

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 20-cv-00133-RM

GABRIEL VILLEGAS CASTRO,
Petitioner,

v.

WILLIAM BARR, in his official capacity as United States Attorney General,
MATTHEW ALBENCE, in his official capacity as Acting Director of U.S. Immigration and
Customs Enforcement,
CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security,
JOHN MARTINEZ, in his official capacity as Acting ICE Denver Field Office Director,
and
JOHNNY CHOATE, in his official capacity as warden of the Aurora Contract Detention
Facility
owned and operated by GEO Group Inc.,
Respondents.

DECLARATION OF CHARLES J. VERNON. ESQ.

I, Charles J. Vernon, pursuant to 28 U.S.C. § 1746, and based on my personal
knowledge and information made known to me from official records reasonably relied
upon by me in the course of my employment, hereby declare as follows relating to the
above-captioned matter:

1. I am attorney licensed by the Supreme Court of Colorado and employed as a
Senior Staff Attorney with the Rocky Mountain Immigrant Advocacy Network
("RMIAN") in Westminster, CO since August 27, 2018. RMIAN is a non-profit
organization that provides free legal services to noncitizens detained in Aurora,
Colorado as well as to families and detained youth before the non-detained court

in Denver, Colorado. Previously I was employed in various capacities at the Florence Immigrant and Refugee Rights Project (“FIRRP”) in Florence, AZ, beginning on January 3, 2012. FIRRP is a similar non-profit organization that affords legal services to clients at no cost.

2. In the course of my employment for both organizations, a significant percentage of my caseload since 2013 has involved representing individuals in removal proceedings who are deemed incompetent to represent themselves and, as such, appointed counsel through the National Qualified Representative Program (“NQRP”). At FIRRP, such cases are also governed by the permanent injunction in *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013). I represent the Petitioner, Gabriel Villegas Castro, in all aspects of his removal proceedings before the Executive Office for Immigration Review pursuant to an NQRP appointment.
3. While at FIRRP, I regularly represented individuals by appointment pursuant to both *Franco-Gonzalez* and NQRP. As a result, I have extensive experience providing legal counsel to clients deemed mentally incompetent who sought and received custody redetermination hearings before the immigration court. A significant number of my clients, and those of my colleagues, were subject to mandatory detention under 8 U.S.C. §§ 1225(b), 1226(c), & 1231(a)(5), but nevertheless received bond hearings pursuant to the *Franco-Gonzalez* permanent injunction after six months of detention. Immigration judges released several numerous such clients on bond or conditional parole. Separately, it is within the discretion of the Department of Homeland Security to release people

who are otherwise subject to mandatory detention, as I have seen them exercise this authority on more than one occasion.

4. While employed at FIRR, I also regularly handled appeals before the BIA in both Franco/NQRP cases and in other removal cases. Additionally, through my prior duties at FIRR under the Legal Orientation Program, which provides legal support to pro se litigants, assisted dozens of other respondents in removal proceedings with the process of filing their own appeals. Virtually all of these were matters involving detained respondents.
5. In my experience, the BIA frequently suspends the prescribed the regulatory time frames for adjudication and disposition of appeals, even in detained cases. The BIA has the power to order supplemental briefing and oral argument, and may hold appeals in abeyance pending the outcome of another relevant matter. I have personally handled or been involved with three detained appeals where the BIA ordered supplemental briefing. Moreover, I have observed that where there is a dissenting opinion, the BIA has suspended the regulatory time frames.
6. I have represented, supervised, or supported at least three detained appeals where the BIA took between 14 and 23 months to decide the appeal. These include *In re V-P-*, Axxx-xxx-344 (BIA June 29, 2017); *In re D-M-R-*, Axxx-xxx-524 (BIA June 9, 2015); and *In re O-V-M-*, Axxx-xxx-938 (BIA July 31, 2019). There were three separate IJ decisions, and three separate BIA appeals in *In re D-M-R-*. The first of the three appeals lasted approximately 23 months from the date of the immigration judge's decision to the BIA's decision remanding the

matter. Because these cases are not available on Westlaw, I am attaching them to my declaration.

7. I have also assisted approximately ten pro se respondents at the Eloy Detention Center in Eloy, AZ, to file their detained appeals where I observed that the BIA took between one and three years to decide the appeal. In those cases, the BIA appeared to be holding the cases in abeyance pending a decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which addressed the viability of a particular social group in relation to an asylum claim.
8. The immigration court in Aurora, CO, appointed me to represent Mr. Villegas Castro in his removal proceedings pursuant to the NQRP. I first appeared on his behalf on March 8, 2019, and requested a two-week continuance to review the record of proceedings.
9. On March 22, 2019, I again appeared on Mr. Villegas Castro's behalf and requested the opportunity to submit a successive asylum application based on changed personal circumstances. The Department of Homeland Security ("DHS") opposed the request, and the immigration judge ordered briefing by both parties. Briefing was completed on April 8, 2019.
10. On April 23, 2019, at a master calendar hearing, the immigration judge announced his decision allowing Mr. Villegas Castro to proceed on a successive asylum application. He unilaterally adjourned the matter until May 17, 2019, to allow Mr. Villegas Castro time to prepare and submit the application where no continuance was requested. On May 17, 2019, I appeared with Mr. Villegas Castro and submitted the application on his behalf; the immigration judge then

set a merits hearing date of August 21, 2019. Neither party requested a continuance, and the hearing went forward on that date. The immigration judge took the matter under advisement and issued a decision granting Mr. Villegas Castro asylum on September 16, 2019.

11. On October 7, 2019, the DHS submitted a Notice of Appeal from the immigration judge's September 16, 2019 decision. Thereafter, the BIA issued a briefing schedule with a deadline for both parties of December 10, 2019. On Mr. Villegas Castro's behalf, I timely filed a motion for summary affirmance of the immigration judge's decision on that date.

12. The DHS brief arrived at the BIA on December 11, 2019, and as it was untimely, the BIA rejected it. The DHS then resubmitted the brief on or about December 23, 2019. The DHS also filed a motion to amend its opening brief on or about December 20, 2019. On Mr. Villegas Castro's behalf, I filed oppositions to both motions on December 31, 2019. Neither party has submitted any additional briefs, motions, or other pleadings to the BIA as of this writing.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is all true and correct to the best of my knowledge and belief.

s/ Charles J. Vernon

Date: March 10, 2020

Charles J. Vernon, Esq.
Senior Staff Attorney
Rocky Mountain Immigrant Advocacy Network
7301 Federal Blvd Ste 300
Westminster, CO 80030



Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Vernon, Charles
Florence Immigrant and Refugee Rights
Project
PO Box 654
Florence, AZ 85132

DHS/ICE Office of Chief Counsel - EAZ
P.O. Box 25158
Phoenix, AZ 85002

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

A [REDACTED]

Date of this notice: 6/9/2015

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:
Adkins-Blanch, Charles K.
Greer, Anne J.
Miller, Neil P.

taylor

Userteam: Docket

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

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: [REDACTED] – Eloy, AZ

Date: JUN - 9 2015

In re: D [REDACTED] M [REDACTED] R [REDACTED] a.k.a. Maria Merida Espinosa a.k.a. Susana Lopez

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Charles Vernon, Accredited Representative

ON BEHALF OF DHS: Julie Nelson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

Lodged: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -
Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a 52-year-old native and citizen of El Salvador, appeals from the Immigration Judge's March 3, 2015, decision denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The appeal will be dismissed in part and sustained in part.

This case has a lengthy procedural history culminating in the Immigration Judge's certification of her March 3, 2015, decision to the Board following the Board's remand directing the Immigration Judge to apply recent jurisprudence on the evolving issue of particular social group.¹ See *Matter of W-G-R*-, 26 I&N Dec. 208 (BIA 2014), *Matter of M-E-V-G*-, 26 I&N Dec. 227 (BIA 2014), and *Matter of A-R-C-G*-, 26 I&N Dec. 388 (BIA 2014).

The factual basis of the respondent's claim was set forth in the Immigration Judge's initial decision on September 15, 2011, and is not meaningfully disputed by the parties (9/15/11 I.J. Dec. at 4-6). The respondent was subjected to repeated and severe abuse by the man she lived with for more than 15 years. The couple eventually had 5 children together, who were also abused. The respondent did not own any property or have money, and was afraid to call the police. The respondent testified that she knew of other women who were trapped in similar relationships.

¹ There are three separate decisions from the Immigration Judge, which are identified by date when cited.

[REDACTED]

In 1996, the respondent first left El Salvador for Mexico. For 3 years, she returned to El Salvador each month because her children were still there and she was trying to bring them to Mexico. She described recurring problems with her partner when she made her return trips. In March 2001, the respondent first entered the United States without inspection. In 2005, she returned to Mexico because one of her daughters was sick. Sometime later in 2005, she returned to the United States without inspection after several unsuccessful attempts. In 2009, the respondent was returned to Mexico by immigration officials. The respondent last entered the United States on November 15, 2009. In May 2011, one of the respondent's sons told her that her former partner still intends to harm her.

An asylum application must be filed within 1 year of the applicant's last arrival in the United States. *See* section 208(a)(2)(B) of the Act; 8 C.F.R. § 1208.4(a)(2); *Matter of F-P-R*, 24 I&N Dec. 681 (BIA 2008). In her September 15, 2011, decision, the Immigration Judge found that the respondent's May 5, 2011, asylum application was not timely filed within 1 year of her November 15, 2009, arrival date (9/15/11 I.J. Dec. at 9). Although the respondent concedes that the record does not currently establish that she qualifies for an exception to the 1-year filing deadline, she seeks an opportunity to further address this issue before the Immigration Judge.

