File: (b) (6) [redacted] – Miami, FL

Date: DEC - 8 2015

In re: JOSE GUILLERMO GARCIA-MERINO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alina Cruz, Esquire

ON BEHALF OF DHS: Loren G. Coy and Gina Garrett-Jackson
Senior Attorneys

CHARGE:

Notice: Sec. 212(a)(3)(E)(iii)(I), I&N Act [8 U.S.C. § 1182(a)(3)(E)(iii)(I)]
Participation in any act of torture

Lodged: Sec. 212(a)(3)(E)(iii)(II), I&N Act [8 U.S.C. § 1182(a)(3)(E)(iii)(II)]
Participation in any extrajudicial killing

APPLICATION: Termination

The respondent, a native and citizen of El Salvador and lawful permanent resident of the United States, has timely appealed the Immigration Judge's April 21, 2014, decision. The respondent contests the Immigration Judge's order finding him inadmissible as charged and ordering his removal from the United States. The Department of Homeland Security ("DHS") has filed a brief opposing the respondent's appeal. The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including findings with regard to credibility and the likelihood of future events, to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *Zhou Hua Zhu v U.S. Att'y Gen.*, 703 F.3d 1303, 1314 (11th Cir. 2013). We review de novo all questions of law, discretion, and judgment and any other issues in appeals from decisions of Immigration Judges. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was Minister of Defense of El Salvador from mid-October 1979 until April 1983 (I.J. Dec. dated Feb. 26, 2014, at 6). The respondent entered the United States in October 1989 and was granted asylum in August 1990 (I.J. Dec. dated Feb. 26, 2014, at 1). In October 1991, he adjusted his status to that of a lawful permanent resident (I.J. Dec. dated Feb. 26, 2014, at 2). On December 22, 2005, the respondent departed the United States for El Salvador (I.J. Dec. dated Feb. 26, 2014, at 2). He applied to reenter the United States as a lawful permanent resident on July 7, 2006 (I.J. Dec. dated Feb. 26, 2014, at 2). On October 2, 2009, the DHS filed a Notice to Appear charging him as an arriving alien who is inadmissible pursuant to section 212(a)(3)(E)(iii)(I) of the Act for having assisted or otherwise participated in the commission of acts of torture while he was Minister of Defense from October 1979 to April 1983 (I.J. Dec dated Feb. 26, 2014, at 2). On June 23, 2010, the DHS

filed an additional charged ground of inadmissibility against the respondent under section 212(a)(3)(E)(iii)(II) of the Act for having assisted or otherwise participated in an extrajudicial killing (I.J. Dec. dated Feb. 26, 2014, at 3). The respondent contested the charges of inadmissibility.

In a detailed written order issued on February 26, 2014, the Immigration Judge found the respondent was inadmissible as charged. The Immigration Judge also stated in his decision that he would "notify the parties through a separate notice concerning the addressing of relief from removal" (I.J. Dec. dated Feb. 26, 2014, at 62). Accordingly, in a written order issued on February 28, 2014, the Immigration Judge instructed the respondent to file any and all applications for relief with a written statement as to his eligibility for relief no later than April 14, 2014.

On March 31, 2014, the respondent filed an interlocutory appeal of the Immigration Judge's February 26, 2014, decision with this Board. On April 21, 2014, the Immigration Judge issued a final decision and noted that the respondent had filed an interlocutory appeal with the Board and that he had not filed an application for relief despite the Immigration Judge's written notice that he do so by April 14, 2014. Therefore, the Immigration Judge found the respondent removable as charged, found that he abandoned any relief which may be available to him, and ordered the respondent removed from the United States (I.J. Dec. dated April 21, 2014, at 2).

On April 30, 2014, this Board issued a decision declining to address the issues raised in the respondent's interlocutory appeal and returned the record to the Immigration Judge without further action. On May 20, 2014, the respondent filed an appeal of the Immigration Judge's April 21, 2014, decision. We will now address the respondent's appeal of the Immigration Judge's April 21, 2014, decision.[1]

The respondent claims that he should not have been charged as an arriving alien because he is a longtime permanent resident who has never been charged in a criminal court with any crime and who did not intend to abandon his legal permanent residence in the United States or stay outside the United States for over 180 days (Respondent's Brief at 16). The Immigration Judge found that the DHS established by clear and convincing evidence that the respondent is considered an applicant for admission under section 101(a)(13)(C)(ii) of the Act (I.J. Dec. dated Feb. 26, 2014, at 37). We agree.

