



U.S. Department of Justice

Executive Office for Immigration Review

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Name: M [REDACTED], D [REDACTED] R [REDACTED]

A [REDACTED]-606

Date of this notice: 7/16/2019

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:
Cole, Patricia A.**

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Falls Church, Virginia 22041

File: A [REDACTED]-606 – Aurora, CO

Date: JUL 16 2019

In re: D [REDACTED] R [REDACTED] M [REDACTED] a.k.a. [REDACTED]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Matthew K. Barringer, Esquire

ON BEHALF OF DHS: Elanie Cintron
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The applicant is a native and citizen of El Salvador. The Department of Homeland Security (DHS) ordered the applicant removed under section 241(a)(5) of the Immigration and Nationality Act. On October 2, 2018, an asylum officer found that the applicant established a reasonable fear of torture if removed to El Salvador (Exh. 1 at 8). Therefore, the applicant was placed in withholding-only proceedings (IJ at 1). On February 7, 2019, the Immigration Judge granted the applicant's application for withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and denied his request for protection pursuant to the Convention Against Torture. The DHS now appeals that decision. The appeal will be dismissed.

We review the Immigration Judge's factual findings for clear error, including findings as to the credibility of testimony. We review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*. See 8 C.F.R. § 1003.1(d)(3); see also *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).

The applicant testified that in 2009 he was a moto taxi driver in Corinto, El Salvador (IJ at 5, 13; Tr. at 19-20). He said that he transported members of the public to different towns or around Corinto (IJ at 5; Tr. at 18). After about 6 months, he noticed that some of the persons he was driving included MS-13 gang members (IJ at 5, 13; Tr. at 20, 22). He said that, eventually, the gang members started to threaten the applicant that, if he did not drive them exclusively, they would kill him and burn his taxi (IJ at 5; Tr. at 23). The applicant testified that he continued to drive the gang members out of fear for 5 or 6 months (Tr. at 23-24). After that, he stopped working for them and temporarily fled to Honduras (Tr. at 25).

The applicant testified that, when he returned to El Salvador, he was approached by law enforcement officers who asked whether he had information about gang members (IJ at 14; Tr. at 26). He told the officers everything that he had heard when he was driving the MS-13 gang members (IJ at 13; Tr. at 26-27). The applicant became a government witness against the gang members and was given protection by the government in exchange for his testimony in court (IJ at 13; Tr. at 27-28).

The applicant said that he cooperated with Salvadoran prosecutors as a witness against MS-13 from December 2010 until the end of 2011 (IJ at 10, 13; Tr. at 30, 62). He appeared as a witness in court six times in front of the defendants. He was wearing a ski mask to conceal his face but his voice was not altered (IJ at 10, 13; Tr. at 28-29, 64). The applicant said that he testified about the crimes that he heard gang members discussing in his cab (IJ at 5; Tr. at 30). He also submitted a recorded statement regarding his knowledge of the crimes committed by the gang members (IJ at 10, 13; Tr. at 64). The applicant believes that he testified against 20 to 25 gang members and some of them went to jail (IJ at 12, 13; Tr. at 65, 39-40).

On appeal, the DHS argues that the Immigration Judge erred by finding that the applicant did not commit a serious nonpolitical crime that rendered him ineligible for withholding of removal (DHS Br. at 8-11). *See Matter of E-A-*, 26 I&N Dec. 1, 4, 8 (BIA 2012). According to the DHS, because MS-13 gang members paid the applicant for the motto taxi rides, he effectively worked for the gang and was an accomplice to their crimes (DHS Br. at 10, 11). The DHS argues that the applicant was “privy to a murder, extortion, meeting houses, and places where the MS-13 acquired firearms and drugs” (DHS Br. at 10).

As an initial matter, we note that the Immigration Judge found that the DHS did not timely raise this argument (IJ at 5). The DHS raised this argument only after the record was closed and the Immigration Judge was announcing his decision (IJ at 5; Tr. at 80-82). Therefore, the Immigration Judge found that the DHS waived this argument (IJ at 5). *See Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (matters not raised before the Immigration Judge are waived on appeal); *see also Matter of R-S-H-*, 23 I&N Dec. 629, 638 (BIA 2003); *Matter of Edwards*, 20 I&N Dec. 191, 196-97 n.4 (BIA 1990).

In addition, contrary to the DHS’s argument, the applicant testified that he drove the gang members under duress. He said that the gang members told him that, if he did not continue to drive them, they would kill him (IJ at 5, 6; Tr. at 23). He also said that he did not participate in the gang’s crimes and, in fact, he testified against the gang members several times and several were sent to jail (IJ at 12, 13; Tr. at 37, 39-40, 50, 52, 65). In addition, although the Salvadoran authorities were aware that the applicant was forced to drive MS-13 gang members, he was not charged with any crimes in El Salvador (IJ at 5-6; Tr. at 37). For these reasons, given the evidence presented, we uphold the Immigration Judge’s conclusion that the applicant did not commit serious nonpolitical crimes barring him from withholding of removal.¹

The DHS raises several other arguments on appeal. We have reviewed the Immigration Judge’s opinion, and the record of proceedings. We are not persuaded that the Immigration Judge’s factual determinations are clearly erroneous or that his legal determinations are in error. Specifically, the Immigration Judge properly held that the applicant demonstrated in this case that his proposed particular social group, “Salvadoran men who are protected witnesses and testify to crimes by MS-13,” constitutes a particular social group under the Act (IJ at 9-12; DHS Br. at

¹ Contrary to the DHS’s argument that the applicant knew that the gang members had committed murder, the applicant testified that he knew that the MS-13 gang members extorted money from persons but he did not say that he knowingly drove them to kill anyone (Tr. at 51-53).

