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

Hernandez, Jenny Reed
Metropolitan Public Defender Services
630 SW 5th Avenue
Suite 500
Portland, OR 97204

DHS/ICE Office of Chief Counsel - TAC
1623 East J Street, Ste. 2
Tacoma, WA 98421

Name: R[redacted], M[redacted] A[redacted]

A [redacted]-017

Date of this notice: 1/15/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Crossett, John P.

Userteam: Docket

Immigrant & Refugee Appellate Center, LLC | www.irac.net

For more unpublished decisions, visit
www.irac.net/unpublished/index

File: A[redacted]-017 – Tacoma, WA

Date: JAN 15 2019

In re: M[redacted] A[redacted] R[redacted]

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Jenny Reed Hernandez, Esquire

APPLICATION: Deferral of removal under the Convention Against Torture

This matter is before us pursuant to the Immigration Judge's order of certification dated August 17, 2018. *See* 8 C.F.R. § 1003.1(c) (2018). The record will be remanded for further proceedings before a different Immigration Judge.

This case was previously before the Board on May 24, 2018. On review at that time was the Immigration Judge's January 10, 2018, decision denying the respondent's application for deferral of removal under the Convention Against Torture on the ground that the respondent had not demonstrated a clear probability of prospective "torture" in his native El Salvador (IJ at 4-7 (Jan. 10, 2018)). In our decision of May 24, 2018, we determined that a remand was necessary for the Immigration Judge to "make clear predictive findings of fact" (BIA at 2 (May 24, 2018)). Hence, the case was remanded with instructions for the Immigration Judge to "evaluate all evidence relevant to the possibility of future torture[,]" and to allow the parties to "update the evidentiary record with any relevant evidence" (BIA at 2, 3 (May 24, 2018)).

In addition to instructing the Immigration Judge to make predictive factual findings, we explained, "While torture might occur immediately after the respondent returns to El Salvador, the proper inquiry is whether the respondent will be subject to torture within the meaning of the Convention Against Torture, which might occur at any point in the future" (BIA at 2 (May 24, 2018)). We expressed no opinion, however, on the ultimate merits of the respondent's application for deferral of removal (BIA at 4 (May 24, 2018)).

On remand, the Immigration Judge received additional evidence and argument from the parties, and conducted a new hearing on the merits of the respondent's application for deferral of removal (IJ at 1 (Aug. 17, 2018); Tr. at 28-29 (Aug. 16, 2018)). However, the Immigration Judge expressly refused to enter the ordered predictive factual findings (IJ at 1-2 (Aug. 17, 2018)). Instead, at the remanded merits hearing on August 16, 2018, the Immigration Judge stated that our May 24, 2018, decision "is totally incorrect in [its] analysis" and "wrong" (Tr. at 10, 21 (Aug. 16, 2018)). He further stated that we have "created" a new eligibility standard "on [our] own" (Tr. at 36 (Aug. 16, 2019)). In his decision of August 17, 2018, moreover, the Immigration Judge opined that, in clarifying that torture "might occur at any point in the future," we have "grossly misinterpreted the law" (IJ at 1 (Aug. 17, 2018)). Thus, the Immigration Judge rejected our May 24, 2018, decision as applying an "impermissible standard" to the adjudication of the respondent's application for deferral of removal (IJ at 1 (Aug. 17, 2018)).

Immigrant & Refugee Appellate Center, LLC | www.irac.net

As a result of these determinations, the Immigration Judge "strongly and most certainly move[d] the BIA to refer this case to Attorney General Jeff Sessions on the basis that the BIA . . . has *created a new standard of review* in dealing with cases that fall under the Convention Against Torture" (IJ at 1 (Aug. 17, 2018) (emphasis added in original and underscore omitted); Tr. at 26 (Aug. 16, 2018)). Finally, the Immigration Judge purported to "reinstate" his January 10, 2018, decision, and certified the case back to us for resolution of the respondent's appeal (IJ at 2 (Aug. 17, 2018)).

The Immigration Judge had no justification for refusing to carry out our mandate to make further factual findings. *Cf. Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016) (recognizing that a lower court "'that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it.'" (quoting *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012))). Due to the Immigration Judge's refusal to make the ordered factual findings, this case will be removed from his docket and reassigned to another Immigration Judge. On remand, the new Immigration Judge shall conduct such further proceedings as may be necessary for him or her to make the predictive findings contemplated by our prior decision. Absent such findings, we lack a meaningful basis for appellate review. *See Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002).

To briefly summarize, the respondent is a native and citizen of El Salvador who was admitted to the United States as a derivative asylee of his mother in 1999, but he never subsequently applied for adjustment of status (IJ at 3, 4 (Jan. 10, 2018); Tr. at 25 (May 3, 2017), 30-31 (Jun. 6, 2017)). His asylum status has now been terminated (IJ at 3 (Jan. 10, 2018)). The respondent has expressed fear of returning to El Salvador (Tr. at 24 (May 3, 2017), 57 (Sep. 18, 2017)), but due to his multiple aggravated felony convictions, which also constitute "particularly serious crimes," he is ineligible for asylum and withholding of removal pursuant to sections 208(b)(2)(A)(ii) and 241(b)(3)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii) (2012). The respondent concedes that he is only eligible to seek deferral of removal under 8 C.F.R. § 1208.17 (IJ at 3 (Jan. 10, 2018); Tr. at 59-61 (Oct. 30, 2017)).

To properly assess the respondent's eligibility for deferral of removal, the Immigration Judge must make predictive factual findings. *See Ridore v. Holder*, 696 F.3d 907, 919 (9th Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). These predictive findings must be based solely on the evidence in the record of proceedings, and the respondent bears the burden of establishing his eligibility for deferral of removal. Again, we express no opinion on the proper outcome of the case.

The following order will be entered.

ORDER: The record is remanded for the new Immigration Judge to conduct further proceedings and for the entry of a new decision consistent with this order.

FOR THE BOARD

Immigrant & Refugee Appellate Center, LLC | www.irac.net