U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Quinn, Candida S.
Candida Quinn
P O Box 457
Helena, MT 59624

USICE/DHS Litigation/ULS
15 Governor Drive
Newburgh, NY 12550

Name: A[redacted]-M[redacted], G[redacted]... **A [redacted]774**

Date of this notice: 11/17/2017

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:
O'Connor, Blair
Greer, Anne J.
Adkins-Blanch, Charles K.

Userteam: Docket

File: [redacted] 774 – Napanoch, NY Date: NOV 17 2017

In re: G[redacted] M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Candida S. Quinn, Esquire

ON BEHALF OF DHS: Daniel W. Kelly
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of Chile, appeals the Immigration Judge's May 23, 2017, decision finding him removable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), and denying his applications for withholding of removal and protection under the Convention Against Torture. *See* section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 1208.16-1208.18. The Department of Homeland Security opposes the appeal. The appeal will be sustained and the proceedings will be terminated.

On January 13, 2016, the respondent was convicted of second degree burglary pursuant to N.Y. Pen. Law § 140.25(2) (IJ at 1-2; Exh. 2). Based on this conviction, the Immigration Judge found the respondent removable as an alien convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), a law relating to a burglary offense for which the term of imprisonment is at least 1 year (IJ at 2-3; Exh. 1). *See* section 237(a)(2)(A)(iii) of the Act (stating that an alien convicted of an aggravated felony is removable). The Immigration Judge then denied the respondent's applications for relief (IJ at 5-10). On appeal, the respondent contends that the Immigration Judge erred in concluding that his offense constitutes an aggravated felony pursuant to section 101(a)(43)(G) of the Act.[1]

In determining whether the respondent's offense of conviction qualifies as a burglary offense pursuant to section 101(a)(43)(G) of the Act, we employ the categorical approach. *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013); *Matter of Chairez*, 26 I&N Dec. 819, 819-20 (BIA 2016). Pursuant to this approach, we focus on whether the state statute defining the crime of conviction categorically fits within the generic definition of the corresponding aggravated felony. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). Furthermore, "in a narrow range of cases" in which a statute has multiple alternative elements, we employ the modified categorical approach. *Descamps v. United States*, 133 S. Ct. at 2283-84; *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (distinguishing a statute "that lists multiple elements disjunctively" from one that

[1] The respondent concedes that he was sentenced to a term of imprisonment of at least 1 year (Respondent's Br. at 1).

"enumerates various factual means of committing a single element"). Under this approach, we look to a limited class of documents to determine "what crime, with what elements, a defendant was convicted of." *Mathis v. United States*, 136 S. Ct. at 2249.

The Supreme Court has defined the generic definition of "burglary" as an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). At the time of the respondent's conviction, N.Y. Pen. Law § 140.25(2) stated that "a person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . [t]he building is a dwelling." For the following reasons, we agree with the respondent's contention that N.Y. Pen. Law § 140.25(2) is overbroad and indivisible when compared to the generic definition of burglary and, thus, that his offense does not constitute an aggravated felony pursuant to section 101(a)(43)(G) of the Act (Respondent's Br. at 7-14).

Specifically, N.Y. Pen. Law § 140.25(2) is overbroad as to its element defining manner of entry. The generic definition of burglary requires that a person effect "an unlawful entry along the lines of breaking and entering." *Descamps v. United States*, 133 S.Ct. at 2285. A person can be prosecuted under N.Y. Pen. Law § 140.25(2), however, if he "knowingly enters or remains unlawfully," which is defined as being "in or upon the premises when he is not licensed or privileged to do so." N.Y. Pen. Law § 140.00(5). The New York Court of Appeals has thus found a defendant guilty of third-degree burglary, which includes the same element of "knowingly enters or remains unlawfully," when he "entered legally, but remain[ed] for the purpose of committing a crime after authorization to be on the premises terminat[ed]." *People v. Gaines*, 74 N.Y. 2d 358, 363 (N.Y. 1989); *see also Moncrieffe v. Holder*, 133 S. Ct. at 1684-85 (stating that there must be a "realistic probability" of being prosecuted for conduct under the statute of conviction that would fall "outside the generic definition of a crime"). As N.Y. Pen. Law § 140.25(2) does not require an "unlawful entry along the lines of breaking and entering," is it not a categorical match to the generic definition of burglary. *See Descamps v. United States*, 133 S. Ct. at 2285.

