" and was responsible for many "serious abuses, including unlawful killings, disappearances, torture, and detention, as among the serious human rights problems facing the DRC in 2011." *Id.* at 171. The 2010 Department of State report likewise described the DRC security forces "killing political opponents," sometimes while holding them in custody and sometimes during protests. Exh. 4, Tab D-39 at 622, ¶20. Dr. Lienweber described "strong government responses" to student demonstrations in Kinshasa. Exh. 4, Tab D-39 at 623. Human Rights Watch reviewed incidents dating back to 2006 and found systematic use of arbitrary arrest and detention, ill-treatment and frequently torture of suspected political opponents and activists. Exh. 4, Tab D-31 at 376-380. In addition to the direct evidence of nexus, the Judge should have considered the context in which Mr. B's persecution occurred. *See Castro v. Holder,* 597 F.3d 93 (2nd Cir. 2010) (finding the immigration judge erroneously failed to consider the broader political context that corroborated nexus between persecution and political opinion); *In re S-P-*, 21 I & N Dec. at 492-5.

The facts establish that the DNC National Police persecuted Mr. B at least in part on account of his political opinion. Only by ignoring years of caselaw confirming that a persecutor may have a mixed motivation did the Immigration Judge rule otherwise. *See. e.g. Lukwago*, 329 F.3d at 170. *See* I.J. at 5-6. The Immigration Judge's nexus determination is contrary to the facts

[6] The State Department document refers to the State Security Forces as the "SSF" and the National Police as the "PNC." Exh. 4, Tab D-26 at 171 and 172.

and the law and should be reversed. Because Mr. B did suffer serious harm, rising to the level of persecution, on account of his political opinion, he is entitled to a presumption that he would suffer future persecution if returned to DRC. *See* 8 C.F.R. § 1208.13(b)(1). Because the government presented no evidence to rebut this presumption, Mr. B is entitled to a grant of asylum or, in the alternative, to a remand of his case for reconsideration under the proper legal standard.

C. The Judge's analysis of future persecution is fundamentally flawed because she (1) applied a heightened and inapplicable legal standard; (2) misapplied the facts to the law; (3) failed to consider whether there was a pattern or practice of persecution in the DRC; and (4) mistakenly required Mr. B bear the burden of proof that he could not reasonably internally relocate.

Even if Mr. B had not established past persecution, the Judge's findings on Mr. B's well-founded fear of future persecution are contrary to the law and the record in this case. The Immigration Judge found Mr. B established a subjective fear of future persecution but did not find his fear to be "objectively reasonable." I.J. at 5. In making this finding, the Judge applied the "clear probability" standard applicable in withholding of removal cases rather than the "reasonable possibility" standard applicable in asylum cases; ignored extensive country conditions evidence that despite a change in the president's political party, the same actors who tortured Mr. B retain power; did not apply the requisite legal tests; and impermissibly shifted the burden of proof on internal relocation.

i. The Immigration Judge erroneously applied a "clear probability" rather than "reasonable possibility" standard required to establish a well-founded fear of future persecution in asylum cases.

To frame her analysis on future persecution, the Immigration Judge wrote, "[T]he respondent has not demonstrated a ***clear probability*** of persecution in this case." I.J. at 6. While "clear probability" of future persecution is the standard in withholding of removal cases, an

applicant need only demonstrate a ***"reasonable possibility"*** he will suffer future persecution in ***asylum*** cases. *Garcia v. Att'y Gen. of the United States*, 665 F.3d 496, 502-503 (3rd Cir. 2012); *see also* 8 C.F.R. 1208.13(b)(2)(i)(B). That is, to establish the "objective component" of the well-founded fear analysis, an asylum applicant is not required to prove that future persecution is "more likely than not" to occur; rather, he must prove a "reasonable possibility" of future persecution, which may be satisfied by "***[e]ven a ten percent chance***." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). The Immigration Judge flatly misstated the burden of proof established by regulation and decades of caselaw. Further, the error permeated her opinion, as demonstrated by her flawed analysis on the question of well-founded fear of future persecution, and Mr. B's should be reversed and remanded for application of the correct standard.

ii. The Immigration Judge's analysis of Mr. B's risk of future persecution is fundamentally flawed.