Section 101(a)(13)(C)(ii) of the Act provides that an "alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has been absent from the United States for a continuous period in excess of 180 days." As set forth by the Immigration Judge, the respondent's counsel conceded at the hearing that the respondent left the United States for more than 180 days. *See* I.J. Dec. dated Feb. 26, 2014, at 37; Tr. at 5 (counsel for respondent conceding allegations 9, 10, and 11 in the Notice to Appear that he departed the United States on

[1] The Immigration Judge's February 26, 2014, decision on removability shall now be reviewed because the Immigration Judge issued a final decision in this case on April 21, 2014.

or about December 22, 2005, attempted to reenter on July 7, 2006, and was absent from the United States for a continuous period in excess of 180 days); *see also* Tr. at 748 (respondent testifying that he spent more than 180 days abroad). The respondent argues he erroneously conceded that he was an arriving alien and argues that he intended to return to the United States but stayed in El Salvador longer (b) (6) (Respondent's Brief at 16-17). However, due to his absence for a continuous period in excess of 180 days, the Immigration Judge correctly deemed the respondent an arriving alien. *See* section 101(a)(13)(C)(ii) of the Act; I.J. Dec. dated Feb. 26, 2014, at 37.[2]

We also will affirm the Immigration Judge's determination that the DHS met its burden of proof as to substantive inadmissibility. We held in *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011), that the DHS bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident falls within one or more of the six enumerated provisions in section 101(a)(13)(C) of the Act and, therefore, is to be regarded as seeking admission into the United States; but we reserved the issue of who bears the ultimate burden of proving inadmissibility. Here, the Immigration Judge found that the DHS bears the burden of establishing by clear and convincing evidence that the respondent, as an applicant for admission with lawful permanent resident status, is inadmissible to the United States (I.J. Dec. dated Feb. 26, 2014, at 37).

Section 212(a)(3)(E)(iii) of the Act provides that an alien is inadmissible if he has "committed, ordered, incited, assisted, or otherwise participated in the commission" of any act of either torture or extrajudicial killing. As we will set forth below, the record supports the Immigration Judge's determination that the DHS has met its burden of proving by clear and convincing evidence that the respondent is inadmissible as charged for having committed, ordered, incited, assisted, or otherwise participated in the commission of any act of torture or extrajudicial killing pursuant to sections 212(a)(3)(E)(iii)(I) and (II) of the Act.

The respondent disputes the finding that he is inadmissible as charged (Respondent's Brief at 13). The respondent contends that courts have ruled that an individual must personally have ordered, incited, assisted, or otherwise participated in the alleged persecution to sustain a charge of inadmissibility for torture or extrajudicial killings (Respondent's Brief at 13). The respondent argues that he should not be held culpable for atrocities committed during his tenure as Minister of Defense by simple virtue of his position while it has been established by prior case law in *Ford v. Garcia*, No. 99-08359-CV-DTKH (S.D. Fla. Nov. 3, 2000), *aff'd*, 289 F.3d 1283 (11th Cir. 2002), that he was not in control of his troops (Respondent's Brief at 14).[3] He contends that the theory of command responsibility should have no bearing on the application of immigration

---

[2] In any event, even if the DHS were required to charge deportability rather than inadmissibility, the deportability provisions state that any alien described in the inadmissibility ground at section 212(a)(3)(E)(i), (ii) or (iii) of the Act is deportable. *See* section 237(a)(4)(D) of the Act, 8 U.S.C. § 1227(a)(4)(D).

[3] *Ford v. Garcia*, *supra*, is a civil case brought under the Torture Victim Protection Act against the respondent by the survivors of churchwomen who were tortured and murdered in El Salvador. The respondent prevailed in that case.

law (Respondent's Brief at 14).[4] The respondent contends that there is a need for a precedent decision regarding the meaning of participation within the context of section 212(a)(3)(E)(iii) of the Act (Respondent's Brief at 13).

Such a precedent decision has been issued by the Board since the Immigration Judge's April 21, 2014, final decision in this case. In *Matter of Vides-Casanova*, 26 I&N Dec. 494 (BIA 2015), we addressed the issue of whether an alien's actions, or failures to act, as a military commander fall within the definition of assisting or otherwise participating in either extrajudicial killing or torture. That case involved the individual who served as the Minister of Defense of El Salvador after the respondent, from 1983 until 1992.