Furthermore, N.Y. Pen. Law § 140.25(2) is indivisible as to the manner of entry. In determining whether a statute is divisible, we look first to authoritative sources of state law. *Mathis v. United States*, 136 S. Ct. at 2256-57. Here, the applicable sentencing statute, N.Y. Pen. Law § 70.02(3)(b), provides one, undifferentiated sentencing range, regardless of manner of entry. *Id.* at 2256 (stating that, "if statutory alternatives carry different punishments . . . they must be elements"). Further, the New York model jury instructions show that "enter" and "remain" are alternative means for committing the same offense. CJI2d N.Y. Pen. Law § 140.25(2) at n.2; *see Mathis v. United States*, 136 S. Ct. at 2248 (defining an "element" as "what the jury must find beyond a reasonable doubt to convict the defendant"). The modified categorical approach therefore is not appropriate. As such, N.Y. Pen. Law § 140.25(2) is overbroad and indivisible when compared to the manner of entry provided in the generic definition of burglary.[2]

[2] Given our holding that N.Y. Pen. Law § 140.25(2) is overbroad and indivisible as to the manner of entry element for generic burglary, we need not address the respondent's argument that the statute is also overbroad and indivisible as to the types of dwellings that can be burglarized.

Based on the foregoing, we vacate the Immigration Judge's determination that the respondent's conviction pursuant to N.Y. Pen. Law § 140.25(2) is an aggravated felony as defined by section 101(a)(43)(G) of the Act that renders him removable pursuant to section 237(a)(2)(A)(iii) of the Act. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained and the proceedings are terminated.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NAPANOCH, NEW YORK

File: [redacted]774 May 23, 2017

In the Matter of

G[redacted] A[redacted] A[redacted]-M[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(2)(A)(iii), as defined within Section 101(a)(43)(G).

APPLICATIONS: Withholding of removal under Section 241(b)(3) of the Act; withholding or deferral of removal under the Convention Against Torture.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: DANIEL KELLY

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a native and citizen of Chile who was admitted to the United States, through New York City, in July of 1996 as a lawful permanent resident. A Notice to Appear, dated April 14, 2016, was served on him by regular mail charging him with the above-count of removability. This charge is based upon the fact that the

respondent was convicted in Orange County, New York, in January of 2016, under Indictment Number 373-2015, of the offense of burglary in the second degree, in violation of Section 140.25(2) of the New York State Penal Law. Respondent was sentenced to a determinate term of three and a half years of incarceration for this offense.

At hearings before the Court, respondent confirmed receipt of the Notice to Appear and admitted to allegations 1, 2, and 4 contained therein. Respondent denied allegation 3 regarding his admission to the United States as a resident, claiming that he came to the United States in 1976, not 1996. However, based upon the evidence of record, Exhibit 3, the Court found allegation 3 to have been established by clear and convincing evidence. The Court does not doubt that the respondent had been in the United States prior to 1996, h. ~~H~~owever, his visa shows that he was admitted as an LPR in that year.

Accordingly, based upon the respondent's admissions, as well as the evidence of record, specifically, Exhibits 2 and 3, the Court found the lone charge of removability to have been established by clear and convincing evidence. The Court is satisfied that the respondent's conviction ~~of~~ for burglary in the second degree is an aggravated felony, specifically, a burglary offense for which he was sentenced to at least one year of incarceration.

———The Court believes that the penal law section that the respondent was convicted under, 140.25(2), which states a person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein and when (2) the building is a dwelling, is sufficiently in line with the general generic f~~F~~ederal offense of burglary, which provides for the unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a crime.