12-16). As the Immigration Judge held, the applicant demonstrated that the members of the group share a common immutable characteristic, and that the group has the requisite particularity and social distinction (IJ at 9-12). *See Matter of W-G-R-*, 26 I&N Dec. 208, 223-24 (BIA 2014, review granted in part, decision vacated in part by *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), cert. denied, 138 S. Ct. 736 (2018); *Matter of M-E-V-G*, 26 I&N Dec. 227, 230 (BIA 2014).

In addition, the DHS also challenges on appeal the Immigration Judge's finding that the applicant demonstrated that the harm he fears would be inflicted on account of his membership in the particular social group (DHS Br. at 17-18). We review for clear error the Immigration Judge's findings with regard to the persecutor's motives. *See Matter of D-R-*, 27 I&N Dec. 105, 123 (BIA 2017), citing *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 215 (BIA 2007) (Immigration Judge's fact finding regarding persecutors' motives not clearly erroneous); *Matter of S-P-*, 21 I&N Dec. 486, 490 (BIA 1996) (persecutor's motives are a question of fact). The DHS has not shown clear error in the Immigration Judge's finding that the applicant would be harmed because he testified against the MS-13 gang members (IJ at 13).

As the Immigration Judge found, gang members knew that the applicant testified against them (IJ at 13). He testified in front of the gang members with his face covered but his voice was not altered (IJ at 10, 13; Tr. at 28-29, 64). The applicant also testified that at least one relative subsequently told him that gang members suspected that he was involved in the prosecutions (IJ at 13; Tr. at 32, 41-42, 58; DHS Br. at 18). Gang members also threatened the applicant's wife in 2012 and said that if he returned to El Salvador they would harm the applicant or his family (IJ at 14; Tr. at 36-37, 56-57). In addition, a statement by the Justice of the Peace in the applicant's town indicates that the applicant cannot safely return there because he testified against the gang members (IJ at 14; Exh. 3 at 89). Moreover, the Immigration Judge also found that gang intimidation and violence against witnesses is prevalent in El Salvador and that gang members often target persons who cooperated with the police against them (IJ at 10-11, 14; Tr. at 38-39).

Although the DHS argues that the MS-13 gang members wanted to harm the applicant because he stopped working for them, the DHS has not shown that the factual findings of the Immigration Judge are clearly erroneous (DHS Br. at 17). For these reasons, we uphold the Immigration Judge's finding that the applicant demonstrated that the harm he fears is due to the fact that he testified against the gang members.

The DHS also argues that the Immigration Judge erred by finding that the government of El Salvador is unable or unwilling to protect the applicant from the MS-13 gang members (DHS Br. at 18-20). *See* sections 101(a)(42)(A) and 208(b)(1)(B)(i) of the Act. This is a factual determination that we review for clear error. *See Matter of Z-Z-O*, 26 I&N Dec. at 586 (predictive findings about what might happen in future are factual).

The DHS contends that, because the applicant was in the witness protection program in El Salvador, the government is willing and able to protect him. Despite this argument, the DHS admits that the applicant is no longer in the witness protection program and, therefore, if he returns to El Salvador, he will not benefit from that protection (IJ at 15; Tr. at 32-33; DHS Br. at 20; Appl. Br. at 3). In addition, as the Immigration Judge found, country condition reports in the record support the finding that the government of El Salvador is unable to protect the applicant from the

MS-13 gang (IJ at 16-17. In many neighborhoods, armed groups and gangs targeted certain persons . . . and created a climate of fear. Efforts by authorities to remedy these situations were generally ineffective (IJ at 16-17; Exh. 3 at 53, 57, 72, 81). For these reasons, we discern no clear error in the Immigration Judge's finding that the government of El Salvador is unable or unwilling to protect the applicant.

We also discern no clear error in the Immigration Judge's finding that the applicant demonstrated that he could not reasonably relocate to another part of El Salvador (IJ at 14-16). See *Matter of J-C-H-F-*, 27 I&N Dec. 211, 218 (BIA 2018), citing *Matter of Z-Z-O-*, 26 I&N Dec. at 590 (an Immigration Judge's predictive findings of fact are subject to a clear error standard of review). The Immigration Judge found that the applicant attempted to relocate to another town in El Salvador and that members of the MS-13 gang found him there (IJ at 14-15; Tr. at 34-35, 54). In addition, as noted above, if the applicant is removed to El Salvador, he would no longer be a part of the witness protection program (IJ at 15). Further, the Immigration Judge found that the MS-13 gang is located throughout El Salvador and that, in many areas, the government is unable to control the gang activity (IJ at 15-16). For these reasons, we find no clear error in the Immigration Judge's finding that the applicant demonstrated that he could not reasonably relocate to another part of El Salvador.

In sum, given the evidence presented, we uphold the Immigration Judge's decision granting the applicant's application for withholding of removal. Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed.



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