In *Matter of Vides-Casanova*, we held that the language "assisting or otherwise participating" in section 212(a)(3)(E)(iii) of the Act does not require an alien to have taken personal action to promote or facilitate the alleged acts of torture or extrajudicial killings. Rather, we held that it was sufficient that an alien (1) had knowledge that his subordinates committed unlawful acts, and (2) failed to take action to investigate those acts afterwards in a genuine effort to punish the perpetrators. *See id* at 502. In particular, we noted that, as in *Matter of D-R-*, 26 I&N Dec. 445, 453 (BIA 2011), in which we applied section 212(a)(3)(E)(iii) of the Act to an individual with "command responsibility," we "consider whether the alien 'knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts.'" *Id.* (citing *Matter of D-R-*, *supra*, at 453, which quoted S. Rep. No. 108-209, at 10 (2003), 2003 WL 22846178, at *10 (relating to the proposed Anti-Atrocity Alien Deportation Act of 2003, S.710, 108th Cong. (2003), whose language was incorporated into the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5501(a)-(c), 118 Stat. 3638, 3740 ("IRTPA"))).

Further, in *Matter of Vides-Casanova*, we found no clear error in the Immigration Judge's determination that Mr. Vides-Casanova had the authority and control over his subordinates to give him the requisite command responsibility. We also concluded that Mr. Vides-Casanova was properly found to have participated in the commission of particular acts of torture and extrajudicial killing of civilians in El Salvador because 1) the acts of torture and extrajudicial

[4] The term "command responsibility" means that:

> a commander [is] responsible for unlawful acts when (1) the forces who committed the abuses were subordinates of the commander (i.e., the forces were under his control either as a matter of law or as a matter of fact); (2) the commander knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts; and (3) the commander failed to prove that he had taken the necessary and reasonable measures to (a) prevent or stop subordinates from committing such acts, or (b) investigate the acts committed by subordinates in a genuine effort to punish the perpetrators.

Matter of D-R-, 25 I&N Dec. 445, 452-53 (BIA 2011) (quoting S. Rep. No. 108-209, at 10, 2003 WL 22846178, at *10 (Leg. Hist.)).

killing of civilians took place while he was in command, 2) he was aware of these abuses during or after the fact, and 3) through both his personal interference with investigations and his inaction, he did not hold the perpetrators accountable. *See Matter of Vides-Casanova*, *supra*, at 502-05.

Pursuant to our recent decision in *Matter of Vides-Casanova*, as applied to the evidence presented here, we affirm the Immigration Judge's decision that the respondent assisted or otherwise participated in the commission of the acts of torture and extrajudicial killings of civilians in El Salvador because 1) the acts took place while he was in command, 2) he knew or should have known about the acts of torture and extrajudicial killings during or after they occurred, and 3) he did not hold the perpetrators accountable.

First, despite his claims to the contrary, the respondent was properly found to have had the authority and control over his subordinates to give him the requisite command responsibility while he was Minister of Defense of El Salvador.[5] In particular, we find no clear error in the Immigration Judge's determination that the respondent as Minister of Defense of El Salvador had actual and legal authority to command all aspects of the Salvadoran Armed forces. *See* I.J. Dec. dated Feb. 26, 2014 at 10-11, 45; Exh. 11 at 35 (expert report of Professor Terry Karl providing that the respondent had command over the entire military and security forces). Likewise, the Immigration Judge did not clearly err in finding that numerous acts of torture and extrajudicial killings of civilians took place while the respondent was in command. *See* I.J. Dec. dated Feb. 26, 2014, at 60-62; Exh. 11 at 8-10.