Under the categorical approach, the Court is satisfied that the New York State provision comports with the generic federal definition of burglary and that the respondent is removable from the United States as an aggravated felon. See, generally, Moncrieffe v. Holder, 133 S.Ct. 1678 (2013); Johnson v. United States, 559 U.S. 133 (2010); Mathis v. United States, 136 S.Ct. 2245 (2016); Taylor v. United States, 495 U.S. 575 (1990); and Matter of Perez, 22 I&N Dec. 1325 (BIA 2000).

Accordingly, as a lawful permanent resident of the United States, one with an aggravated felony conviction, respondent applied for the only forms of relief or protection available to him, specifically, withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act, and withholding or deferral of removal pursuant to the Convention against Torture. Respondent testified in support of his application on today's date, May 23, 2017, and for the reasons that follow, his applications will be denied.

The following items have been marked into evidence in this case: Exhibit 1 is the Notice to Appear; Exhibit 2 is the conviction records for Indictment Number 373-2015; Exhibit 3 is the respondent's immigrant visa face sheet; Exhibit 4 is the respondent's RAP sheet; Exhibit 5 is the Department of Homeland Security's submission of October 28, 2016, containing copies of the respondent's immigrant visa, his application for an immigrant visa and alien registration, a Form I-130, a Form G-325A, and a temporary resident card; Exhibit 6 is respondent's Form I-589 and all supporting documentation; and Exhibit 7 is the Department of State Country Report on Human Rights Practices for 2016 for Chile.

A claim to withholding of removal is factually related to an asylum claim, but the applicant bears a heavier burden of proof and persuasion to merit protection. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985). For withholding, the applicant must demonstrate a

clear probability that if returned to his country his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. This means that the applicant's facts must establish it is more likely than not that he will be subject to persecution on one of the grounds specified in the Act.

An applicant is ineligible for withholding of removal, however, if he has been convicted of a particularly serious crime. An applicant's conviction need not be an aggravated felony under Section 101(a)(43) of the Act in order to qualify as a particularly serious crime for purposes of Section 241(b)(3) of the Act. See Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007).

The Convention Against Torture and the regulations provide that no person may be removed to a country where it is more likely than not that he would be subject to torture. Torture within the meaning of the Convention and the regulations is an extreme form of cruel and inhuman treatment and does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment. For an Act to constitute torture, it must satisfy the elements ~~and~~ of the definition set forth in the regulations at 8 C.F.R. Section 1208.18. See Matter of J-E-, 23 I&N Dec. 291 (BIA 2002). Protection~~, however,~~ does not extend to persons who fear entities that a government is unable to control; ~~h~~However, it requires only the government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it. See Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000); Khouzam v. Ashcroft, 361 F.3d 161 (2nd Cir. 2004).

In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including, but not limited to, evidence of past torture inflicted upon the applicant~~,~~; evidence that he could relocate to a part of the country of removal where he is not likely to be tortured~~,~~;

evidence of gross, flagrant, or mass violations of human rights within the country of removal, where applicable;, and other relevant information regarding country conditions. ——A pattern of human rights violations alone, however, is insufficient to show that a particular person would be in danger being subjected to torture upon his return to that country. Rather, specific grounds must exist to indicate that the applicant will be personally at risk of torture. Matter of S-V-, 22 I&N Dec. at 1313. To meet the burden of proof, an applicant for torture protection must establish that someone in his particular alleged circumstances is more likely than not to be tortured in the country designated for removal. Eligibility for torture protection cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each type in the hypothetical chain of events is more likely than not to happen. Matter of J-F-F-, 23 I&N Dec. 912 (A.G. 2006).

For those applications filed on or after May 11, 2005, credibility is assessed in accordance with the amendments made to the Immigration and Nationality Act by the REAL ID Act of 2005.