An asylum applicant's credible testimony alone may be enough to establish a reasonable possibility of future persecution. *See* 8 U.S.C. § 1158(B)(1)(b)(ii). In. the instant case, Mr. B's credible testimony is bolstered by hundreds of pages of country conditions evidence, and clearly meets this burden. Nevertheless, the Judge erroneously discounted Mr. B's well-established future fear based on a misunderstanding of the evidence regarding current conditions in the DRC and a misapplication of the law.

First, the Judge's superficially and myopically focuses on the fact that current DRC President Tshisekedi's political party is distinct from Kabila's political party. I.J. at 7 ("[T]he Court finds that the current president is, in fact, a member of a different opposition party, and therefore, does not find that the respondent has established that he has a well-founded fear of future persecution.") Here, she fails to consider the overwhelming evidence that Kabila and his

party continued to control the government and that human rights abuses are rampant even following Tshisekedi's election and irrespective of Tshisekedi's political party.

The record is replete with evidence that Tshisekedi "won" the election through a rigged process that involved a power-sharing agreement with former president Kabila, and that in addition to exercising control over Tshisekedi, Kabila retained control over large swaths of the government. It is widely believed that Tshisekedi did not win the majority of votes and that the election was "almost certainly rigged," and that the "official" results placing him in power "reflected a power-sharing deal between Tshisekedi and Kabila." Exh. 4, Tab D-32, p1, 5, 6, 14, 18 within the document; D-39[7] (*Financial Times* article); Exh. 4, Tab D-39 (expert declaration) at 620-621, ¶14, 15. In Mr. B's words, "Kabila put Tshisekedi into power for his own security, and so that he can stay in Congo."

Additionally, independent of back-door deals and power-sharing agreements, Kabila also retains direct political power in the legislative and executive branches of government. When Tshisekedi was elected president, Kabila was simultaneously deemed "Senator for Life," his coalition "won sweeping majorities in simultaneous legislative and provincial-level elections, ensuring enduring influence for the former president and his supporters," and his coalition retained two-thirds of the cabinet posts in the Tshisekedi administration, including security-related posts. Exh. 4, Tab D-32 at 382, 384, 388; Exh. 4, Tab D-39 article; Exh. 4, Tab D-39 at 621, ¶15.

Also to the point, human rights abuses similar to those Mr. B observed and endured are continuing under the current government as documented by United Nations observers. Exh. 4,

[7] It appears two exhibits were inadvertently labeled with the same exhibit number, D-39. *See* Evidentiary Submission, Exhibit 4, at vix. Both are relevant here.

Tab D-33, 405-413; Exh. 4, Tab D-39 at 626, ¶28, 29. DRC country conditions expert Dr. Leinweber wrote, "[G]iven that President Tshisekedi does not have control of the security forces, we can expect the number of human rights abuses, such as arbitrary detentions and torture of political activists, to continue." Exh. 4, Tab D-39 at 629, ¶29.

The Judge's finding that Tshisekedi and Kabila are not from the same political party is accurate but entirely beside the point. Kabila continues to exercise control over both the executive and the legislative branches of government; persecution based on political opinion is ongoing; and the overwhelming evidence in the record establishes that Mr. B faces a reasonable possibility of persecution should he return to his country.