Furthermore, we find no clear error in the Immigration Judge's determination that the respondent knew or should have known about the extrajudicial killings during or after the time they were committed and did not hold the perpetrators accountable (I.J. Dec. dated Feb. 26, 2014, at 51-58).[6] For example, the Immigration Judge observed that a United States military attaché, Brian Bosch, informed the respondent about the January 1981 assassinations in the Sheraton Hotel in San Salvador (I.J. Dec. dated Feb. 26, 2014, at 22; Exh. 11 at 83-84). The Immigration Judge found that the respondent delayed making an investigation into the assassinations at the Sheraton Hotel and eventually appointed National Police Director Lopez Nuila to head an investigation, which came up empty despite evidence that the assassinations were carried out by members of the Intelligence Section of the National Guard (I.J. Dec. dated Feb. 26, 2014, at 22; Exh. 11 at 83-85). The Immigration Judge observed that upon further pressure by the United States government, the respondent set up a second investigation, but the two National Guard commanders who ordered the assassinations were not punished or sanctioned in relation

[5] The respondent claims that he did not have actual control of his troops (Respondent's Brief at 5). The respondent also contends that his title as Minister of Defense during a chaotic war does not automatically make him culpable for illegal acts by members of the armed forces (Respondent's Brief at 6).

[6] The report by Professor Terry Karl provides that not a single Salvadoran military officer was ever held accountable for human rights abuses during the respondent's tenure as Minister of Defense (Exh. 11 at 26).

to the assassinations (I.J. Dec. dated Feb. 26, 2014, at 22-23; Exh. 11 at 85). These findings are supported by the evidence.

Likewise, we find no clear error in the Immigration Judge's determinations that the respondent knew or should have known that his subordinates committed extrajudicial killings at El Mozote in December 1981, and that he did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators (I.J. Dec. dated Feb. 26, 2014, at 55). About 1,000 civilians were killed at El Mozote (I.J. Dec. dated Feb. 26, 2014, at 55; Exh. 11 at 87-88). The Immigration Judge noted that the respondent claimed that he was out of the country when the El Mozote massacre occurred and that he was not informed of it when he returned (I.J. Dec. dated Feb. 26, 2014, at 24). However, the Immigration Judge observed that the massacre was later made public in January 1982, at which time the respondent denied any knowledge of military action in El Mozote and claimed that accounts of a massacre were part of a guerrilla campaign to block U.S. military assistance to El Salvador (I.J. Dec. dated Feb. 26, 2014, at 24; Exh. 3, Tab C at 146-47; Exh. 11 at 90-91). The United Nations Truth Commission reported that Salvadoran authorities did not order an investigation into the massacre (I.J. Dec. dated Feb. 26, 2014, at 25; Exh. 11 at 92-93).

Furthermore, we find no clear error in the Immigration Judge's determination that the respondent knew or should have known about, and did not take reasonable measures to prevent or stop or investigate, the August 1982 El Calabozo Massacre, in which over 200 men, women, and children were killed (I.J. Dec. dated Feb. 26, 2014, at 26-27, 56). The Immigration Judge observed that the Truth Commission found that the massacre was reported publicly but that the respondent said an investigation had been made and that no massacre had occurred (I.J. Dec. dated Feb. 26, 2014, at 27; Exh. 3, Tab C at 155). The Truth Commission found that there was no evidence that an investigation had occurred (I.J. Dec. dated Feb. 26, 2014, at 27; Exh. 3, Tab C at 156).

In addition, we find no clear error in the Immigration Judge's determination that the respondent knew or should have known that his subordinates committed acts of torture during or after the time they were committed and did not hold the perpetrators accountable (I.J. Dec. dated Feb. 26, 2014, at 58-60). In particular, the Immigration Judge cited the torture of the following individuals: 1) Dr. Juan Jose Romagoza Arce by the National Guard, 2) an unnamed individual referenced in a November 1981 cable from the United States Embassy in El Salvador, and 3) an unnamed Salvadoran Green Cross member (I.J. Dec. dated Feb. 26, 2014, at 30-32, 58, 61; Exh. 3, Tabs J and M; Tr. at 283-87).[7] The Immigration Judge noted that all these acts of torture occurred within military installations in San Salvador, the capital of El Salvador (I.J. Dec. dated Feb. 26, 2014, at 58; Exh. 3, Tabs J and M; Tr. at 282).

The Immigration Judge also found that the respondent knew or should have known that his subordinates committed acts of torture because tortured bodies were left on public display, including bodies bearing signs of torture heaped in piles on the streets of the capital city, along well-traveled highways, in shopping centers, and in parking lots of upscale hotels (I.J. Dec. dated

[7] Dr. Romagoza Arce testified at the respondent's hearing regarding his torture.