The Court does not believe it necessary to provide a near verbatim summation of the testimony provided in ~~the~~ court today by the lone witness, the respondent, [redacted] A[redacted]. Suffice it to say that despite some vague answers, ~~and~~ some meandering answers-, ~~and~~ some slightly nonresponsive answers, and some minor inconsistencies, the Court will find for purposes of this decision that the respondent has testified in a generally credible fashion as to the reasons he fears returning to his native country of Chile. The Court does not believe it is necessary to reach the issue of credibility in order to address the respondent's applications.

Turning first to the respondent's application for withholding of removal under Section 241(b)(3) of the Act, the Government argues that the respondent's application

should be summarily denied as his aggravated felony conviction for burglary in the second degree should be deemed a particularly serious crime. The Court, however, while it could certainly reach such a conclusion and has done so in other cases in the past, declines to do so in this instance as it does not have enough documentary evidence to reasonably and confidently reach such a conclusion.

In determining the seriousness of a crime, the Court must examine the nature of the conviction, the sentence imposed, the circumstances and underlying facts of the conviction, and whether the type and circumstances of the crime indicate that the alien will be a danger to the community. See Matter of L-S-, 22 I&N Dec. 645 (BIA 1999); Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).

———The Court does not have a presentence report from the Department of Probation that provides in greater detail the facts and circumstances regarding the incident underlying the respondent's conviction. The respondent testifies that he had gone to an apartment building trying to go to an apartment on the third floor in order to purchase more drugs as he was trying to kill himself at the time, and it appears from the respondent's testimony that he mistakenly entered an apartment on the second floor instead. Again, while the Court has found in the past and probably could find in this case that such a crime constitutes a particularly serious crime, it declines to do so in this instance.

Turning next to the merits of the respondent's application for withholding of removal, the Court, nevertheless, must still deny said application, as the Court finds that the respondent has failed to establish a clear probability that if returned to his country he would be persecuted on account of a protected ground.

———Respondent makes no claim to a fear of return to his native country of Chile due to his race, his religion, ~~or~~ his nationality, or, in fact, his political opinion. Respondent's

fear of returning to Chile is, essentially, threefold.

First, respondent states that he suffers from diabetes, ~~and~~ he is sick~~,~~ and he needs medicine, and though he did not explicitly state it, it is clear that he fears not being able to obtain necessary medical care in his native country. That does not constitute persecution and certainly does not given the evidence of record in this case.

Secondly, the respondent states that he has no support structure in his native country of Chile, as he has not lived there ~~except~~ since approximately 1976 except for a period of one year in roughly 1991 to 1992 or possibly 1995 to 1996. The respondent has testified that he has no family in Chile. He has no place to live. He has no job there. He has not been in contact with anyone in that country since he last left Chile sometime in the 1990s. Again, that does not constitute persecution.

The third reason the respondent states that he fears returning to his native country of Chile is that he states ~~that~~ his mother was involved in the trafficking of narcotics, specifically, cocaine, for essentially the respondent's entire life. And while she died approximately five years ago, the respondent states that he had suffered harm at the hands of the police in Chile in the past due to his mother's illegal activity, and he fears that his mother may have left problems, specifically, debts outstanding at the time of her death, and the police or other individuals would look to the respondent for payment of those debts or the money his mother owed.

There is no evidence of record, however, to indicate that anyone in Chile has any interest in harming the respondent at this point in time. Respondent has not received any threats from anyone in Chile. When asked if he had an idea of whether anyone wanted to harm him, he stated that he had no idea if anyone in Chile wanted to harm him. He has presented no evidence whatsoever that the police in Chile or the government of Chile in any fashion is interested in his mother at this point in time five

years after her death or are still interested in the respondent at this point in time given that his mother has died.

Respondent did testify that when he was living in Chile for approximately one year in the early to mid-1990s that the police were "still after him," as they were still interested in his mother and they were trying to find her ~~whereabouts~~ or determine her whereabouts. There is no evidence of record, however, and the respondent has testified to the same, that he was ~~n~~ever arrested or detained during this year of residency in Chile, or that he was ~~not~~ harmed by the police or any other government officials. It appears that the police were simply trying to carry out their lawful law enforcement duties in asking potential witnesses as to the location of a suspected criminal.

