



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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**ELWIN, RICARDO GERMAINE
A210-139-442
1133 HAMPTON DUPRE ROAD
PINE PRAIRIE, LA 70576**

**DHS/ICE Office of Chief Counsel - SDC
146 CCA Road, P.O.Box 248
Lumpkin, GA 31815**

Name: ELWIN, RICARDO GERMAINE

A 210-139-442

Date of this notice: 3/31/2016

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:
Greer, Anne J.
Pauley, Roger
Geller, Joan B

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Userteam: Docket

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8/27

Falls Church, Virginia 22041

File: A210 139 442 – Lumpkin, GA

Date: **MAR 31 2016**

In re: RICARDO GERMAINE ELWIN a.k.a. Ricardo Roger Elwin

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Remand

The respondent, a native and citizen of Dominica, appeals from an Immigration Judge's decision, dated October 5, 2015, finding him removable under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), and under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), and ordering him removed to Dominica. The Department of Homeland Security ("DHS") has not filed a brief in opposition to the appeal. The respondent's appellate fee waiver request is granted. The record will be remanded.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3).

The Immigration Judge indicated on the form summarizing the oral decision that the respondent waived appeal. We acknowledge that the respondent, when asked if he accepted the decision or wished to appeal, initially answered that he accepted the decision (Tr. at 23). However, very shortly after, and immediately after DHS counsel waived appeal, the respondent apparently got the attention of the Immigration Judge; the Immigration Judge asked what the respondent had to say and the respondent said "no, no" (Tr. at 23-24). The Immigration Judge moved on to the next respondent at the master calendar hearing without any further explanation from the respondent as to what he meant by "no, no" (Tr. at 24). Under the circumstances, we conclude that the initially stated waiver of appeal was modified by the respondent in such a way that his appeal right was not knowingly or willingly waived. Hence the initial waiver was ineffective, and the respondent preserved his right to appeal.

The Notice to Appear alleges that the respondent was convicted on February 24, 2015, for the offense of cruelty to children, second degree, in violation of O.C.G.A. § 16-5-70 (Exh. 1). The respondent is charged with removability under section 237(a)(2)(E)(i) of the Act for having been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment. The respondent is also charged with removability under section 237(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude for which a sentence of one year or longer may be imposed.

The Immigration Judge took only partial pleadings in this case. 8 C.F.R. § 1240.10(c). The pleadings are an essential part of the proceedings and ensure that every respondent has been accorded due process of the law. Here, there was no written stipulation to the factual allegations

and the charged grounds of removability. 8 C.F.R. § 1003.25(b). The respondent, who represented himself, was found removable during a master calendar hearing where he disagreed with the Immigration Judge's characterization of his sentence. The length of the sentence to imprisonment is a contested issue in this case. Specifically, the respondent challenged at the hearing, and challenges on appeal, the Immigration Judge's conclusion that he had been sentenced to imprisonment (Tr. at 22-23).

While the Immigration Judge referenced the conviction records in this case, it is not clear what conclusion the Immigration Judge made (Tr. at 17-19, 22-23). We note that the conviction records indicate that the respondent was "sentenced for a total of five (5) years to be served on probation" under certain conditions, one of which was that he serve 120-150 days in a "Detention Center" (Exh. 3, *Final Action, Inventory of Special Conditions of Probation, and Sex Offender Conditions of Probation, State of Georgia versus Ricardo Elwin, # 15CR0219, in the Superior Court of Cherokee County*). The Immigration Judge explained her reasoning to the respondent in general terms but did not address the issue in an oral or written decision. The respondent persuasively argues that the Immigration Judge erred in concluding that his sentence includes a term of imprisonment for anything more than 150 days.

Under the totality of the circumstances, including the lack of pleadings and the not fully resolved issue over the contested length of the respondent's sentence to imprisonment, we conclude that remand is necessary. Upon remand, the Immigration Judge shall take pleadings from the respondent. If the respondent's removability is established, he should then be given an opportunity to seek, to the applicable extent, any relief for which he may be prima facie eligible. The following order will be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents in part and would not remand to determine removability. The respondent's cruelty to children conviction falls well within our decision in *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010), deferred to in *Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015) and renders the respondent removable as charged under section 237(a)(2)(E)(i) of the Act. See also *Johnson v. State*, 742 S.E.2d 460 (Sup. Ct. Ga. 2013). Moreover, the length of the respondent's sentence is irrelevant to this charge.

IMMIGRATION COURT
146 CCA ROAD, PO BOX 248
LUMPKIN, GA 31815

In the Matter of

Case No.: A210-139-442

ELWIN, RICARDO GERMAINE
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 10/5/2015.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

- ☒ The respondent was ordered removed from the United States to or in the alternative to DOMINICA
- ☐ Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .
- ☐ Respondent's application for voluntary departure was granted until upon posting a bond in the amount of \$ _____ with an alternate order of removal to .
- Respondent's application for:
- ☐ Asylum was () granted () denied () withdrawn.
- ☐ Withholding of removal was () granted () denied () withdrawn.
- ☐ A Waiver under Section _____ was () granted () denied () withdrawn.
- ☐ Cancellation of removal under section 240A(a) was () granted () denied () withdrawn.

Respondent's application for:

- ☐ Cancellation under section 240A(b)(1) was () granted () denied () withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
- ☐ Cancellation under section 240A(b)(2) was () granted () denied () withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
- ☐ Adjustment of Status under Section _____ was () granted () denied () withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
- ☐ Respondent's application of () withholding of removal () deferral of removal under Article III of the Convention Against Torture was () granted () denied () withdrawn.
- ☐ Respondent's status was rescinded under section 246.
- ☐ Respondent is admitted to the United States as a _____ until _____.
- ☐ As a condition of admission, respondent is to post a \$ _____ bond.
- ☐ Respondent knowingly filed a frivolous asylum application after proper notice.
- ☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
- ☐ Proceedings were terminated.
- ☒ Other: Convicted Cruelty to Children 2nd
- Date: Oct 5, 2015

SHUNDRA D. ARRINGTON
Immigration Judge

Appeal: Waived Reserved Appeal Due By:

Must Register as Sex Offender -> R Age 35 at offense
D. Victim Age 2 "Victim" alternate Evidence