Feb. 26, 2014, at 32-33, 59; Exh. 11 at 49). Furthermore, the Immigration Judge found that tortured bodies were left to decay in the Playon Body Dump, which was an area accessible only with the consent of the military (I.J. Dec. dated Feb. 26, 2014, at 59; Exh. 11 at 18-19). The Immigration Judge found that the respondent initiated no investigations into reports of torture by his military and there were no prosecutions of alleged torturers within the Salvadoran Armed Forces during the respondent's tenure as Minister of Defense (I.J. Dec. dated Feb. 26, 2014, at 59; Exh. 11 at 26).[8] All of the above findings also are supported by the evidence.

Based on the foregoing, we affirm the Immigration Judge's determination that the respondent participated in acts of extrajudicial killings and torture (I.J. Dec. dated Feb. 26, 2014, at 60-62). The record supports the Immigration Judge's determination that the DHS has met its burden of proving by clear and convincing evidence that the respondent is inadmissible as charged for having committed, ordered, incited, assisted, or otherwise participated in the commission of any act of torture or extrajudicial killing pursuant to sections 212(a)(3)(E)(iii)(I) and (II) of the Act. Further, the evidence offered or cited by the respondent in support of his defense was not of such import as to require the Immigration Judge to reach a different outcome. Therefore, we affirm the Immigration Judge's determination that the respondent is removable as charged.[9]

The respondent also contends that res judicata applies and that the Immigration Judge's decision is in conflict with *Ford v. Garcia*, *supra*, and *Romagoza Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (Respondent's Brief at 15).[10] The DHS argues that the Immigration Judge correctly found that res judicata does not apply in this case (DHS's Brief at 6).

We agree with the Immigration Judge that res judicata does not apply in this case (I.J. Dec. dated Feb. 26, 2014, at 35-36). Inasmuch as the DHS was not a party in the cases cited by the respondent, res judicata does not apply. *See Lobo v. Celebrity Cruises, Inc* , 704 F.3d 882, 892 (11th Cir. 2013) ("The doctrine of res judicata, or claim preclusion, bars the parties to an action from litigating claims that were or could have been litigated in a prior action between the same parties").

Lastly, the respondent argues that his removal from the United States would violate the Convention Against Torture because it is more likely than not that he would be tortured or

---

[8] United States Ambassador to El Salvador White testified that he repeatedly asked the respondent to investigate military abuses but no investigations were conducted and no military officers were punished for disappearances, torture, or killings when the respondent was Minister of Defense. *See* Tr. at 164, 211-12; I.J. Dec. dated Feb. 26, 2014, at 13, 30.

[9] Our affirmance is based on the matters discussed herein, and we need not and do not reach the validity of any findings by the Immigration Judge that this order does not explicitly discuss.

[10] *Romagoza Arce v. Garcia*, *supra*, involved a claim by Salvadoran torture victims against the respondent and Mr. Vides-Casanova under the Torture Victims Protection Act and the Alien Tort Claims Act. The lower court awarded the torture victims $54,600,000 and the Court of Appeals for the Eleventh Circuit concluded that the lower court did not abuse its discretion in equitably tolling the statute of limitations.

(b) (6)

murdered if he were removed to El Salvador (Respondent's Brief at 17). However, the respondent did not apply for relief by the deadline set by the Immigration Judge. The Immigration Judge's February 28, 2014, order required the respondent to file for relief by April 14, 2014, and cautioned that if no timely application was filed, the Immigration Court would proceed with an order of removal. The respondent did not file any relief applications. The fact that he had a pending interlocutory appeal with this Board did not render the respondent unable to comply with the Immigration Judge's order regarding applications for relief. The mere filing of an interlocutory appeal does not divest an Immigration Judge of jurisdiction over a case and jurisdiction remains with the Immigration Judge unless the Board asserts jurisdiction over the case. *See Matter of Ruiz-Campuzano*, 17 I&N Dec. 108 (BIA 1979); *Matter of Ku*, 15 I&N Dec. 712 (BIA 1976); *Matter of Sacco*, 15 I&N Dec. 109 (BIA 1974). Inasmuch as the Board did not assert jurisdiction over the case during the time the Immigration Judge required the respondent to file for relief, the Immigration Judge retained jurisdiction in the respondent's case. Further, while the respondent's brief on appeal argues the merits of the claim under the Convention Against Torture that he wishes to pursue, it does not meaningfully challenge the Immigration Judge's determinations with regard to jurisdiction over and abandonment of that claim. Therefore, we will not disturb the Immigration Judge's ruling that the respondent abandoned the opportunity to file for relief.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD