U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: F[redacted]-H[redacted], M[redacted]

A[redacted]-149

Date of this notice: 2/13/2019

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:
Malphrus, Garry D.
O'Connor, Blair
Donovan, Teresa L.

Userteam: Docket

File: A[redacted]-149 – San Diego, CA

Date: FEB 13 2019

In re: M[redacted] F[redacted]-H[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patricia Ojeda, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's August 29, 2018, decision, denying his application for withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3); and his request for protection under Article 3 of the Convention Against Torture, 8 C.F.R. §§ 1208.13-.16.[1] The appeal will be dismissed, in part, and sustained, in part; and the record will be remanded for further proceedings consistent with this opinion and the entry of a new decision.[2]

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

At the outset, we note that an Immigration Judge in these proceedings concluded that the respondent was entitled to a qualified representative based on his membership in the class certified in *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014), along with additional procedural safeguards provided consistent with *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) (IJ at 2-4; Tr. at 5-22, 88-91, 139; Exhs. R8, R9, R10, R11, 15). As a threshold matter, we note that the appointment of counsel and the implementation of safeguards are not challenged by either party on appeal.

The Immigration Judge denied the respondent's application for withholding of removal by relying, generally, on the doctrine of res judicata (IJ at 4-6). In so doing, the Immigration Judge noted that, in separate removal proceedings, an Immigration Judge denied withholding of removal to this respondent on November 15, 2016, and we dismissed the resulting appeal on April 3, 2017 (IJ at 1-2). The respondent challenges the applicability of the res judicata doctrine and asserts that the Immigration Judge should have considered the instant withholding application on the merits (Respondent's Br. at 7-12).

[1] On appeal, the respondent does not dispute that he is ineligible for asylum pursuant to section 208 of the Act, 8 U.S.C. § 1158, consistent with the Immigration Judge's decision (IJ at 2, 4-5; Respondent's Br. at 6; Tr. at 66-67). Therefore, that application for relief is not before us.

[2] The respondent's fee waiver request is granted. 8 C.F.R. § 1003.8(e)(3).

Although the Immigration Judge did not discuss the basis of the prior denial in his August 29, 2018, decision, the November 15, 2016, decision is contained in the record of proceedings (August 29, 2018, Documentary Submission). Therein, an Immigration Judge found the respondent had (1) sustained a May 13, 1998, conviction for transportation for sale of marijuana under California Health & Safety Code § 11359, and (2) that the conviction qualified as a particularly serious crime under *Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002), *overruled on other grounds by Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003). *See also Guerrero v. Whitaker*, 908 F.3d 541, 543 (9th Cir. 2018). In addition, the Immigration Judge concluded that the respondent did not carry his burden of proof to demonstrate past persecution on account of a protected ground by the Mexican government or anyone the government was unable or unwilling to control. In our April 3, 2017, order, affirming the Immigration Judge's decision, we explained that "The respondent's arguments on appeal do not persuade us of any legal or factual error in the Immigration Judge's decision" (August 29, 2018, Documentary Submission).

We need not decide the application of res judicata as to withholding of removal generally but only decide that the doctrine of res judicata should not be applied to bar reexamination of the particularly serious crime question here, as there has been a change in law that has altered the relevant particularly serious crime analysis (IJ at 5-6; Respondent's Br. at 13, 17-21). *See, e.g.*, *Lopez-Bazante v. Gonzales*, 237 F. App'x 131, 134 (9th Cir. 2007). Specifically, the Immigration Judge in the November 15, 2016, decision properly relied on *Matter of Y-L-, A-G-, & R-S-R-*, in concluding that the respondent's drug conviction was a presumptive particularly serious crime. However, in 2018, the United States Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises, issued a published decision explaining that a respondent's mental health condition at the time a crime is committed is a relevant factor in evaluating whether an offense is particularly serious. *See Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018).

Accordingly, where, as here, there is a determination that the respondent lacks competency to proceed without procedural safeguards, we conclude that it is not appropriate for the Immigration Judge to use res judicata principals in relying on a previously entered particularly serious crime determination that does not take into account what, if any, impact the respondent's mental condition had on his conviction, considering the intervening circuit case law.

Turning to the respondent's request for deferral of removal under the Convention Against Torture, the respondent has been diagnosed with schizoaffective disorder, bipolar type, with mild neurocognitive disorder due to traumatic brain injury (IJ at 2-3; Tr. at 95-103; Exhs. 14B, 15A-B). The respondent sustained the initial brain trauma in a car accident in 1989 but the injury was exacerbated by additional falls, including one that occurred during his immigration detention, further impairing his cognitive abilities (IJ at 3; Tr. at 99-101, 131-32; Exhs. 14B, 15A-B). As a result, he expressed a fear of return to Mexico because, without structured medical care and family supports, he was concerned that he would decompensate and come to the attention of authorities, resulting in mistreatment rising to the level of torture should he be detained by authorities or involuntarily hospitalized (IJ at 8-10; Tr. at 104, 106-08, 124-27, 134-38; Exhs. 11, 15A).

In denying the application for relief, the Immigration Judge found the respondent was not previously tortured, or even harmed, in Mexico, and this finding is not challenged on appeal (IJ at 7). 8 C.F.R. §§ 1208.16(c)(3)(i); 1208.18(a)(1), (2), (4). Notably, the respondent last resided in Mexico in 2017 for 3 months, during which time he was not harmed or detained by police, nor was he involuntarily hospitalized (IJ at 8-9; Tr. at 133-34). In the absence of evidence of past mistreatment by or encounters with the police or psychiatric hospital staff, and considering the background evidence regarding the conditions existing in Mexican mental health facilities, the Immigration Judge concluded that there was an insufficient likelihood that the respondent would detained or hospitalized in public institutions and then mistreated by authorized individuals who held a specific intent to torture him (IJ at 9-10; Tr. at 102-03, 104, 106-08, 133-34; Exhs. R7, R8, 11, 15C).

On appeal, the respondent generally maintains that (1) without medication he would decompensate and come to the attention of the authorities and (2) the record contains sufficient background evidence to establish that hospital staff members often mistreat patients in Mexican psychiatric hospitals with a specific intent to harm them (Respondent's Br. at 22-24). Assuming, arguendo, that the background evidence is sufficient to establish such individuals would act with a specific intent to torture the respondent, should he be hospitalized, we discern no clear error in the Immigration Judge's factual prediction that the respondent has not established, by a sufficient likelihood, that he would be arrested and/or hospitalized in Mexico (IJ at 9-10). In so doing, we note that, during his recent return to Mexico in 2017, the respondent had no interaction with any police or public health officials and the record does not contain sufficient persuasive evidence establishing a practice by Mexican police to target individuals similarly situated to the respondent for arrest, detention, and/or hospitalization (IJ at 9-10; Tr. at 102-04, 106-08, 133-34; Exhs. R7, R8, 11, 15C). *See Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *see also Vitug v. Holder*, 723 F.3d 1056, 1066 (9th Cir. 2013). Thus, we will affirm the Immigration Judge's decision to deny the respondent's request for such protection (IJ at 9-10).

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is dismissed insofar as it relates to the respondent's request for protection under the Convention Against Torture.

ORDER: The respondent's appeal is affirmed insofar as it relates to the respondent's application for withholding of removal.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this opinion and the entry of a new decision as it relates to the respondent's eligibility for withholding of removal.

FOR THE BOARD