U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: U[redacted] V[redacted], G[redacted]... **A [redacted]-408**

Date of this notice: 11/21/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.

Userteam: Docket

File: A[redacted]-408 – Florence, AZ Date: NOV 21 2019

In re: G[redacted] O[redacted] U[redacted] V[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elizabeth J. Bradley, Esquire

ON BEHALF OF DHS: Jeremy Martinez
Assistant Chief Counsel

APPLICATION: Convention Against Torture

The Department of Homeland Security (DHS) appeals from the decision of the Immigration Judge dated June 6, 2019, granting the respondent, a native and citizen of Mexico, deferral of removal under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-.18.[1] The appeal will be dismissed.[2]

We review the findings of fact made by the Immigration Judge, including determinations as to credibility and the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i); *see also Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, neither party has challenged the Immigration Judge's finding that the respondent is not competent to proceed without safeguards (IJ at 2; Tr. at 79-91). *See Matter of J-S-S-*, 26 I&N Dec. 679, 684 (BIA 2015) ("[a] finding of competency is a finding of fact that the Board reviews to determine if it is clearly erroneous."); *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) (setting forth the test for determining whether an alien is competent to participate in removal proceedings); *see also Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

[1] We are unpersuaded by the respondent's contention that the DHS's appeal was not timely filed (Respondent's Motion for Summary Dismissal). The DHS properly filed the Notice of Appeal and all attachments with the Board. Any deficiency of the service of the appeal packet was corrected and the respondent suffered no prejudice by the DHS's administrative error.

[2] The Immigration Judge erroneously captioned the written decision as being in "withholding only proceedings" (IJ at 1). However, the respondent is in removal proceedings that were commenced when a Notice to Appear was filed with the Immigration Court on July 14, 2016 (IJ at 1; Exh. 1).

The Immigration Judge implemented appropriate safeguards, including the appointment of a qualified representative (QR), multiple continuances, and considering the respondent's mental health condition in assessing his testimony. The parties do not contest the sufficiency of the safeguards. *See Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016) (holding that in cases involving issues of mental competency, an Immigration Judge has the discretion to select and implement appropriate safeguards, which this Board reviews de novo); *see also Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015).

We affirm the Immigration Judge's grant of deferral of removal under the Convention Against Torture.[3] *See* 8 C.F.R. §§ 1208.16-.18. The Immigration Judge granted the respondent's application for this relief based upon the likelihood of the respondent being killed or otherwise tortured as a consequence of his having witnessed members of a cartel disposing of two corpses and later taking possession of a cellular telephone that contained videos of the cartel members committing other violent crimes. In doing so the Immigration Judge concluded that the respondent is more likely than not to be killed or tortured, that Mexican officials would acquiesce to the harm perpetrated by private actors, and that the respondent could not relocate within Mexico to avoid being harmed (IJ at 5-8). On appeal, the DHS challenges numerous aspects of the Immigration Judge's analysis. We find none of these challenges persuasive and will affirm the Immigration Judge.

We do not find the Immigration Judge's findings of fact, including the positive credibility assessment of the respondent and the expert witness, to be clearly erroneous (IJ at 6-7). *See* 8 C.F.R. § 1003.1(d)(3)(i). *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (holding that on clear error review, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."); *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985) (holding that where there are two permissible views of the evidence, the fact finder's choice between them cannot be deemed clearly erroneous); *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (stating that the Board may overturn an Immigration Judge's findings of fact only when it "is left with the definite and firm conviction that a mistake has been committed.") (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotation marks omitted).

Additionally, we do not find clear error in the Immigration Judge's findings that criminal cartel members have both the will and the ability to harm the respondent in Mexico. Nor do we find clear error in the finding that the respondent cannot internally relocate to avoid being harmed upon his return to Mexico (IJ at 7-8). 8 C.F.R. § 1208.16(c)(3)(ii). In arriving at both of these conclusions, the Immigration Judge relied on the testimony of the respondent's expert witness (IJ at 8).

Moreover, upon de novo review we affirm the Immigration Judge's determination that the harm the respondent is more likely than not to experience, a violent death, is torture as a matter of law (IJ at 7-8). *See* 8 C.F.R. § 1208.18(a)(1) (requiring, inter alia, severe pain or suffering);

[3] The parties do not contend that the respondent is eligible to apply for any relief other than deferral of removal.

Cole v. Holder, 659 F.3d 762, 773 (9th Cir. 2011). (in general terms treating "killed" and "tortured" as equivalent in considering an application for protection under the Convention Against Torture); *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) ("Acts constituting torture are varied, and include beatings and killings.").

Finally, our review of the record of proceeding and consideration of the arguments presented by the parties does not persuade us to disturb the Immigration Judge's determination that Mexican officials will acquiesce to the harm the respondent is more likely than not to experience (IJ at 8). 8 C.F.R. §1208.18(a)(1) (requiring the severe pain and suffering to be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); *Madrigal v. Holder*, 716 F.3d 499, 509–10 (9th Cir. 2013) ("[A]n applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture."); *Ornelas–Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006) (acquiescence requires only that public officials were aware of the torture but remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.). The arguments presented on appeal by the DHS do not convince of us of clear error in the facts upon which the Immigration Judge based this determination.

In sum after consideration of the record and the appellate arguments, and in light of the deference to be accorded to the Immigration Judge's factual findings, we do not find a sufficient basis to conclude that the Immigration Judge's ultimate determination that the respondent is eligible for deferral of removal under the Convention Against Torture is erroneous. Accordingly, the following orders will be entered.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

Linda S. Wendtland
FOR THE BOARD