The respondent did testify to one instance of having been detained by the police in approximately 1972 for three days when he was allegedly handcuffed and electrically shocked by ~~the~~ police who were at that time trying to find out information regarding his mother's whereabouts. This, however, was during the presidency of Salvador Allende, an individual who was deposed and died in 1973. The respondent did not suffer any harm under the Pinochet regime thereafter and the Pinochet regime ~~is~~, too ~~ag~~, ~~ain~~ is long gone, as is the Allende regime.

Again, the respondent has not resided in Chile for any great length of time since he left that country at roughly 19 years of age in 1976. It is now approximately 40 plus years since the respondent has been a permanent resident of Chile and there is no evidence whatsoever to indicate that anyone in that country would seek to harm him on ~~the~~ account of any protected ground. And while the respondent did not specify his protected ground, the Court is assuming for purposes of his withholding application that it is membership in a particular social group, that is, relatives of his mother. Again,

however, the respondent has simply failed to carry his burden of proof and the Court must deny his claim to withholding of removal.

Turning next to respondent's claim to protection under the Convention, the Court must similarly deny said application as the respondent has failed to establish it is more likely than not that he would intentionally be subjected to severe physical or mental pain or suffering, for a proscribed purpose, by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of him. Though persecution and torture are distinct legal concepts, they ~~do~~ often, as they do in this case, bear a similar basis in fact and it necessarily follows that if one has failed to carry the burden of proof to make out a claim to protection under Section 241(b)(3) of the Act, that one must also have failed to carry out a claim to protection under the Convention.

Again, the respondent has put forth a ~~harm or~~ fear of harm of returning to Chile due to his medical condition and his lack of a support structure in that country. Again, there is no evidence that anyone in Chile wants to harm him due to the fact that he is diabetic. There is no evidence the government would purposely withhold medication from him a. ~~And~~ the respondent has not even claimed that the medication he needs is not available in Chile. Furthermore, the lack of a support structure in his native country, while certainly a valid humanitarian consideration, does not support a torture claim.

~~——~~And ~~And finally~~ with regards to the respondent's claim that he fears harm at the hands of potential people his mother may have owed money to at the time of her death, that claim is simply too speculative for the Court to find that the respondent has demonstrated that it is more likely than not that he would be tortured, as that concept is specifically defined within the Convention ~~or~~ and the regulations, if returned to his native country. There is no evidence whatsoever in this case that the government of Chile would explicitly or implicitly provide permission, cooperation, acquiescence, or willful

blindness to any individual that would wish to harm respondent at this point in time. And, in fact, there is no evidence whatsoever that anyone would want to harm the respondent at this point in time in his native country of Chile.

While the Court is certainly sympathetic to the respondent given the facts of his case ~~,~~ he has been a long-time resident of the United States, he has U.S. citizen children, he was distraught after the death of his apparently beloved spouse, and he does not have a lengthy criminal record here in the United States ~~,~~ the fact of the matter is that the respondent pled guilty to burglary in the second degree, a conviction that he has failed to appeal at any point in time. It is a final conviction for ~~i~~Immigration purposes and he is not eligible for any other forms of relief or protection given that conviction. ~~And~~ Accordingly, for the reasons stated above, the Court believes that it must issue the following orders.

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States based upon the charges set forth within the Notice to Appear. The Department designates Chile as the country for removal;

IT IS FURTHER ORDERED that respondent's application for withholding of removal under Section 241(b)(3) of the Act be denied; and

IT IS FURTHER ORDERED the respondent's application for withholding or deferral of removal under the Convention be denied.

Please see the next page for electronic signature

ROGER F. SAGERMAN
Immigration Judge

//s//

Immigration Judge ROGER F. SAGERMAN

sagermar on July 17, 2017 at 4:15 PM GMT