Second, neither the fact that Mr. B's parents have not been arrested nor the Judge's speculation that Mr. B's uncle potentially could have been "disappeared" without a trace, due to some reason other than his political activism, negates Mr. B's "reasonable possibility" of future persecution. Mr. B's credible testimony and declaration set forth the reasons the family suspected his young uncle Guy Mpaba, like Mr. B five years earlier, was kidnapped by the police due to his political activism. Tr. at 52-53, 61-65; Exh. 4, Tab B-7 at 29-30. Mr. Mpaba and Mr. B were the same age, and Mr. Mpaba was also a student and a member of the MLC. Tr. at 52. Mr. B's mother explained that the police arrested her young brother in 2016 for "an unknown reason," and he has been disappeared ever since. Exhibit 4, Tab C-13 at 79. Mr. B's father wrote, "Guy Mpaba, who was a student, disappeared and has not been found to this day."[8] Exhibit 4, Tab C-14 at 75 Nothing in the record establishes a reason other than political persecution for Mr. Mpaba's disappearance.

[8] Perhaps because Mr. B and his uncle are the same age, Tr. at 53, his father refers to both Mr. B and Mr. Mpaba as his "children."

As to Mr. B's parents, the Judge ruled, "both of his parents are supporters of the MLC Party, but there has been insufficient testimony to show that the respondent's similarly-situated family members have suffered harm since the respondent has left the Congo." I.J. at 6. Importantly, however, Mr. B also testified that due to "everything that has . . . transpired in the family" his three siblings have chosen not to have a political affiliation." Tr. at 66. He also testified that another uncle is living in South Africa due to his opposition to the government. Tr. at 65-66. Furthermore, the Immigration Judge ignored the many important ways in which Mr. B and his parents are not "similarly situated." In contrast to his parents, Mr. B is a political activist who was detained and tortured on account of his political opinion (including student activism) and then escaped. Further, he continued his activism by speaking out against the DRC government vis social media from abroad, and his on-line presence was known in the DRC. Tr. at 54-57; Exh. 4, Tab B-7 at 30, 32; Exh. 4, Tabs C-18 – C-22. And importantly, the government has not abandoned its particularized interest in Mr. B, as evidenced by the reissuance of the warrant for his arrest in 2018, distributed to law enforcement including airport officials seven years after he left the country. Exh. 4, Tab B-17 at 100-101. In his declaration, Mr. B testified that "members of the government security forces are on the lookout at the airport for returning activists." Exh. 4, Tab B-7 at 33. Indeed, the DRC has "specifically targeted" and tortured failed asylum seekers upon their return to the country. Exh. 4, Tab B-39 at 627, ¶31-32. Applying her expert knowledge of conditions in the DRC, and after reviewing Mr. B's declaration, the 2019 medical report from Dr. Truglio, and other documents, including Country Reports on Human Rights by the United States Department of State, Dr. Leinweber concluded that Mr. B "would be in danger of further persecution were he to return to the Congo." *Id*. at 618 ¶6 and 627 ¶33.

The record clearly establishes a reasonable possibility that Mr. B would be singled out for persecution should he return to the DRC. Like the immigration judge's findings in the *Doe* case, the Judge's findings in the case at bar "are not supported by substantial evidence, because they are based on mischaracterizations, unreasonable inferences, and an incomplete assessment of the record." *See Doe,* 2020 WL 1886282 at *12. Further, whether the facts of a case establish an objectively reasonable fear of future persecution is a legal determination that the Board reviews *de novo*. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590-591 (BIA 2015). The Board should reverse, as Mr. B's fear is objectively reasonable.

iii. The Immigration Judge erred in failing to consider whether there was a "pattern-or-practice" of persecution in DRC

Because the pertinent regulations recognize both pattern-or-practice and individualized-persecution claims, it is error for the Immigration Judge to consider just one to the exclusion of the other. *See Sukwanputra v. Gonzales*, 434 F.3d 627, 637 (3d Cir. 2006). Importantly, the applicant does not bear the burden of affirmatively raising both regulatory pathways to a well-founded fear. *See Banks v. Gonzales*, 453 F.3d 449, 452–53 (7th Cir. 2006). To the contrary, the regulations impose ***on the adjudicator*** an affirmative duty to consider, unbidden, whether the applicant will be singled out for persecution ***and*** whether he is a member of a group subjected to a pattern or practice of persecution. *See id.* (explaining that 8 C.F.R. § 1208.13(b)(2)(iii) "governs not only the proofs at the hearing but also an [Immigration Judge]'s process of reasoning, and it must be followed whether or not an [applicant] draws it to the agency's attention").

