U.S. Department of Justice

Executive Office for Immigration Review

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Name: N[redacted] L[redacted], G[redacted] **A [redacted]-970**

Date of this notice: 2/1/2019

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.
Greer, Anne J.
Cole, Patricia A.

Userteam: Docket

File: [redacted]-970 – Los Angeles, CA Date: FEB - 1 2019

In re: G[redacted] N[redacted] L[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James G. Kim, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's July 21, 2017, decision denying his applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1158, 1231(b)(3), and protection under the Convention Against Torture.[1] *See* 8 C.F.R. §§ 1208.16-.18. The respondent's appeal will be sustained in part and the record will be remanded for additional consideration.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The Immigration Judge found both the respondent and his mother credible (IJ at 12).

The respondent's application for asylum, withholding of removal under the Act, and protection under the Convention Against Torture is based on the harm he experienced in El Salvador beginning in October 1986 when he was kidnapped and forced to join the El Salvadoran military to fight against guerillas (IJ at 8-9). The respondent claims that following several months of training he was sent to the mountains to engage in combat with guerillas and was "told to do bad things" (IJ at 8). The respondent testified that he never fired his weapon and was constantly seeking a way to get out of the military (IJ at 9). In 1987, the respondent's mother, with the assistance of an acquaintance, was able to make arrangements for the respondent to be released from military service if he was willing to submit to a beating (IJ at 9). The respondent submitted to the beating, was released from military service, and was told that he should leave El Salvador as soon as possible (IJ at 9). After making the necessary arrangements, the respondent departed El Salvador, and arrived in the United States on or about August 26, 1990, where he has remained ever since (IJ at 9; Exh. 2 at 1). The respondent contends that if he returns to El Salvador, he will

[1] The respondent has not challenged on appeal the Immigration Judge's denial of his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (IJ at 2-3). We therefore consider this application waived. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2011) (when a respondent fails to substantively appeal an issue addressed in an Immigration Judge decision, that issue is waived before the Board); *Matter of Edwards*, 20 I&N Dec. 191, 196-197 n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived).

be subjected to harm in relation to the conditions under which he left the military (IJ at 10). The respondent also claims that he will be harmed by members of criminal gangs if he returns to El Salvador (IJ at 10).

The Immigration Judge concluded that the respondent was ineligible for asylum because he did not file his application for that relief within 1-year of arriving in the United States or establish that an exception to that filing deadline applied (IJ at 4). The Immigration Judge concluded that the respondent is ineligible for withholding of removal under both the Act and the Convention Against Torture because he has been convicted of a particularly serious crime (IJ at 4-8). The Immigration Judge also concluded that the respondent did not meet his burden of proof to establish eligibility for deferral of removal under the Convention Against Torture because his fear of being tortured in El Salvador is speculative (IJ at 10-13).

We affirm the Immigration Judge's determination that the respondent is ineligible for asylum because he did not file his application for that relief within 1 year of arriving in the United States (IJ at 4). *See* sections 208(a)(2)(B), (D) of the Act. On appeal, the respondent has not specifically challenged this aspect of the Immigration Judge's decision and we therefore consider the issue waived. *Matter of R-A-M-*, 25 I&N Dec. at 658 n.2; *Matter of Edwards*, 20 I&N Dec. at 196-197 n.4.

We also affirm the Immigration Judge's determination that the respondent did not establish eligibility for protection under the Convention Against Torture (IJ at 9-13).[2] The record establishes that there is pervasive violence and crime in parts of El Salvador. However, it does not establish that it is more likely than not that the respondent will be tortured by or at the instigation of or with the consent or acquiescence (to include the concept of willful blindness) of a public official or other person acting in an official capacity upon removal to El Salvador. 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010). On this record, we do not find a clear error of fact or error of law in the Immigration Judge's determination that the respondent did not establish the requisite likelihood that he would be subjected to torture with the consent or acquiescence of a public official upon his return to El Salvador. We agree with the Immigration Judge that the respondent's fear of being tortured in relation to his military service in the late 1980's is speculative. *See Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (holding that an alien's eligibility for deferral of removal under the Convention Against Torture cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen). The record does not indicate that El Salvadoran authorities have any specific interest in harming the respondent.

[2] While the Immigration Judge only considered whether the respondent established eligibility for deferral of removal under the Convention Against Torture in light of the determination that the respondent has been convicted of a particularly serious crime, because the requirements to establish eligibility for withholding of removal and deferral of removal under the Convention Against Torture are otherwise identical, we consider both forms of relief here. *See* 8 C.F.R. §§ 1208.16-.18.

However, we conclude that the Immigration Judge erred in holding that the respondent has been convicted of a particularly serious crime such that he is ineligible to apply for withholding of removal under section 241(b)(3) of the Act. According to the Immigration Judge, the respondent is ineligible for withholding of removal because he has been convicted of a "particularly serious crime" within the meaning of section 241(b)(3)(B)(ii) of the Act (IJ at 4-8). The factual basis for that determination is the respondent's four convictions for driving while under the influence (DUI) under California law in 1993, 1994, and twice in 2003, respectively (IJ at 5). The Immigration Judge also appears to have considered the respondent's complete criminal history, including two additional convictions of domestic violence under section 273.5(A) of the California Penal Code, in 2004 and 2012, respectively, as well as several probation violations (IJ at 6-7). The respondent challenges that determination on appeal, arguing that the offense does not rise to the level of a "particularly serious crime."

When an applicant for asylum and withholding of removal has been convicted of an offense that is neither an aggravated felony nor a "particularly serious crime" based solely on its elements, we assess the applicant's eligibility for protection by examining "the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *see also Matter of Frentescu,* 18 I&N Dec. 244, 247 (BIA 1982)).

We agree with the Immigration Judge that driving while intoxicated is an exceedingly dangerous crime, and we in no way condone the respondent's actions. *Accord Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018). In our precedential decisions, however, we have generally reserved the "particularly serious crime" designation for offenses of truly exceptional gravity. *See, e.g., Matter of R-A-M-*, 25 I&N Dec. 657, 662 (BIA 2012) (possession of child pornography); *Matter of N-A-M-*, 24 I&N Dec. at 343 (felony menacing involving the use or threatened use of a deadly weapon); *Matter of Y-L-*, 23 I&N Dec. 270, 274 (A.G. 2002) (drug trafficking); *Matter of S-V-*, 22 I&N Dec. 1306, 1308-09 (BIA 2000) (robbery), *disagreed with on other grounds by Zheng v. Ashcroft*, 332 F.3d 1186, 1194-96 (9th Cir. 2003); *Matter of L-S-J-*, 21 I&N Dec. 973, 975 (BIA 1997) (robbery with a deadly weapon); *Matter of B-*, 20 I&N Dec. 427, 429-30 (BIA 1991) (aggravated battery with a firearm); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423, 425-26 (BIA 1986) (burglary of a dwelling while armed with a deadly weapon or causing injury to another); *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986) (armed robbery with a firearm).

Not all serious crimes can be "*particularly* serious." *See Alphonsus v. Holder*, 705 F.3d 1031, 1048-49 (9th Cir. 2013), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018). Indeed, we have expressly held that, "except possibly in unusual circumstances . . . , we would not find a single conviction for a misdemeanor offense to be a 'particularly serious crime.'" *Matter of Juarez*, 19 I&N Dec. 664, 665 (BIA 1988) (finding no particularly serious crime where the applicant was convicted in a municipal court for misdemeanor assault with a deadly weapon). We have also concluded that even serious felonies such as residential burglary and alien smuggling may not be *particularly* serious on their facts. *See Matter of Frentescu*, 18 I&N Dec. at 247 (holding that burglary with intent to commit theft was not a particularly serious crime where "there [was] no indication that the [burglarized] dwelling was occupied or that the applicant was armed; nor [was] there any indication of an aggravating

circumstance."); *Matter of L-S-*, 22 I&N Dec. 645, 655-56 (BIA 1999) (holding that alien smuggling was not a particularly serious crime, even though the offense posed some risk to the alien hidden in the floor of a van, because "there [was] no indication the [applicant] intended to harm the smuggled alien" and the applicant "did not, in fact, cause her harm.").

Moreover, the Immigration Judge did not rely on any aggravating element (in addition to the DUI recidivism), such as injury to another person. *Cf. Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1078 (9th Cir. 2015) (affirming this Board's determination that a conviction under California Health & Safety Code § 23153(b) for driving under the influence and causing bodily injury to another person is a particularly serious crime); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 679-80 (9th Cir. 2010) (same). The record does not reflect that any of the respondent's DUI convictions involved any damage to property or injury to any person. *Cf. Matter of G-G-S-*, 26 I&N Dec. 339, 344 (BIA 2014) (noting that crimes against persons are more likely to be designated as particularly serious), *vacated on other grounds sub nom. Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018).

We therefore conclude that the respondent is not subject to the particularly serious crime bar to withholding of removal. *See* section 241(b)(3)(B)(ii) of the Act. In light of this determination, we also conclude that remand is warranted for the Immigration Judge to make the findings of fact and legal determinations regarding the respondent's eligibility for withholding of removal under the Act in the first instance.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained in part.

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

Linda J. Wendtland

FOR THE BOARD

Board Member Patricia A. Cole respectfully dissents from the majority's finding that the respondent is not subject to the particularly serious crime bar to withholding of removal. The majority's reliance on the absence of "exceptional gravity" or "damage to property or injury to any person" ignores the Immigration Judge's particularized analysis of the nature and the circumstances of the respondent's offenses as well as his sentence and punishments. The Immigration Judge's analysis was consistent with *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) and *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); *Mahini v. INS*, 779 F.2d 1419, 1421 (9th Cir. 1996). I agree with the Immigration Judge that the inherent dangerousness of the respondent's repeated convictions for driving under the influence qualify as a particularly serious crime (*see* IJ at 6-7); *Alphonsus v. Holder*, 705 F.3d 1031, 1042-43 (9th Cir. 2013) ("the key to determining whether a crime is particularly serious is whether the nature of the crime shows that the alien poses a danger to the community or the United States"). Therefore, I would dismiss the respondent's appeal.