



U.S. Department of Justice

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Name: S [REDACTED]-R [REDACTED], E [REDACTED] ... A [REDACTED]-958

Date of this notice: 9/3/2019

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:
Greer, Anne J.

User team: Docket

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RL

Falls Church, Virginia 22041

File: [REDACTED]-958 – Florence, AZ

Date: **SEP - 3 2019**

In re: B [REDACTED] S [REDACTED]-R [REDACTED] a.k.a. [REDACTED]
[REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Maite C. Garcia, Esquire

ON BEHALF OF DHS: Arnold Eslava-Grunwaldt
Deputy Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, appeals from the Immigration Judge's April 8, 2019, decision finding him removable as charged and denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208, 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c). The Department of Homeland Security ("DHS") opposes the appeal. The record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of law and issues of discretion, *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge erred in finding that his 2006 conviction for shoplifting in violation of Arizona Revised Statutes § 13-1805(A)(1) is a crime involving moral turpitude and in sustaining the charge of removability (Respondent's Br. at 5, 8-19; Exh. 3). He also argues that the Immigration Judge did not act as a neutral fact-finder and that his mental competency should have been assessed (Respondent's Br. at 5, 19-24).

As competency is a threshold issue, we turn to that first. Given the particular circumstances present in this matter, we conclude that a remand is warranted for the Immigration Judge to evaluate the respondent's mental competency. While an Immigration Judge is under no obligation to analyze an alien's competency absent indicia of incompetency, there were indicia of incompetency before the Immigration Judge. *See Matter of M-A-M-*, 25 I&N Dec. 474, 477, 479 (BIA 2011) (explaining that indicia of incompetency can include "certain behaviors by the respondent, such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction," as well as "evidence of mental illness," including "direct assessments of the respondent's mental health").

The respondent submitted medical records indicating that he was diagnosed with anxiety and prescribed various medications, including the antipsychotic risperidone, while in detention (Exh. 19). These records also indicate that he reported experiencing auditory hallucinations (*id.*). Although a provider indicated in a progress note that the respondent appeared to be “embellishing” his symptoms in order to obtain medication, she referred him to a psychiatrist for further assessment and he was subsequently prescribed risperidone, buspirone, and trazodone (*id.*).

In addition, the conviction documents in the record contain indicia of incompetency. According to the presentence investigation relating to the respondent’s conviction for aggravated assault, “[o]fficers who worked the area and knew the defendant . . . expressed concern over his mental stability” (Exh. 5 at 1). A release questionnaire pertaining to the same conviction contains similar concerns (Exh. 4 at 13, 15).

On appeal, the respondent, who was pro se before the Immigration Judge but is now represented by counsel, submitted a letter from a Florence Immigrant and Refugee Rights Project social worker describing the interactions staff has had with the respondent that describe mental health issues (Respondent’s Br., Tab A). The respondent also submitted additional medical records from detention, some of which are duplicative of Exhibit 19, and an officer report from the aggravated assault arrest describing the respondent as “mentally unstable” (Respondent’s Br., Tabs A-B). The transcript does not reflect that competency issues were discussed during any of the respondent’s hearings.

Based on the above indicia of incompetency, the Immigration Judge will need to take measures to determine whether the respondent is competent to participate in these proceedings under the guidelines outlined in *Matter of M-A-M-*. See also *Mejia v. Sessions*, 868 F.3d 1118, 1121-22 (9th Cir. 2017) (holding that “clear indicia” of incompetency, which included a history of serious mental illness, testimony by the alien that he was not taking his medication and was experiencing symptoms of mental illness, and “confused and disjointed” testimony, “triggered an [Immigration Judge’s] duty to explain whether [an alien] was competent and whether procedural safeguards were needed.”). If, on remand, the respondent is pro se, the Immigration Judge should also follow the guidelines outlined in *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction order), as amended by *Franco-Gonzalez v. Holder*, No. CV 2:10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (order further implementing permanent injunction). On remand, the DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent’s mental competency. *Matter of M-A-M-*, 25 I&N Dec. at 480 (noting that the DHS “will often be in possession of relevant evidence, particularly where the alien is detained”).


If, after considering all appropriate evidence, the Immigration Judge determines that the respondent lacks sufficient competency to proceed with the hearing, the Immigration Judge should identify and apply appropriate safeguards, conduct a new hearing, and articulate his or her reasoning in the decision. *Matter of M-A-M-*, 25 I&N Dec. at 483-84; see generally *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016).

In addition, if the Immigration Judge finds evidence of mental health concerns, he or she should consider that evidence in reevaluating whether the respondent was convicted of a particularly

serious crime (IJ at 8-9). *See Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018) (holding that an alien's mental health can be considered as a factor in the particularly serious crime determination). On remand, both parties should be given the opportunity to submit additional evidence regarding the respondent's competency. In light of our disposition of this matter, we decline to address the remaining appellate arguments at this time.

Accordingly, the following order will be entered.

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



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