We conclude pursuant to our de novo review over questions of law that the respondent is ineligible for asylum under section 208 of the Act because she did not file a timely asylum application or establish that an exception applies.² *See* 8 C.F.R. § 1003.1(d)(3)(ii). The respondent has been in removal proceedings since 2011. She did not challenge the 1-year bar finding in her initial appeal in 2011, and she has not advanced any arguments in the subsequent years that her failure to timely file was the result of changed or extraordinary circumstances. Under these facts, we decline to remand for further consideration of the issue. We therefore dismiss the respondent's appeal of the denial of her application for asylum.³

With respect to withholding of removal under section 241(b)(3) of the Act, the Immigration Judge found that the respondent met her burden of establishing that the harm she suffered rose to the level of persecution within the meaning of the Act, and that the Salvadoran government was unwilling or unable to control the persecutor in this case (9/15/11 I.J. Dec. at 11, 14). We agree with the Immigration Judge's findings in these respects. The critical issue here is whether the respondent defined a cognizable particular social group and if so, whether she was persecuted on account of her membership in that particular social group. 8 C.F.R. § 1208.16(b)(1). The respondent has advanced numerous social groups during the course of these proceedings (3/3/15

² Because the respondent is ineligible for asylum under section 208 of the Act, she is necessarily ineligible for humanitarian asylum. *See* 8 C.F.R. § 1208.13(b)(1)(iii).

³ The Immigration Judge found that the respondent had not been convicted of a particularly serious crime barring her application for withholding of removal (9/15/11 I.J. Dec. at 14). The DHS has not challenged this determination.

I.J. Dec. at 2). We will focus on the proffered social group defined as “El Salvadoran women in domestic relationships who are unable to leave.”

We recently held that depending on the facts and evidence in an individual case, victims of domestic violence can establish membership in a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal. *Matter of A-R-C-G-*, *supra*. In that case, we held that under the facts and evidence, “married women in Guatemala who are unable to leave their relationship” was a cognizable particular social group. We also recently clarified our particular social group jurisprudence. In doing so, we stated that an applicant seeking asylum or withholding of removal based on his or her membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question (renaming the former concept of “social visibility”). *Matter of M-E-V-G-*, *supra*; *Matter of W-G-R-*, *supra*.

Here, the Immigration Judge found that the proposed social group “El Salvadoran women in domestic relationships who are unable to leave” was distinguishable from “married women in Guatemala who are unable to leave their relationship” because the respondent was not married to Jose (3/3/15 I.J. Dec. at 3). The Immigration Judge also found that the group was not defined with particularity and did not meet the social distinction test (3/3/15 I.J. Dec. at 4).

We disagree. First, we note that our decision in *Matter of A-R-C-G-*, *supra*, does not necessarily require that an applicant seeking asylum or withholding of removal based on domestic violence have been married to his or her abuser. Rather, we look to the characteristics of the relationship to determine its nature. Here, the respondent was in a lengthy relationship with her abuser, the couple had 5 children together, and the respondent tried to leave him on several occasions. These facts are similar to those in *Matter of A-R-C-G-*, *supra*, even though the respondent in that case was formally married to her abuser. We are thus satisfied that the respondent has established that members of her proffered social group share a common immutable characteristic of being women in domestic relationships that they are unable to leave.

We also disagree with the Immigration Judge’s conclusory finding that the group is not defined with particularity (9/15/11 I.J. Dec. at 10; 3/3/15 I.J. Dec. at 3). The terms used to describe the group – “women,” “domestic relationship,” and “unable to leave” can be sufficiently particular in society, and we find them to be so here. *See Matter of A-R-C-G-*, *supra* at 393.

We also disagree that “El Salvadoran women in domestic relationships who are unable to leave” is not socially distinct. In her September 15, 2011, decision, the Immigration Judge found that there “is nothing from a social perspective that would distinguish the member from the rest of the population or cause others in the proposed social group to recognize herself as a member of the group” (9/15/11 I.J. Dec. at 10). Notably, the group analyzed in that decision was “poor women in violent relationships in El Salvador,” not “El Salvadoran women in domestic relationships who are unable to leave.” The Immigration Judge does not further discuss the issue of social distinction (formally “social visibility”) in her November 29, 2013, decision. In her most recent decision, she held that “while the record suggests that victims of domestic violence are viewed as a distinct group within society, as evidenced by laws and programs enacted for the

benefit of such group, the respondent's group does not appear to be as socially distinct" (3/3/15 I.J. Dec. at 4). However, in our view, these facts found by the Immigration Judge support the proposition that the group is socially distinct. Moreover, the respondent testified that she knew other women in similar relationships and that it was normal in Salvadoran society to be trapped in bad relationships with no recourse from the police. Finally, the country conditions evidence cited by the respondent on appeal supports our conclusion that the group is socially distinct (Respondent's Br. at 20-21).

In light of the foregoing, we conclude that "El Salvadoran women in domestic relationships who are unable to leave" is a cognizable particular social group in this case. We further find the Immigration Judge's alternative determination that the group was not "one central reason" for the persecution to be clearly erroneous (9/15/11 I.J. Dec. at 11, 14; 11/29/13 I.J. Dec. at 3; 3/3/15 I.J. Dec. at 4-5). See 8 C.F.R. § 1003.1(d)(3)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007); *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (a persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by this Board for clear error). The respondent's inability to leave the relationship in the broader context of Salvadoran society supports a nexus determination in this matter. See *Matter of A-R-C-G-*, supra at 394. We therefore conclude that the respondent suffered past persecution on account of a particular social group. Accordingly, the burden shifts to the DHS to establish that there has been a fundamental change in circumstances such that the respondent no longer has a clear probability of future persecution. 8 C.F.R. § 1208.16(b)(1)(ii). Alternatively, the DHS bears the burden of showing that internal relocation is possible and is not unreasonable (*Id.*).

The Immigration Judge made an alternative finding that even assuming that the respondent had established past persecution on account of a statutorily enumerated ground, the DHS met its burden of proof on both the changed country conditions and internal relocation issues (9/15/11 I.J. Dec. at 14-15; 11/29/13 I.J. Dec. at 3; 3/3/15 I.J. Dec. at 5). The Immigration Judge reasoned that the respondent had not been back to El Salvador for many years, and "there has been some change in country conditions pertaining to the treatment of domestic violence matters." (9/15/11 I.J. Dec. at 14-15) She further noted that the respondent's former domestic partner is now 59 years old, and the respondent has family members in El Salvador that could assist her.

We disagree with the Immigration Judge. In our view, these limited observations by the Immigration Judge are not sufficiently developed or linked to evidence in the record to support the conclusions she reached. Rather, based on the record, we conclude that the DHS has not met its burden of rebutting the presumption of future persecution or showing that internal relocation is possible and is not unreasonable. We therefore conclude that the respondent is eligible for the withholding of removal under section 241(b)(3) of the Act.

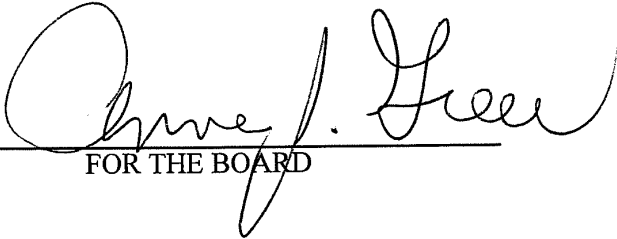
Accordingly, the following orders will be entered.

ORDER: The respondent's appeal of the denial of asylum under section 208 of the Act is dismissed.

FURTHER ORDER: The respondent's appeal of the denial of withholding of removal under section 241(b)(3) of the Act is sustained.

[REDACTED]

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).



FOR THE BOARD

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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

Vernon, Charles
Florence Immigrant and Refugee Rights
Project
PO Box 654
Florence, AZ 85132

DHS/ICE Office of Chief Counsel - EAZ
Eloy Detention Ctr, 1705 E. Hanna Rd
Eloy, AZ 85131

Name: P, V

-344

Date of this notice: 6/29/2017

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

Sincerely,

A handwritten signature in cursive script, reading "Cynthia L. Crosby".

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly
Greer, Anne J.
Kelly, Edward F.

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A 344 – Eloy, AZ

Date:

JUN 29 2017

In re: V. P -

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Charles Vernon, Accredited Representative

ON BEHALF OF DHS: Danielle Sigmund
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude

APPLICATION: Asylum; withholding of removal; Convention Against Torture;
special-rule cancellation of removal

This matter was last before the Board on October 31, 2014, at which time we granted a motion to remand for the respondent to appear before the Immigration Judge with counsel in the first instance. We found that the Immigration Judge had committed clear error in finding the respondent competent, and had rendered her decision without providing adequate safeguards. We vacated the Immigration Judge's decision, and remanded the record for further proceedings with the benefit of the qualified representative and any additional safeguards the Immigration Judge deemed necessary, including the possibility of administrative closure.

On remand, the Immigration Judge conducted de novo proceedings on the respondent's removability and eligibility for relief or protection from removal. After receiving additional testimony and evidence, the Immigration Judge issued a new decision dated September 1, 2015, in which she found that the presence of the qualified representative was sufficient to safeguard the respondent's rights and privileges in the proceedings,¹ and denied the respondent's request that

¹ As additional safeguards, the Immigration Judge accepted a new asylum application prepared by his representative without the respondent's signature (I.J. at 4; Exh. 61; Remand Tr. at 64), and permitted the respondent's representative to conduct limited direct examination of the respondent, received the respondent's proffered testimony, and accepted his fear of harm expressed therein as subjectively reasonable (I.J. at 5-6, 13-14).