The well-founded-fear determination in this case requires reversal because the Immigration Judge did not analyze, or even contemplate, a pattern or practice of persecution. *See Banks*, 453 F.3d at 452–53. Consideration of the pattern-or-practice standard is no mere

formality in this case; to the contrary, as an activist and long-time critic of the DRC government, Mr. B is precisely the type of person at risk for ongoing persecution if returned to his country, as amply established by the hundreds of pages of country conditions evidence regarding the ongoing human rights abuses against activists and government critics. *See. e.g.,* Exh. 4, Tabs C11 to 16 and D-26 to D-39 (including both exhibits marked with Tab 39). The case should be remanded for analysis of the extensive record of a pattern or practice of politically motivated persecution in the DRC. *See Sukwanputra*, 434 F.3d at 637.

iv. The Immigration Judge erred in failing to place the burden on the government to show Mr. B could relocate within DRC and in her assessment that such relocation would be reasonable.

An asylum application may be denied where the "applicant could avoid future persecution by relocating to another part of the applicant's country…and under all the circumstances, it would be reasonable to expect the applicant to do so." 8 CFR §1208.13(b)(1)(i)(B). "[T]he regulation envisions a two-part inquiry: whether relocation would be ***successful,*** and whether it would be ***reasonable***." *Gambashidze v. Ashcroft*, 381 F.3d 187, 192 (3d Cir. 2004). In cases where "the persecutor is a government or is government sponsored," the burden of proof on both issues is on the government, and "it shall be presumed that internal relocation would not be reasonable, unless the [Department] establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 CFR §1208.13(b)(3)(ii); *Gambashidze v. Ashcroft*, 381 F.3d 187, 192 (3d Cir. 2004)

In this case, the Immigration Judge improperly placed the burden Mr. B, rather than on the Department, to show whether internal relocation was reasonable. Mr. B was previously targeted by the National Police, or "PNC," and feared persecution by the PNC and other government agents upon his return to DRC. Tr. at 41, 69-70; Exh. 4, Tab B-7 at 28. Indeed, the

Immigration Judges acknowledged that the "actors against" Mr. B were "government officials," but then placed the burden on Mr. B and held that Mr. B "has not demonstrated that it would not be reasonable for him to internally relocate." I.J. at 6-7. In light of this clear legal error, Mr. B's case must be remanded for the Immigration Judge to assess the reasonableness of Mr. B's internal relocation with the burden properly placed on the Department. *See Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008) (remanding where the Immigration failed to place the burden on DHS to show that the Respondent could reasonably relocate).

The Department in no way carried its burden. Mr. B was the sole witness to testify at hearing, and the only exhibits other than Mr. B's submissions were the Notice to Appear and the I-213. Tr. at 27. The Department did not address the issue in closing argument. Tr. at 91-93. In short, the Department failed to present any evidence or argument to establish Mr. B could successfully or reasonably relocate within the DRC to avoid future persecution.

In addition to her improper placement of the burden on Mr. B, the Immigration Judge failed to identify any reason Mr. B would be able to successfully or reasonably relocate. Instead, she simply shifted the burden: "Although the actors against the respondent were, according to the respondent's testimony, government officials, if the respondent were to return to the Congo, nine years later, there is insufficient testimony to show why, if he lived in a new location, he would be recognized or even targeted." I.J. at 7. Successful relocation requires identification of "an area of the country where the circumstances are substantially better than those giving rise to a well-founded fear of persecution on the basis of the original claim." *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 28 (BIA 2012). The government's burden on this point is not insubstantial. *See Gambashidze v. Ashcroft*, 381 F.3d 187, 193-194 (3rd Cir. 2004) (Even where "what little evidence there is in the record is consistent with the government's position" on internal

relocation, the evidence on the point was "so thin" that no reasonable factfinder could find the government met its burden"). Nothing in the record would support a finding that the Department had met its burden to show that internal relocation is a safe option for Mr. B.

And even assuming *arguendo* safe internal location were possible for Mr. B, the Immigration Judge then "should balance the factors identified at 8 C.F.R. § 1208.13(b)(3) in light of the applicable burden of proof to determine whether it would be reasonable under all the circumstances to expect the applicant to relocate." *M-Z-M-R-,* 26 I&N Dec. at 28. These factors include "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 CFR §1208.13(b)(3). The Judge undertook no such analysis. The case should be remanded for application of the correct burden of proof and legal analysis.

D. The Immigration Judge erred in denying Withholding of Removal under INA § 241(b)(3) and the Convention Against Torture

The Immigration Judge also erred in denying Mr. B Withholding of Removal under INA § 241(b)(3) and protection under CAT. In her denial of each of these forms of relief, the Immigration Judge again failed to consider the totality of the record before her, misconstrued parts of the factual evidence, and failed to meaningfully engage with the relevant legal standards and precedent.

i. Withholding of Removal under INA § 241(b)(3)

In denying Mr. B's application for Withholding of Removal under INA § 241(b)(3), the Immigration Judge concludes, without further analysis, that because he "did not meet his burden of proving he is eligible for asylum, it necessarily follows that he failed to meet his burden of

proof for the much higher standard necessary for withholding of removal." I.J. at 8. Therefore, her finding that Mr. B is ineligible for Withholding of Removal rests upon the same defective analysis as her decision on asylum, including the erroneous findings that his past treatment did not constitute persecution on account of his political opinion, and her failure to meaningfully consider the testimony, evidence, and country conditions presented in light of the relevant legal standards. Indeed, the evidence and testimony presented by Mr. B regarding his political activism and past treatment, in combination with the voluminous country conditions evidence demonstrating the persecution of political activists and the continuing power of the same government leaders and officials in DRC, is more than sufficient to show that Mr. B would more likely than not be persecuted upon return to DRC.

i. Convention Against Torture

In denying Mr. B's application for protection under CAT, the Immigration Judge provides scant reasoning that misconstrues or ignores the evidence in the record and fails to follow the required legal framework to determine the likelihood of future torture and the issue of government consent or acquiescence.

In assessing whether an applicant is more likely than not to be tortured, the fact finder must consider all evidence of torture, including (1) evidence of past torture; (2) evidence that the applicant could relocate to another part of the country where torture is not likely; (3) evidence of gross, flagrant, or mass human rights violations within the country; and (4) other country conditions. 8 C.F.R. § 1208.16(c)(3). The Immigration Judge's erroneous reasoning begins when she concludes, with no analysis, that Mr. B did not suffer past torture. I.J. at 8. Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...]punishing him or her for an act he or she or a third per son has committed or is suspected of having committed." 8 C.F.R. § 1208. 18(a)(1). Mr. B

was extrajudicially detained for five days, where he was severely beaten over his entire body with boots, batons and belts (causing lasting injury), burned with cigarettes, and placed in fear of imminent death. Tr. at 43-46, 73; Exh. 4, Tab B-7 at 28. According to Mr. B's credible testimony, which was corroborated by a forensic examination, these violent acts were intentionally inflicted and resulted in severe physical and mental pain and suffering. Tr. at 43-46, 73; Exh. 4, Tab B-7 at 28. The Immigration Judge provides no reason to discount this evidence and yet fails to explain why it does not meet the definition of torture. *See* 8 C.F.R. § 1208. 18(a)(1).

In addition, the Immigration Judge failed to consider the full range of the country reports and evidence that demonstrate that Mr. B would likely be subjected to future torture in DRC. The only rationales offered by the Immigration Judge in support of her finding that Mr. B would not suffer future torture is that (1) Mr. B has not been to the DRC in nine years, and (2) Mr. B's "objective evidence goes to generalized brutality that exists in the Congo, rather than his personal risk of torture, in this case." I.J. at 8. The Immigration Judge's dismissal of the voluminous evidence of the continuing abuses against political activists in DRC, including an expert affidavit, without providing any basis to discount that evidence, necessitates a remand. *See e.g.* Exh. 4, Tab D-33 at 405-413, Tab Exh. 4, Tab D-39 at 626, ¶¶28-29*; see Zubeda v. Ashcroft*, 333 F.3d 463, 477 (3d Cir. 2003) (reversing where the Board *"*cavalierly dismissed the substantial documentation of conditions in the DRC" and failed to provide a clear analysis of what country conditions evidence had been taken into account); *Quinteros v. Attorney Gen. of United States*, 945 F.3d 772, 786 (3d Cir. 2019)(confirming that if any evidence is to be disregarded, the Immigration Judge must explain why); *Pieschacon-Villegas v. Attorney Gen. of U.S.*, 671 F.3d 303, 314 (3d Cir. 2011)(remanding where the decision referenced country reports

in the record but didn't indicate whether the reports that provided information about individuals similarly situated to the respondent who were targeted for torture had been considered). The Immigration Judge also failed to apply the proper framework to analyze future torture. In assessing the probability of future torture "the Immigration Judge must address two questions: "(1) what is likely to happen to the petitioner if removed; and (2) does what is likely to happen amount to the legal definition of torture?" *Myrie,* 855 F. 3d at 515-518. The Judge did not make a factual finding about what is likely to happen to Mr. B if he returns to DRC, and remand is required. I.J. at 8 *See Serrano Vargas v. Attorney Gen. United States*, 790 F. App'x 482, 485 (3d Cir. 2019) (remanding where it was unclear whether the BIA applied *Myrie*).

Finally, the Immigration Judge concluded that the government would not acquiesce to Mr. B's torture, based solely on the fact that there is a "new political party in power." I.J. at 8. As in her analysis of Mr. B's asylum claim, the Judge ignored extensive county conditions evidence that the current regime in DRC has continued to target political activists and government critics, and that the same leaders and officials who were in power when Mr. B was tortured continue to hold great power in the country, including over the national security forces. *See e.g.* Exh. 4, Tab D-32; D-33; D-39 (*Financial Times* article); Tab D-39 (expert declaration) at 620, 621, 626, ¶¶14-15 and 28-29. That is, the evidence in the record not only establishes that the government would acquiesce in Mr. B's torture, but that it would again occur at the government's hands. Nevertheless, the Immigration Judge fails to provide any basis to discount this evidence, including the expert declaration and national and international reports. Furthermore, the Immigration Judge fails to follow the prescribed framework or to make the factual findings required by *Myrie*, which requires the immigration judge to determine (1) how public officials will likely respond to the harm the petitioner fears and (2) whether this response constitutes

acquiescence. *See Myrie*, 855 F. 3d at 515-518 These procedural errors, failure to make the requisite factual findings, and unjustified discounting of the facts and country conditions in the record require that Mr. B's case be remanded.

VIII. Conclusion

For the reasons and authorities set forth above, the Board should remand this matter to the Judge to enter findings that Mr. B suffered past persecution on account of his political opinion, and that the presumption of future persecution was not rebutted. Also for the reasons outlined above, the Judge's conclusions on withholding of removal under the INA and CAT should be reversed.

Dated: April 22, 2020

Respectfully submitted,

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Lauren Major

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Laura Rodriguez, hereby certify that on April 22, 2020, I served a copy of this Respondent's Brief on Appeal and any attached pages on Office of Chief Counsel, Immigration and Customs Enforcement, U.S. Department of Homeland Security at 625 Evans Street, Room 135, Elizabeth, NJ 07201 by DHS eservice.

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Laura Rodriguez