U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: S[redacted], P[redacted] A[redacted]

A[redacted]-417

Date of this notice: 7/11/2019

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.
Donovan, Teresa L.
Greer, Anne J.

Userteam: Docket

File: A[redacted]-417 – Los Angeles, CA Date: JUL 11 2019

In re: P[redacted] A[redacted] S[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael S. Carrillo, Esquire

APPLICATION: Convention Against Torture

This case was last before us on September 12, 2013, when we remanded the record to the Immigration Court for further proceedings. The respondent now appeals from the Immigration Judge's December 20, 2017, decision denying his application for protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-.18. The record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In an April 26, 2013, decision, a prior Immigration Judge found the respondent not competent and denied his application for protection under the Convention Against Torture. In our September 12, 2013, decision, we remanded the record for the Immigration Judge to make additional findings regarding the respondent's competency and the availability and sufficiency of safeguards. We also instructed the Immigration Judge to apply, if appropriate, our intervening precedent in *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013), regarding service of a notice to appear on respondents who lack competency.

On remand, the Immigration Judge found the respondent competent and denied his application for protection under the Convention Against Torture. On appeal, the respondent raises three main arguments. He argues that the Immigration Judge: (1) erred in not determining whether the respondent was properly served under 8 C.F.R. § 103.8(c)(2) and *Matter of E-S-I-*; (2) violated his rights in assessing his competency and whether safeguards were adequate, and (3) erred in concluding that he did not establish that he is more likely than not to be tortured in El Salvador (Respondent's Br. at 1, 5-15).

The Immigration Judge's finding that the applicant is mentally competent to participate in his removal proceedings is clearly erroneous (IJ at 3-4). *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."). The test for determining whether an alien is competent to participate in immigration proceedings is whether he or she "has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses."

Matter of M-A-M-, 25 I&N Dec. 474, 479 (BIA 2011); *see also Franco-Gonzalez v. Holder*, No. CV 10-02211, 2014 WL 5475097, at *3 (C.D. Cal. Oct. 29, 2014) (order further implementing permanent injunction).

The respondent has been diagnosed with schizophrenia and exhibits symptoms including paranoia, auditory hallucinations, and delusions (IJ at 3; Exhs. 4, 6, 8-9). On remand, another Immigration Judge held a competency hearing on January 13, 2014 (IJ at 4; Remand Tr. at 27-129). Based on the testimony of the respondent and his expert witness, a clinical psychologist, the Immigration Judge found that the respondent was incompetent to represent himself (IJ at 4; Remand Tr. at 116-18).

Based on a psychological assessment addendum dated April 14, 2016, in which the psychologist concluded that the respondent "understands the hearing process, demonstrates knowledge of his legal situation, the roles of various court personnel, the manner in which immigration decisions are made, and the general way in which the immigration hearing process functions," the present Immigration Judge found the respondent competent in his December 20, 2017, decision (IJ at 4; Exh. 9 at 22). The psychologist concluded in her addendum that the respondent satisfies the first competency standard (having a rational and factual understanding of the nature and object of the proceedings), but she also noted that he "continues to endorse prominent delusions about important people in his life . . . and remains delusional about people in the courtroom" (Exh. 9 at 22). The psychologist further concluded that the respondent "remains delusional and hence incompeten[t] to stand trial" (Exh. 9 at 22). Considering the psychological assessments and the other record evidence, we conclude that the Immigration Judge's finding that the respondent is competent to meaningfully participate in his removal proceedings is clearly erroneous.

We recognize that the Immigration Judge also found that sufficient safeguards were in place to protect the respondent's rights and privileges (IJ at 4-5). *See Matter of M-A-M-*, 25 I&N Dec. at 478, 481 (explaining that if an Immigration Judge determines that a respondent lacks sufficient competency to proceed or is deemed competent but the Immigration Judge has good cause for concern about the respondent's ability to proceed, the Immigration Judge should apply appropriate safeguards). For example, the respondent was represented by counsel, who presented evidence and examined witnesses, and the respondent's mother testified on his behalf (IJ at 4).

On appeal, the respondent argues that the safeguards were inadequate because his mental state prevents him from assisting his counsel (Respondent's Br. at 11). However, the respondent's eligibility for protection under the Convention Against Torture can be assessed without information being directly provided by the respondent. His fear of torture by gangs in retaliation for an incident in the 1980s involving his parents is supported by his mother's testimony, and his fear of torture due to his mental health issues can be evaluated by the objective evidence of record (IJ at 4; Exhs. 3, 3A, 3B, 11-J). We agree that these safeguards were appropriate in this case. *See Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016) (holding that an Immigration Judge has the discretion to select and implement appropriate safeguards, which the Board reviews de novo); *see generally Matter of M-A-M-*, 25 I&N Dec. at 483; *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016).

However, given that we have reversed the competency determination, we will remand for the Immigration Judge to assess the sufficiency of these safeguards and consider whether additional safeguards are warranted. For example, in our prior remand, we specifically asked the Immigration Judge to consider the intervening precedent of *Matter of E-S-I-*, which remains to be done. On remand, the parties should be given the opportunity to update the record with a more recent psychological evaluation. As the respondent points out on appeal, the most recent assessment predates the Immigration Judge's decision by more than a year (Respondent's Br. at 2, 8-10; Exh. 9). *See Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1183 (9th Cir. 2018) (concluding that the Board abused its discretion in affirming an Immigration Judge's competency evaluation when the medical record relied upon was "nearly a year old" and "may no longer have reflected [the petitioner's] mental state"); *see also Matter of M-A-M-*, 25 I&N Dec. at 480 (noting that "[m]ental competency is not a static condition"). Given our disposition, we decline to address the respondent's remaining arguments on appeal at this time.

Accordingly, 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 entry of a new decision.

FOR THE BOARD