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she administratively close or terminate the proceedings (I.J. at 21-22).² The Immigration Judge found that the DHS carried its burden of establishing the respondent's foreign birth (I.J. at 7-8; Exh. 52) and that the respondent did not rebut the presumption of alienage by showing that he automatically acquired United States citizenship pursuant to section 320 of the Immigration and Nationality Act, 8 U.S.C. § 1431, when either his mother³ or his step-father⁴ naturalized (I.J. at 8).

The Immigration Judge further held that the respondent was removable as charged under sections 237(a)(2)(B)(i) and 237(a)(2)(A)(ii) of the Act, 8 U.S.C. §§ 1227(a)(2)(B)(i), (A)(ii) (I.J. at 8-12). Regarding relief or protection from removal, the Immigration Judge accepted the respondent's testimony as credible (I.J. at 13-14) and held that he established he suffered past persecution on account of a protected ground (I.J. at 16-17), but that the DHS had rebutted the resulting presumption of a well-founded fear of future persecution (I.J. at 17) and the respondent had not established that humanitarian asylum was warranted (I.J. at 17-18). The Immigration Judge also denied withholding of removal under the Act (I.J. at 18-19), and protection under the Convention Against Torture (I.J. at 19-21).

On review, we are not persuaded to reverse the Immigration Judge's determination that the respondent is removable as charged under section 237(a)(2)(A)(ii) of the Act (I.J. at 10-12; Resp't Br. at 9-10, 17-24). The Immigration Judge held that the respondent's two shoplifting offenses, in violation of ARIZ. REV. STAT. § 13-1805, were categorically for crimes involving moral turpitude ("CIMTs"), notwithstanding that the statutory language includes the word "deprive," which means a permanent or a temporary taking under Arizona law, because it was reasonable to assume the takings were with the intent of permanently retaining the merchandise, and because there was not a realistic probability of being prosecuted for a mere temporary taking.

On appeal, the respondent argues that the statute is overbroad as to the intent element because one may be convicted with an intent to effect a temporarily taking, that the statute is not divisible because an Arizona jury need not be unanimous as to the means by which a defendant demonstrated the requisite intent, and that the realistic probability test has been satisfied because the statutory language explicitly covers minimum conduct that falls outside the definition of a CIMT. During the pendency of the appeal, however, we addressed this question in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). We held that ARIZ. REV. STAT. § 13-1805, the precise statute of conviction at issue in this case, "defines a categorical crime involving moral turpitude despite the fact that it does not require the accused to intend a *literally* permanent taking." *Id.* at

² For clarity, we note that all citations to the Immigration Judge's decision are to her most recent decision, dated September 1, 2015, and that all citations to the transcript are to the post-remand transcript.

³ The Immigration Judge found that the respondent's mother did not naturalize until after the respondent's 18th birthday (I.J. at 8).

⁴ The Immigration Judge found that the respondent's step-father naturalized 4 years before he married the respondent's mother and, moreover, that there was no evidence presented that he ever adopted the respondent (I.J. at 8 n.2).

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852 (emphasis in original). Accordingly, we affirm the Immigration Judge's removability finding based on our precedential holding in *Matter of Diaz-Lizarraga*.

Because we affirm the Immigration Judge's determination that the respondent is removable as charged under section 237(a)(2)(A)(ii) of the Act, we find it unnecessary to address the respondent's appellate contention that his 2012 conviction for possession of drug paraphernalia did not render him removable as charged under section 237(a)(2)(B)(i) of the Act because neither the statute of conviction, ARIZ. REV. STAT. § 13-3415(A), nor the probation statute, ARIZ. REV. STAT. § 13-901(H)(4), makes the specific controlled substance an essential element of the offense (I.J. at 9-10; Resp't Br. at 8, 10-17).⁵

Regarding relief or protection from removal, the respondent concedes on appeal that the DHS carried its burden of proof to rebut the presumption that the respondent has a well-founded fear of future persecution on the basis of the original claim by showing there had been a fundamental change in circumstances such that he no longer has a well-founded fear of persecution in (I.J. at 17; Resp't Br. at 24). See 8 C.F.R. § 1208.13(b)(1)(i); *Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008). He argues that the Immigration Judge should have granted him "humanitarian asylum" in the absence of a well-founded fear because he established there is a reasonable possibility that he may suffer other serious harm upon his removal to Poland (Resp't Br. at 24-34). See 8 C.F.R. § 1208.13(b)(iii)(B); *Matter of L-S-*, 25 I&N Dec. 705, 713-14 (BIA 2012).

Under the facts and circumstances presented, we agree with the respondent that there is a reasonable possibility he may suffer other serious harm upon removal to [redacted] (Resp't Br. at 27-34). See *Matter of L-S-*, *supra*, at 714. The record reflects the respondent faces a reasonable possibility of debilitation, homelessness, and victimization in [redacted]. He has severe mental health issues and is "unlikely to receive the psychological intervention he needs to maintain stability" in that country (I.J. at 6; Exh. 63, at 16). He has a history of homelessness and unemployment in the United States, and his risk of homelessness in [redacted] would be compounded by the fact that he lacks family support, has not been to [redacted] since coming to the United States at the age of 2, has a child's-level grasp of the [redacted] language and no written proficiency, and lacks any remaining ties to that country (I.J. at 5, 16; Exh. 63, at 43). Further, his strong subjective fear of returning would add to his distress, the expert stated he would be at "extremely high risk for victimization," and the country conditions evidence indicates he may face abuse if imprisoned or inadequate care as a person with disabilities in [redacted] (Exh. 63, at 16, 112-14; Exh. 64, at 1, 3-4; Tr. at 96-97).

Thus, on this record, we conclude the respondent has demonstrated there is a reasonable possibility he may suffer other serious harm upon his removal to [redacted], and has demonstrated eligibility for asylum in the absence of well-founded fear of persecution. While we in no way condone the respondent's criminal history, which includes convictions for shoplifting and possession of drug paraphernalia, in light of the reasonable possibility the respondent may suffer

⁵ Because it bears on the respondent's eligibility for asylum, we separately note that the parties and the Immigration Judge appear to agree that the respondent's paraphernalia conviction does not constitute a particularly serious crime for purposes of asylum (Resp't Br. at 25 n.4).

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other serious harm upon his removal, we also conclude the respondent warrants humanitarian asylum in discretion. Accordingly, the appeal will be dismissed in part and sustained in part, and the record will be remanded the record to permit the DHS to conduct the necessary background investigation.⁶ The following orders will be entered.

ORDER: The appeal is dismissed in part and sustained in part.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).


FOR THE BOARD

Board Member Anne J. Greer respectfully dissents and would not find the respondent to merit humanitarian asylum in the exercise of discretion.

⁶ Although we need not decide whether administrative closure was appropriate in this case, we are troubled by the Immigration Judge's apparent hostility to the respondent's discussion of administrative closure as a safeguard, especially because we directed her to consider the possibility of administrative closure in our October 31, 2014, decision (Board decision dated Oct. 31, 2014, at 1; I.J. at 21-22; Resp't Br. at 34-39; Tr. at 22-26, 53-57, 64, 75-76).

#35145



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

Bradley, Elizabeth J.
Florence Immigrant and Refugee Rights
Project
738 N. 5th Ave., Suite 103
Tucson, AZ 85705

DHS/ICE Office of Chief Counsel - EAZ
Eloy Detention Ctr, 1705 E. Hanna Rd
Eloy, AZ 85131

Name: V. M. C. A 1-938

Date of this notice: 7/31/2019

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:
Liebowitz, Ellen C
Mullane, Hugh G.
Malphrus, Garry D.

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Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A -938 – Eloy, AZ

Date:

JUL 31 2019

In re: O : V. ' M'

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elizabeth J. Bradley, Esquire

ON BEHALF OF DHS: Elly Laff
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of , has appealed an Immigration Judge's June 6, 2018, decision, denying his applications for withholding of removal under section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A), and deferral of removal under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c), 1208.18. The Department of Homeland Security ("DHS") filed a Motion for Summary Affirmance. On May 2, 2019, a three-member panel of the Board heard oral argument in this matter. Both parties submitted supplemental briefs in advance of the oral argument. The record will be remanded.¹

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

In 2007, the respondent was convicted of the offense of "Menacing Felony–Real/Simulated Weapon," in violation of section 18-3-206 of the Colorado Revised Statutes, for which he was sentenced to 3 years' imprisonment (Exh. 15, Tab A, at 5; Exh. 2c, tab R, at 90; IJ at 17). Based

¹ The record reflects that the respondent suffers from mental illness (IJ at 2; Exh. 2a). The DHS issued a "Notice of *Franco-Gonzalez* Class Membership" (Exh. 2a), entitling the respondent to certain procedural protections, as set forth in *Franco-Gonzalez v. Holder*, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) ("*Franco* Implementation Order"), the order further implementing the permanent injunction in *Franco-Gonzalez v. Holder*, 2013 WL 8115423 (C.D. Cal. 2013). The Immigration Judge properly followed the procedures set forth in the *Franco* Implementation Order in assessing the respondent's mental competency (IJ at 2). The Immigration Judge concluded that the respondent is not mentally competent to participate in immigration proceedings without safeguards. She insured that sufficient safeguards were implemented, including the appointment of a qualified representative, in compliance with the injunctions issued in the *Franco-Gonzalez* class action lawsuit (Exh. 2; Tr. at 18-19). The respondent, who continues to be represented by counsel, does not contest this issue on appeal.

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on an examination of the nature of the crime, the type of sentence imposed, and the circumstances and underlying facts of the conviction, the Immigration Judge found that this conviction was for a “particularly serious crime,” rendering the respondent statutorily ineligible for withholding of removal (IJ at 17-19). Section 241(b)(3)(B)(ii) of the Act; *see also Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *see also Delgado v. Holder*, 648 F.3d 1095, 1107 (9th Cir. 2011) (“[A] crime is particularly serious if the nature of the conviction, the underlying facts and circumstances and the sentence imposed justify the presumption that the convicted immigrant is a danger to the community.”).

As noted by the Immigration Judge, the respondent conceded, through counsel, before the Immigration Judge that the respondent is not eligible for asylum or withholding of removal (IJ at 16 n.8; Respondent’s Closing Arguments, May 7, 2018, at 21-22; Respondent’s Reply to DHS’s Closing Argument, May 29, 2018, at 13). To the extent that the respondent contests the denial of withholding of removal on appeal (Respondent’s Br. at 55-61), that issue is waived. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n. 1 (BIA 2007) (issues not raised below are waived on appeal); *Matter of Jimenez-Santillano*, 21 I&N Dec. 567, 570 n.2 (BIA 1996) (recognizing that we need not consider an issue raised for the first time on appeal).

The Immigration Judge also found the respondent to be not credible. Under the REAL ID Act, an adverse credibility finding must be based on consideration of the totality of the circumstances and all relevant factors, including the demeanor, candor, or responsiveness of the applicant, the inherent plausibility of the applicant’s account, the consistency between the applicant’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record, and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim. Sections 208(b)(1)(B)(iii), 240(c)(4)(C) and 241(b)(3)(C) of the Act; *see also Matter of A-B-*, 27 I&N Dec. 316, 342 (2018).

The adverse credibility finding cannot be upheld as currently constituted, and the record will be remanded for further fact finding and analysis regarding the respondent’s credibility.² In this regard, the Immigration Judge noted that the respondent failed to mention any fear of harm when apprehended by United States immigration agents in July 2014 and June 2015, despite allegedly experiencing years of persecution and torture in Mexico (IJ at 13-14). The Immigration Judge found it significant that the respondent instead chose to voluntarily return to Mexico on both occasions instead of seeking asylum in the United States. *Id.*; *see Loho v. Mukasey*, 531 F.3d 1016,

² The dissent criticizes us for remanding on this basis. However, the dissent does not opine whether the adverse credibility finding is sufficient based on the current record under the law of the Ninth Circuit. It also does not address all of the reasons we provide for determining that the adverse credibility finding cannot be upheld as currently constituted, including the Immigration Judge’s failure to confront the respondent with certain inconsistencies as mandated by the law of this circuit. Our decision to remand comports with our limited ability to find facts on appeal and provides the opportunity for the Immigration Judge, as the finder of fact, to reassess credibility in the first instance in light of aspects of her decision which do not comport with Ninth Circuit law or otherwise warrant further consideration.

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1018 (9th Cir. 2008) (holding that Loho's two voluntary returns to her home country "inherently undermines her testimony that she experienced past suffering or that she feared returning home" and thus supported an adverse credibility finding).

However, the respondent did not voluntarily return to ; he was removed from the United States through the expedited removal process. Moreover, there is no documentary evidence establishing that he was asked about any fear of harm in Mexico on those two occasions (Respondent's Br. at 15). The July 30, 2014, Record of Deportable Alien does not mention whether the respondent was asked about his fear of returning to , or whether he was given the opportunity to seek asylum (Exh. 18, Tab G, at 102-03), and the respondent expressly denies that he was asked about his fear of harm in (Tr. at 101). Furthermore, there is no record pertaining to the respondent's June 18, 2015 expedited removal. Although the August 2015 Record of Deportable Alien indicates that the respondent had been previously removed pursuant to expedited removal on June 18, 2015, there is no indication as to whether he was questioned about his fear of harm in on that occasion (Exh. 2c, Tab T, at 102).

The Immigration Judge also cites two apparent inconsistencies in the record regarding the number of times that the respondent transported drugs for the cartel, and the number of arrests the respondent experienced in (IJ at 14). On October 14, 2015, the respondent testified that he transported drugs for the cartel "just once" (Tr. at 7; IJ at 14), yet the respondent later testified that he was forced to transport drugs on numerous occasions over a period of several months (IJ at 14-15; Tr. at 93, 99, 211, 218). However, the earlier statements about drug transportation were made before a qualified representative was appointed pursuant to *Franco-Gonzalez v. Holder*, 2013 WL 8115423 (Exh. 2; Tr. at 18-19), and this was not expressly considered by the Immigration Judge. These two inconsistencies would not alone be adequate to support an adverse credibility finding in this circuit.

Additionally, the Immigration Judge noted that the respondent stated in his August 13, 2015, Record of Sworn Statement that he had never been arrested in any other country, which conflicts with his asylum application and testimony that he was arrested and held in pre-trial detention in for 4 years (IJ at 14; Exh. 2c, Tab N, at 66; Exh. 17 at 5; Tr. at 61-75). The Immigration Judge also noted that in the August 13, 2015, Record of Sworn Statement, the respondent only mentioned the harm he suffered and fears from the mafia and drug cartels and did not mention harm from the authorities (IJ at 14). However, the Immigration Judge did not give the respondent an opportunity to explain these discrepancies and omissions in accordance with Ninth Circuit law. See *Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010) ("In order to ensure a fair hearing, the immigration judge must not only identify specific inconsistencies, but also address in a reasoned manner the explanations that the alien offers for these perceived inconsistencies."); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1092 (9th Cir. 2009) (Immigration Judges must offer the petitioner an opportunity to explain the inconsistencies upon which the adverse credibility determination is based). She should provide the respondent with the opportunity to do so on remand.

Moreover, the Board recently held that when deciding whether to consider a border interview in making a credibility determination, an Immigration Judge should assess the accuracy and reliability of the interview based on the totality of the circumstances, rather than relying on any

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one factor. *Matter of J-C-H-F-*, 27 I&N Dec. 211 (BIA 2018). On remand, the Immigration Judge should accordingly assess the reliability of the interview, including the circumstances under which the respondent's specific statements were made. *Id.* at 214; *see also* IJ at 8-9; Tr. at 100-19; Exh. 18, Tab E.

On remand, the Immigration Judge should consider the totality of the record in assessing the respondent's credibility. *Shrestha v. Holder*, 590 F.3d at 1040. This includes any previous statements regarding his fear of returning to , as well as the totality of his testimony before the Immigration Judge and any corroborative evidence.

The Immigration Judge should also reconsider her alternative decision denying the respondent's application for protection under the Convention Against Torture. The Immigration Judge concluded that even if the respondent was credible, he has not shown that it is more likely than not that he would be tortured at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity in Mexico (IJ at 19-28). 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(1); *see also Aguilar-Ramos v. Holder*, 594 F.3d 701, 705-06 (9th Cir. 2010); *Arteaga v. Mukasey*, 511 F.3d 940, 948-49 (9th Cir. 2007).

In 2009, the respondent was arrested by police in for suspicion of homicide, and he was held in pre-trial detention in a prison with cartel members for 4 years (IJ at 20; Exh. 18, Tab I).³ During his detention, he and other prisoners were stripped naked, forced to lay down on the cold ground, and were beaten with spring-loaded metal batons for 7 hours by federal police officers in an effort to obtain information regarding the location of firearms at the prison (IJ at 20; Tr. at 69-72, 241). The respondent also testified that he was beaten by federal police and military police on other occasions at the prison in an effort to make him confess that he worked for a cartel (IJ at 6; Tr. at 71-72).

For an act to constitute "torture" it must be "specifically intended to inflict severe physical or mental pain or suffering." 8 C.F.R. § 1208.18(a)(5); *Matter of J-R-G-P-*, 27 I&N Dec. 482, 484 (BIA 2018). The Immigration Judge found that the police in the prison were acting pursuant to a lawful sanction, namely to obtain information, and that the beatings therefore did not constitute torture (IJ at 20-21). 8 C.F.R. § 1208.18(a)(3) ("Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."). However, although the respondent's prolonged pre-trial detention may have been lawful, the prison and military officials who beat him and his fellow inmates for 7 hours and who beat the respondent on other occasions to elicit information and a confession as to cartel membership, clearly had a specific intent to inflict torture for an illicit purpose. Although "[t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions," 8 C.F.R. § 1208.18(a)(3), we, as does the DHS on appeal, agree with the respondent that the mistreatment the respondent suffered in prison was not inflicted pursuant to lawful sanctions (DHS Supplemental Br. at 14 n.9). *See Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1031 (9th Cir. 2014) (where the record reflects "that 'severe physical mistreatment' rising to the level of torture 'is a common occurrence' in Vietnamese custody, the pain or suffering that Vietnam is likely to inflict on Nguyen would not constitute a lawful

³ A criminal court eventually determined that there was insufficient evidence to convict (IJ at 6).

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sanction”). As we explained in *Matter of J-E-*, 23 I&N Dec. 291, 298 (BIA 2002), harm inflicted for an illicit purpose, such as “*obtaining information or a confession*; punishment for a victim’s or another’s act; *intimidating or coercing a victim or another*; or any discriminatory purpose,” does not constitute harm arising from lawful sanctions (emphasis added).

To the extent that the Immigration Judge found that the harm experienced by the respondent at the prison did not rise to the level of torture given the lack of evidence that he sought medical treatment (IJ at 20), the respondent did testify that his back is scarred from the beatings (Tr. at 241). Moreover, the Ninth Circuit has held that the fact that a respondent did not require medical treatment is not necessarily fatal to a claim of persecution or torture. *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (“The fact that Petitioner suffered no serious bodily injury and required no medical attention makes the question [of persecution] closer. But it would be a strange rule if the absence or presence of a broken arm were the dispositive fact.”); *see also Quan v. Gonzales*, 428 F.3d 883, 888 (9th Cir. 2005) (holding that using an electrically-charged baton on a prisoner may constitute persecution, even when there are no long-term effects and the prisoner does not seek medical attention).

The Immigration Judge also found a lack of sufficient state action or acquiescence in the harm inflicted at the prison, given that the national law prohibits arbitrary arrest and allows legal mechanisms to challenge one’s detention (IJ at 22). However, the Ninth Circuit has held that uniformed, on-duty police officers and military officers are “prototypical state actor[s]” and constitute “public officials” for purposes of the Convention Against Torture. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015). If a perpetrator is a public official, there is no need to address acquiescence. Therefore, the individuals who inflicted the harm at the prison were state actors.

The Immigration Judge also found that the harm suffered by the respondent at the hands of municipal police officers in 2014 and 2015, which included beating the respondent, detaining him, burning him with a car lighter, pointing guns at his head, and leaving him for dead in an abandoned warehouse (IJ at 8-9, 26; Tr. at 107-08, 115-17, 245-47), did not constitute torture (IJ at 26). The Immigration Judge further found that even if the respondent had established that these officers had tortured, or more likely than not would torture, the respondent, he failed to establish that the government would acquiesce,⁴ given the measures taken by the government to combat corruption, improve security, and oppose drug cartels (IJ at 27-28). However, as recognized by the DHS in its supplemental brief, the Ninth Circuit has expressly rejected this argument (DHS Supplemental Br. at 22 n.13). In *Madrigal v. Holder*, 716 F.3d 499, 510 (9th Cir. 2013), the Ninth Circuit held that “if public officials at the state and local level in Mexico would acquiesce in any torture [petitioner] is likely to suffer, this satisfies [the Convention Against Torture’s] requirement that a public official acquiesce in the torture, even if the federal government

⁴ Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. *Barajas-Romero v. Lynch*, 846 F.3d 351, 361 (9th Cir. 2017); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1059 (9th Cir. 2006).

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in Mexico would not similarly acquiesce.” The Ninth Circuit reaffirmed this holding in *Barajas-Romero v. Lynch*, 846 F.3d at 362, holding that there is no “rogue official” exception under the Convention Against Torture, and that protection may be based on the actions of off-duty police officers, even where they were not acting in an official capacity, so long as they carried out the acts or knowingly acquiesced in the acts.

Turning to the respondent’s fear of torture by the cartel, the Immigration Judge found that the respondent did not establish a clear probability that he will be tortured by cartel members with the acquiescence of a government official (IJ at 22-26). The respondent testified that he was beaten, burned, and subjected to prolonged detention and forced drug trafficking by the Cartel in 2014 and 2015 in (IJ at 13; Exh. 17 at 5; IJ at 13; Tr. at 81-99). Specifically, the armed cartel members kept the respondent and a group of other men imprisoned at gunpoint, and they beat or murdered those who resisted (IJ at 7; Tr. at 87-91, 93-96). The respondent testified that he was beaten, and that on one occasion the cartel members poured gasoline on his foot and set it on fire, causing permanent scarring (IJ at 7; Tr. at 91-93, 96; Exh. 18, Tab D, at 84-85). After 3 months, the respondent was able to escape (IJ at 8; Tr. at 96). However, the cartel located him, beat him again, and took him back to the compound (IJ at 8; Tr. at 98). He was forced to resume transporting drugs for them, under threat of death to himself and his family (IJ at 8; Tr. at 98-99). The respondent was able to escape again when he got separated from his group while transporting drugs. He turned himself in to border patrol officials and provided them with the drug cartel’s transportation routes (Tr. at 99-100).

The Immigration Judge should further consider her finding that the harm suffered by the respondent at the hands of the cartel does not rise to level of torture (IJ at 23). *See Matter of J-E-*, 23 I&N Dec. at 302 (noting that “deliberate vicious acts such as burning with cigarettes ... may constitute acts of torture”). The fact that the respondent initially agreed to transport the drugs in exchange for passage to the United States does not negate the fact that if credible, he was later forced into captivity and forced to continue trafficking drugs (IJ at 22-23). Nor does the fact that the respondent was allowed on occasion to leave the compound to go to a nearby store negate the fact that he was held against his will under threat of death, beaten repeatedly, and set on fire by the cartel members. *Id.*

The Immigration Judge should also reassess, upon consideration of the totality of the evidence, her finding that the respondent did not establish a clear probability that the cartel would torture him if he returned to . *See Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012) (what is likely to happen to an alien upon removal is a factual question for the Immigration Judge). In particular, although the Immigration Judge acknowledged the widespread presence of the cartel (IJ at 23; Exh. 12, Tabs A-U), she found that the respondent could safely relocate within , given that “is a large country,” and the cartel only harmed him in (IJ at 23). 8 C.F.R. § 1208.16(c)(2) (in deciding whether an applicant for CAT has satisfied his or her burden of proof, all relevant evidence, including but not limited to the possibility of relocation within the country of removal, must be considered); *Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015).

However, Dr. Jeremy Slack, whom the Immigration Judge found to be “a credible expert witness” regarding “conflict in as it relates to drug trafficking” (IJ at 16), concluded that the respondent faces a great risk of torture because he will be easily identified by cartels due to his

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tattoos, and because he escaped and attempted to report the cartel to the police (Tr. at 149-50). In Dr. Slack's opinion, there is almost a "100 percent" certainty that the cartel would find out about his reporting attempts (Tr. at 150), and "more likely than not" that the respondent would be tortured before he could leave to relocate (Tr. at 151). He explained that the cartels have a network of informants across the country who report on individuals entering their territory, especially those with tattoos (Tr. at 152). Moreover, he stated that "there is organized crime in practically every part of [redacted]" (Tr. at 179), and he found it "extremely likely" that even if the respondent is able to move to another state, word will get back to the [redacted] cartel of his presence (Tr. at 152), or rival cartels in those areas would likely interrogate and torture the respondent to find out which cartel he works for (Tr. at 153). In other words, according to Dr. Slack, the respondent would not be safe anywhere in [redacted], because of his past interactions with the cartel and his physical appearance (Tr. at 77).

The Immigration Judge gave little weight to Dr. Slack's opinion, noting that it was based primarily on "an ethnographic survey of 1200 participants ... based entirely on uncorroborated stories told by people Dr. Slack encountered" (IJ at 23; Exh. 18, Tab A; Tr. at 131-33). However, an Immigration Judge must "state[] reasons in the record why the [expert] testimony was insufficient to establish the probability of torture necessary to grant CAT relief." *Cole v. Holder*, 659 F.3d 762, 772 (9th Cir. 2011). Dr. Slack testified that "ethnography is considered the gold standard in my field for studying things like drug cartel activities, violence, and drug trafficking," explaining that "spending time in very hard-to-access areas with very hard-to-access populations gives much more information that one could get with government statistics or survey data" (Tr. at 133). Furthermore, Dr. Slack has published 19 scholarly articles and two books on the topic, and his credentials were not questioned at the hearing (Tr. at 133-34; Exh. 18, Tab A, at 2-3; 15-25). Notably, the DHS did not challenge the qualifications of the expert below or on appeal, nor did the DHS argue below or on appeal that the methodology employed by the expert in his studies was flawed or constituted an inadequate basis to support his opinion. Because the Immigration Judge "failed to give reasoned consideration" to the expert's testimony or adequately explain her basis for disregarding the expert's opinion, we will remand the record for further consideration of the expert's testimony. *Id.* at 773.

In assessing the likelihood that the cartel would find the respondent and torture him upon his return to [redacted], the Immigration Judge should also consider that after the respondent previously escaped from the cartel, the cartel located him in [redacted] a city 200 miles away from the cartel's compound in [redacted] (IJ at 8; Tr. at 98, 217). They beat him, kidnapped him, and forced him back into drug trafficking. *See Barajas-Romero v. Lynch*, 846 F.3d at 364 (although a petitioner bears the ultimate burden to prove he would be tortured if returned to his country, the petitioner does not bear the burden to show that it is impossible to avoid torture by internally relocating within a country).

In addition, the Immigration Judge should revisit her determination that the respondent had not established that the cartels acted or would act at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity in [redacted] (IJ at 24-

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26). 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(1).⁵ State involvement or acquiescence in torture, within meaning of the Convention Against Torture, may be established where police officials were corrupt, and worked on behalf of criminals or gangsters. *Barajas-Romero v. Lynch*, 846 F.3d at 351. While [redacted] is making efforts to address corruption and cartel violence, the Department of State Country Report in the record states that “[i]mpunity and corruption in the law enforcement and justice system remained serious problems” (Exh. 11, Tab B, at 185). The report goes on to state that “[t]here were numerous reports the government or its agents committed arbitrary or unlawful killings, often with impunity. Organized criminal groups also were implicated in numerous killings, often acting with impunity and at times in league with corrupt state, local, and security officials.” *Id.* Furthermore, Dr. Slack testified that the cartels have a close relationship with the government (Tr. at 137-38), and the Immigration Judge acknowledged that the country condition materials in the record attribute the [redacted] Cartel’s infiltration throughout [redacted] as a result of its strong ties to the national government (IJ at 25; Exh. 12, Tab A, at 17; Exh. 12, Tab B, at 71; Exh. 13, Tab Q, at 228-30). See *Madrigal v. Holder*, 716 F.3d at 510 (holding that the petitioner had a plausible CAT claim based on the [redacted] government’s inability to control the Los Zetas drug cartel where “[v]oluminous evidence” showed “that corruption of public officials in Mexico remains a problem, particularly at the state and local levels of government, with police officers and prison guards frequently working directly on behalf of drug cartels”).

Moreover, if credible, the respondent’s own encounters with the [redacted] authorities support a finding of governmental acquiescence. The record reflects that although the respondent made multiple attempts to report the abuse he suffered at the hands of the cartel, the authorities refused to protect him or investigate his claims. In fact, as discussed above, on some occasions the authorities harmed the respondent. For example, the respondent sought help at the city hall and at the local police station in [redacted], where the authorities mocked him and refused to help him (Tr. at 103, 243). The military guards at the [redacted] checkpoint told him he needed to leave the area and refused to offer him any protection (Tr. at 104-05, 243-44). The police in Santa Ana laughed at him, detained him overnight, then drove him outside the city limits and told him to go away (Tr. at 106-07, 244). When he sought help from the police in [redacted], the police punched him, burned him with him with a cigarette lighter, and put him in a truck, which he was able to jump out of to escape (Tr. at 107-08, 244). Finally, when he told the police in [redacted] of his fear of harm from the cartel, they pointed guns at him, told him to lay down in their truck, took him to an abandoned warehouse where they left him for dead (IJ at 26; Tr. at 115, 117, 245). See *Barajas-Romero v. Lynch*, 846 F.3d at 361 (acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity); *Garcia-Milian v. Holder*, 755 F.3d at 1034 (“Evidence that the police were aware of a particular crime, but failed to bring the perpetrators to justice, is not in itself sufficient to establish acquiescence in the crime. Instead, there must be evidence that the police are unable or unwilling to oppose the crime.”).

⁵ We note that, as acknowledged by the DHS, the Immigration Judge erred in a portion of her analysis by invoking the “unable and unwilling to control” standard which does not apply to claims under the Convention Against Torture (IJ at 25-26; DHS Supplemental Br. at 20, n.12).

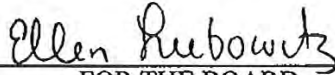
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The dissent, and to a lesser extent the DHS, attempt to argue that it is highly significant that the respondent failed to show that any public official had knowledge that the cartel members were harming the respondent “prior to any harm that he might have experienced” (DHS Supplemental Br. at 16-17). However, the controlling federal circuit in this case has repeatedly rejected this argument. *See, e.g., Madrigal v. Holder*, 716 F.3d at 509 (“Although the public official must have ‘awareness’ of the torturous activity, he need not have actual knowledge of the specific incident of torture.”); *Cordoba v. Holder*, 726 F.3d 1106, 1117 (9th Cir. 2013) (same); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006) (finding that the Immigration Judge “imposed a higher burden of proof than is permitted under CAT” by resting his decision “on the unwarranted premise that the only way a public official can have such awareness, and thus that the duty to intervene can arise, is if the applicant reports the alleged torture to him.”).⁶

In light of the foregoing, the record will be remanded for further consideration of the respondent’s credibility and eligibility for protection under the Convention Against Torture. The Immigration Judge should consider the aggregate risk of torture to the respondent from the various sources of harm he fears. *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1308 (9th Cir. 2015) (holding that Convention Against Torture claims “must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible [Convention Against Torture] claims.”); *Cole v. Holder*, 659 F.3d at 775 (stating that the consideration of the risk of torture must “tak[e] into account all possible sources of torture”).⁷ Furthermore, in adjudicating the respondent’s claim that he will be tortured on account of his mental illness, the Immigration Judge should consider our recent case in *Matter of J-R-G-P-*, 27 I&N Dec. 482, which involved a similar claim of an alien asserting that he would be arrested and either imprisoned or committed to a mental health facility in , where law enforcement officials or mental health workers would have the specific intent to torture him. In remanding, we express no opinion on the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.


FOR THE BOARD

⁶ We note that the dissent states “the majority ignores the definition of acquiescence in the regulations.” However, we are bound to follow the law of the Ninth Circuit in this case, and the dissent does not address the import of the cited cases and makes no effort to distinguish these binding cases.

⁷ Insofar as the dissent asserts that the respondent has presented only two separate and distinct claims, the case law of the Ninth Circuit specifically instructs us not to treat a Convention Against Torture claim in this manner, but rather take into account all possible sources of torture. *See e.g., Cole v. Holder*, 659 F.3d at 775. The dissent does not dispute that if credible, the respondent was tortured by authorities in the past and by the cartel, as well being mistreated by police officers when he tried to report the cartel and seek police assistance.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: AC -938 - Eloy, AZ

Date:

In re: O - V, JMC

JUL 3 1 2020

DISSENTING OPINION: Hugh G. Mullane

Respondent has two separate and distinct claims for protection under the Convention Against Torture. The first relates to mistreatment he suffered in the / prison during his pre-trial detention. The second relates to mistreatment he suffered at the hands of the cartel. Leaving aside, for the moment, the Immigration Judge's credibility finding, the central question is whether the respondent has shown "that it is more likely than not that he . . . would be tortured if removed" to . 8 C.F.R. § 1208.16(c)(2). The majority remands for the Immigration Judge to reconsider the case, but they do so without adequately considering dispositive issues.

The problem with the respondent's claim with respect to the mistreatment he suffered in the prison is the unlikelihood of its recurrence. According to the Immigration Judge, the respondent was detained at because he was charged with homicide (I.J. at 5). While the majority disagrees with the Immigration Judge about the severity of the harm and whether it was pursuant to lawful sanction, the majority does not dispute the Immigration Judge's ultimate finding that he will not be detained and tortured by law enforcement (I.J. at 21). The evidence of past torture is relevant (and important) to the question of future torture but there is no presumption of future torture. See 8 C.F.R. § 1208.16(c)(3)(i); *Maldonado v. Lynch*, 786 F.3d 1155, 1167 (9th Cir. 2015). Moreover, the Immigration Judge's factual findings relating to why the respondent is not likely to re-experience the mistreatment he suffered in Aquiles Serdan are not clearly erroneous.

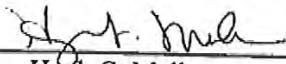
Future problems the respondent may experience with cartel is a different question. In order to prevail based on this claim, the respondent must show that the torture "is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). The question is whether a public official acquiesced to the mistreatment the cartel perpetrated against respondent. In analyzing this part of the respondent's claim, the majority ignores the definition of acquiescence in the regulations. The regulation says: "Acquiescence of a public official requires that the public official, *prior to the activity constituting torture*, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7) (emphasis added). The majority effectively reads out the "prior to activity constituting torture" requirement and relies on actions taken (and not taken) after the respondent escaped from the cartel. See Maj. Op. at 8. This is contrary to the plain language of the regulations. See *Garcia-Milan v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014) ("Evidence that police were aware of a particular crime, but failed to bring the perpetrators to justice, is not in itself sufficient to establish acquiescence in the crime."); *Reyes-Sanchez v. U.S. Att'y Gen.*, 369 F.3d 1239, 1243 (9th Cir. 2004) ("Indeed, were we to follow this reasoning, a person could obtain CAT relief merely because he was attacked by a gang of neighborhood thugs whom the police were unable to apprehend."). The majority cites no evidence that government officials knew about the cartel's activities at the ranch and breached their legal responsibility to stop it. Instead,

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the majority points to the inadequacy of the assistance the local police provided to the respondent after he escaped the cartel.

Turning to the Immigration Judge's adverse credibility finding, the majority indicates that it "cannot be upheld as currently constituted" (Maj. Op. at 2), but never concludes that the finding is clearly erroneous. An Immigration Judge's credibility finding is reviewed for clear error. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of A-B-*, 27 I&N Dec. 318, 345 (A.G. 2018) ("Board failed to give adequate deference to the credibility determinations and improperly substituted its own assessment of the evidence."). The majority faults the Immigration Judge for describing the respondent's removal pursuant to expedited removal orders in 2014 and 2015, as "voluntary returns" where the Immigration Judge stated that they were removals (I.J. at 13) and merely used the phrase "voluntary returns" to indicate that respondent did not request asylum. The majority ignores the Immigration Judge's reliance on the multiple incident reports relating to the impermissible possession of tattoo equipment that undermine his claim that he will be a target in because of his tattoos (I.J. at 14). Furthermore, the respondent's inconsistent statement about the number of times he transported marijuana are deemed unreliable because one of the statements was made before a qualified representative was appointed, even though the statement was made to a different Immigration Judge, no case law prohibits such blanket exclusion, and the Immigration Judge considered the circumstances of the statements. The majority has strayed from the deferential standard of review we are obligated to afford an Immigration Judge.

For all these reasons, I would affirm the Immigration Judge.



Hugh G. Mullane

EXHIBIT B

DECLARATION

I, Amy J. Cohen, M.D., make this declaration based on my personal knowledge and declare the the following is true and correct to the best of my knowledge:

1. My name is Dr. Amy J. Cohen. I am a physician licensed to practice medicine in the state of California. I have been in active practice for over 30 years. I graduated from the Perelman University of Pennsylvania School of Medicine with honors and completed a medical/pediatric internship, psychiatry residency and child psychiatry fellowship at Harvard Medical School programs. I am considered a national expert on the trauma of vulnerable populations of children, especially those seeking asylum, separated from families and with experience in government detention facilities, including ORR shelters. In this role, I have been called upon to speak before the United States Senate as well as those the United States House of Representatives. I have published on this subject and lecture, teach and supervise others who serve this population.

2. I have served for nearly 2 years as a mental health and child welfare consultant to senior Flores Settlement counsel. In that role I have been asked to write this declaration in response to the “ORR Field Guidance #4, COVID-19 Discharge Guidance” document released today, April 6, 2020.

3. Regarding the release of children overall from Office of Refugee Resettlement (“ORR”) facilities, recent data reveals that, despite the reduction in the absolute population of children in ORR custody, protracted lengths of stay continue to be problematic for many children. On a granular level, I have had an opportunity to work with over 50 families where release has been capriciously delayed, often for months. In these cases, arbitrary factors were cited and an escalating series of demands made which did not in any way bear on the safety and security of the children involved. Examples of such demands have included: parents required to have a separate individual room for the detained child (forbidding them to share a room with same-gendered siblings),

parents required to obtain the summer school transcripts of a sibling, parents required to show that they have not only enrolled in but are attending English classes, parents required to show that they have over \$4000 in the bank.

4. Delays in the release of children are demonstrably traumatic for them not only because of ongoing separation from family but also because institutionalization in locked facilities itself is experienced as traumatic and counter to the emotional and developmental needs of children of all ages.

5. The current coronavirus crisis exacerbates this trauma for all children in detention. This is a frightening time with a worldwide crisis with escalating numbers of deaths from a deadly disease. Children in ORR custody are aware of this crisis. Those of us who care for children are seeing a marked increase in anxiety and regression even in children in loving family homes. There is no doubt that children kept away from the protection and nurturance of loving family are experiencing significantly greater symptoms of anxiety and distress than are their home-bound counterparts.

6. For children in government detention facilities the distress and psychological deterioration which is well documented over separation from family and community is likely to be profoundly compounded by the current crisis, while the physiological manifestations of their distress may place them at greater risk of contracting a more severe form of the COVID illness. These children naturally long for a loving, nurturing home in which to shelter through such a crisis. To deprive them of such a home at a time such as this is to significantly increase the stress and trauma to which they are already exposed. Further, the measures to isolate them from each other - restriction of their activity, imposition of social distancing, removal from the social activities that are their only offset to institutional life - create a sense of aloneness which only increases their fear and despair. Should these children become ill or their friends become ill their need for a nurturing familial presence escalates and becomes a necessary element in their recovery.

7. Many of the proposed instructions issued by ORR make no sense medically and threaten to psychologically further damage those children under government custody.

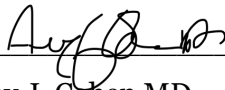
8. For example, the government proposes to “postpone release of UAC to sponsor if an ORR care provider, facility...or individual in a foster home...experience[s] one or more confirmed cases of active COVID-19 infection in either children or staff;”. This is both illogical and dangerous. If a facility with a large number of children has had the potential exposure of some of those children to a single individual with COVID-19, by what logic would one continue to group those children together? Indeed, this would increase the exposure of all. To illustrate the point, if only one or two of those children have been closely exposed to the infected individual, when grouped with other children these one or two are likely to communicate the virus to all. A far better plan would be to hastily discharge these children to individual homes where they may be quarantined for 14 days.

9. It is similarly illogical to refuse to release a child to a household in which an active COVID-19 infection is present. ORR is not suggesting that an active COVID-19 infection within an ORR facility would mandate the removal of all children from that facility (which make more sense from a public and psychological health perspective). Within families and homes the capacity for true quarantine of infected family members is far more likely than it is in institutional facilities. Further, the supervision of children to insure isolation from infected members - as well as the necessity for the other sanitizing measures such as regular hand washing - is far more likely to be carried out by family than it is by the limited and rotating staff at shelters.

10. In the section labeled “Post Release Reporting”, ORR suggests, reasonably, that Case Managers follow up to receive updates on the conditions of released children. However, there is no corresponding directive regarding the necessity to inform sponsors of released children when either ORR staff, foster family members, or other children have demonstrated active infection. Such a directive must be part of any ORR protocol.

11. Children under threat experience an increase in neurochemicals which impact their capacity to ward off all manner of illness, including infection. To protect all children - as well as the communities in which these group facilities reside - every child should be released as soon as possible to the loving home of sponsors who can supervise, protect, nurture and care for them.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, based on my personal knowledge. Executed in Los Angeles this 6th day of April 2020.



Amy J. Cohen MD

EXHIBIT C

DECLARATION OF CLAUDIA R. CUBAS

I, Claudia R. Cubas, declare as follows:

1. This declaration is based on my personal knowledge. If called to testify in this case, I would testify competently about the following facts.

2. My name is Claudia R. Cubas. I am an attorney licensed to practice in the State of Maryland and the U.S. District Court of Maryland. This declaration describes my experiences and observations working with unaccompanied migrant youth detained at the Shenandoah Valley Juvenile Center, Youth for Tomorrow, which are both located in Virginia, and the Bethany Christian's Services Center, which is located in Maryland.

Experience Serving Youth in ORR Custody

3. Since 2011, I have been an attorney at Capital Area Immigrants' Rights ("CAIR") Coalition, a legal service organization that provides legal services to adults detained in the custody of Immigration and Customs Enforcement ("ICE") and children detained in the custody of the Office of Refugee Resettlement ("ORR"). While originally our services mainly focused on providing services to immigrants in adult detention, for the last several years, we have seen an increase in the provision of services to immigrant youth detained in ORR.

4. Since 2010, CAIR Coalition has served unaccompanied children in the legal custody of the ORR, and who have been placed by ORR at various facilities in the states of Maryland. In Virginia, we serve immigrant youth detained at the Northern Virginia Juvenile Detention Center, which has since stopped housing immigrant youth, the Shenandoah Valley Juvenile Detention Center ("SVJC") the only secure facility housing immigrant youth in the nation, and Youth For Tomorrow ("YFT"). In Maryland, we serve immigrant youth detained at the Bethany Christian Service's Center ("BCC"). Both YFT and BCC operate shelter care and foster care programs within the ORR network of care

1 providers. In 2019, CAIR Coalition conducted intakes with over 1,000 immigrant youth
2 in ORR custody. Although the majority of these youth come from Mexico, Honduras,
3 Guatemala and El Salvador, youth placed at these facilities may come from all over the
4 world.

5 5. As the legal service provider for ORR facilities in Virginia and Maryland, our
6 attorneys maintain regular contact with the youth at the facilities and represent both
7 children who stay in detention because they have no identifiable sponsor and children
8 who reunify in the local communities in Maryland and Virginia. We provide ongoing
9 consultations and presentations concerning the legal rights of detained minors, as well as
10 provide direct legal representation to youth.

11
12 Delays in Reunification Due to Removal Orders

13 6. It is our understanding that each of our local facilities has a no-release policy for
14 children who are deemed to have final orders of removal *in absentia* or removal orders
15 obtained because of their participation in the Migrant Protection Protocol program
16 (“MPP”).

17 7. For example, I currently represent three minor siblings who entered in January of
18 2020, after they were ordered removed with their mother through the MPP program. The
19 children have entered the U.S. twice, once in 2019 with their mother when they were
20 returned to Mexico under MPP and again in January after they had been ordered removed
21 by an immigration judge, but this time they entered as unaccompanied minors. Customs
22 Border Protection (“CBP”) detained the children and then turned them over to ORR
23 custody. These children were detained for over two months at a shelter program in
24 Maryland less than 50 miles from where their father/step-father was living. Their
25 father/step-father completed all the requirements and requests made by the shelter staff
26 for the purposes of reunification within two weeks of the children being detained and
27 held in ORR custody, but ORR paused their reunification on the basis that it believed the
28 children had an outstanding final order of removal. Indeed, a week or so later, ICE

1 informed us they would remove the children within a week's time. In order to stop their
2 imminent removal and push for reunification we filed a complaint and a motion for a
3 temporary restraining order ("TRO") with the Federal District Court in Washington D.C.
4 Our TRO sought to stop these children's removal on the basis that the Department of
5 Homeland Security ("DHS") had yet to issue and file a Notice to Appear, and require
6 reunification of the minors with their father. Following a hearing on March 20, 2020 on
7 the TRO, the children were reunified with their father within less than a weeks' time. We
8 believe the only reason the children were reunified with their father was because we filed
9 a federal suit to push for their reunification.

10 8. I also recently have been consulting with two other organizations and pro bono
11 partners for two other children in ORR custody detained in El Paso, Texas and in
12 Harlingen, Texas. These children, who like my clients, also had previously been in MPP
13 proceedings and then reentered following a removal order by a judge under the MPP
14 program. In one of those cases, I mentored a pro bono attorney in filing a federal
15 complaint to stop the child's removal on the basis that the government had not issued
16 them a new NTA following their most recent entry. The child also has a known sponsor
17 living in North Carolina, but this reunification has been paused because ORR believed
18 they had a final order. The child remains in detention despite having a close-family
19 member who is willing to sponsor them out of ORR detention.

20 9. Our organization also represents a 17-year-old minor at a local shelter whose
21 reunification with a grandparent was stopped after completion of all required paperwork,
22 background checks, and a home study because the minor has an *in absentia* removal
23 order. The minor has been detained for approximately three months. We filed a motion to
24 reopen with the immigration court to reopen his case. When we filed this motion this
25 triggered an automatic stay of the minor's removal while the court adjudicates the motion
26 to reopen. The minor will turn 18 in April of this year and he is at risk of aging-out of
27 ORR custody into ICE detention due to ORR's failure to release him to an otherwise
28 suitable sponsor. We just learned ORR had paused reunification of this child to his

1 sponsor despite this Court's order issued several days ago on March 28, 2020, requiring
2 ORR to reunify children without delay given the COVID-19 virus. This case represents a
3 clear failure to comply with the Court's order to reunify children without delay.

4
5 Delays in Reunification Due to COVID-19

6 10. ORR has not provided clear guidance regarding the release of unaccompanied
7 immigrant children during this pandemic. I am not clear in what circumstances release
8 will be delayed due to COVID-19 related issues, or in what circumstances we can expect
9 the release process to proceed as per usual.

10 11. Despite a lack of clear guidance from ORR, we understand directly from sponsors
11 that they have experienced difficulties completing fingerprints, particularly in areas that
12 are heavily affected by COVID-19 such as California. Home studies have similarly been
13 postponed until further notice unless they can be completed virtually.

14 12. In the situations described above, the failure of ORR to provide accommodations
15 for requirements which cannot reasonably be completed due to COVID-19, such as
16 fingerprint cards, has delayed children's release for reasons that do not meaningfully
17 protect children's safety.

18
19 I declare under penalty of perjury that the foregoing is true and correct. Executed on this
20 7th day of April, 2020, in Washington D.C.

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Claudia R. Cubas

EXHIBIT D

DECLARATION OF ANTHONY ENRIQUEZ, ESQ.

I, Anthony Enriquez, declare as follows:

1. This declaration is based on my personal knowledge. If called to testify in this case, I would testify competently about the following facts.

2. My name is Anthony Enriquez, Esq. and I am an attorney licensed to practice in the State of New York. This declaration describes my experiences and observations working with unaccompanied migrant youth detained in facilities in New York State. These facilities include MercyFirst (including its Residential Treatment Center program), Lutheran Social Services, Rising Ground, Catholic Guardian Services, Children's Home of Kingston, Children's Home of Poughkeepsie, and Lincoln Hall.

Experience Serving Youth in ORR Custody

3. Since January of 2018, I have been the Director of the Unaccompanied Minors Program of Catholic Charities Community Services of the Archdiocese of New York, (CCCS-NY), a legal service provider that serves youth at MercyFirst, Lutheran Social Services, Rising Ground, Catholic Guardian Services, Children's Home of Kingston and Children's Home of Poughkeepsie, and Lincoln Hall. I supervise the work of a team of 40 attorneys, paralegals, and other staff who represent unaccompanied migrant youth seeking relief before immigration courts and agencies. Over the last 10 years, Catholic Charities has represented hundreds of youth in ORR custody. Although the majority of these youth come from Honduras, Guatemala and El Salvador, youth placed in ORR custody in New York may come from all over the world.

4. As the legal service provider for MercyFirst, Lutheran Social Services, Rising Ground, Catholic Guardian Services, Children's Home of Kingston and Children's Home of Poughkeepsie, and Lincoln Hall, our legal staff maintain regular contact with the youth

1 at the facilities. We provide ongoing consultations and presentations concerning the legal
2 rights of detained minors, as well as direct legal representation to youth who request it.

3
4 Lack of ORR Guidance Regarding COVID-19 Policy Changes on Release

5
6 5. In order to be effective advocates, legal service providers need up-to-date guidance
7 from ORR regarding any changes in policies impacting the safety, welfare, and release of
8 our clients to their sponsors. During the COVID-19 pandemic, with so much
9 misinformation out there, having access to such policy changes is all the more important
10 so that we can effectively advise our clients of their legal rights during this high stress
11 situation. Moreover, knowledge of such guidance is essential for youth in ORR custody
12 to be able to make informed decisions regarding their legal representation and to provide
13 direction to their attorneys.

14 6. Unfortunately, despite repeated requests to the ORR Federal Field Specialists
15 (FFS) assigned to the facilities where our clients reside, we did not receive formal
16 guidance from ORR regarding COVID-related changes in release policies until temporary
17 restraining orders were filed in the *Lucas R.* and *Flores* cases.

18 7. The only formal guidance we have seen has come from ORR's court filings in
19 response to the *Lucas R.* and *Flores* temporary restraining order motions, including the
20 "ORR Field Guidance #4, COVID-19 Discharge Guidance" that ORR filed with the
21 Court on April 6, 2020. This guidance had not been shared with legal service providers
22 prior to the court filing. The lack of guidance has resulted in unnecessary confusion
23 among our attorneys and anxiety among our clients because they do not know if they
24 must remain in ORR custody for days, weeks, or months.

25 8. The lack of guidance has also resulted in our attorneys being given conflicting
26 information from different FFS at different times. Over the past couple weeks, at one
27 point we were advised that there was a complete freeze on releases of our clients. At
28 another point, were told there was a two-week quarantine before releases could occur.

1 And, yet, despite these directives, some children are being released, without explanation
2 as to what made their cases different than others with materially similar circumstances.

3 9. The lack of release guidance is especially problematic for our advocacy for clients
4 aging out of ORR custody. We currently have clients who will age out of ORR custody
5 before the end of April and face the specter of ICE custody unless they are released to
6 individual or institutional sponsors. We have been told that youth aging out will be
7 transferred to ICE custody, notwithstanding any freezes on other release from ORR
8 custody that may be in place.

9 10. Given ORR's April 6, 2020 guidance to the field requiring an individualized
10 determination about release and ORR's release of some of our clients, it seems clear to
11 me that the TRO issued in *Flores* is having an effect. I question whether ORR would
12 have issued any guidance at all were it not for the pressure from this litigation.

13
14 Lack of Access to Client-Specific COVID-19 Health Information

15
16 11. Our attorneys have also been concerned about ORR's refusal to inform us in a
17 timely manner if our clients have tested positive for COVID-19 or been exposed to
18 someone who has tested positive. Instead, we have learned this information from court
19 filings and press reports. This information is crucial to our ability to advise our clients –
20 especially regarding release. Without having information about our clients' exposure to
21 COVID-19, we cannot advise them about the pros and cons of remaining at their current
22 placement a little longer. This lack of information impedes our ability as advocates to
23 ensure our clients can make an informed decision.

24
25 Delays in Release of Unaccompanied Children
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27
28

1 12. As of April 6, 2020, we have eleven clients who have been approved for release by
2 the assigned FFS, but who have not yet been released. Of those eleven children, three are
3 waiting to be reunified with a parent. We also have nineteen clients who have a complete
4 family reunification packet submitted and are only awaiting FFS final approval. Of those
5 nineteen children, two are waiting to be reunified with a parent.

6 13. ORR is not providing information to us about the reason for the delay in release of
7 these children so we have no way of knowing if it is related to a blanket policy or the
8 individualized circumstances of a child. We also are not being provided with any
9 information regarding when we might expect FFS final approval for our clients or
10 whether such approval is being deferred under a blanket policy, because of specific issues
11 at certain facilities, or based on the individualized circumstances of particular children.
12 Again, the lack of information impedes our ability to advocate for and advise our clients.

13
14 Barriers to Release of Unaccompanied Children

15
16 14. While in some situations home studies are required by the TVPRA, in no
17 circumstances are fingerprints required by the TVPRA or other federal law. Given the
18 uncertainties of how long shelter in place orders will remain in effect, it is my opinion
19 that ORR could reasonably consider making modifications to release policies concerning
20 discretionary fingerprinting and home studies and at the same time fulfill its duties to
21 ensure the safe release of youth in its custody. I base this opinion on ORR's previous
22 decisions in the recent past to waive discretionary fingerprinting policies for certain
23 sponsors or their household members when releasing large groups of young people in
24 ORR care.

25 15. In or around June 2018, for example, ORR reversed its longstanding policy of not
26 requiring fingerprinting for all sponsors and adults in a sponsor's household. Within
27 months that policy contributed to a massive backlog in releases and record numbers of
28 youth in ORR custody for extended periods of time. So ORR changed its policy once

1 again, noting that additional discretionary fingerprinting was not necessary to ensure
2 children's safety. Under the new policy, parents were not required to be fingerprinted
3 prior to a child's release; other fingerprinting requirements were also discarded. In these
4 unique circumstances, where congregate care poses enhanced risks of viral transmission,
5 ORR might reasonably decide to once more waive non-mandatory fingerprinting or non-
6 mandatory home studies. There was a time that ORR did not require fingerprinting at all
7 prior to releasing children to sponsors. I am not aware of any widespread safety concerns
8 arising during that time attributable to lack of fingerprinting.

9 16. No one knows exactly when face-to-face home studies will be able to resume or
10 when access to fingerprinting will return to normal. Children needn't remain in ORR
11 custody indefinitely due to delays with these discretionary requirements if there are other
12 reasonable means to ensure their safe release, including enhanced post-release services.

13
14
15 I declare under penalty of perjury that the foregoing is true and correct. Executed on this
16 7th day of April, 2020, at New York, New York.



ANTHONY ENRIQUEZ

EXHIBIT E

DECLARATION OF ELISA GAHNG

I, Elisa Gahng, declare as follows:

1. This declaration is based on my personal knowledge. If called to testify in this case, I would testify competently about the following facts.

2. My name is Elisa Gahng and I am an attorney licensed to practice in the State of New York. This declaration describes my experiences and observations working with unaccompanied migrant youth detained at Cayuga Centers in New York City.

Experience Serving Youth in ORR Custody

3. Founded in 2008, KIND is the leading national organization that works to ensure that no refugee or immigrant child faces immigration court alone. KIND provides children with legal representation at no cost, and works for positive systemic change in law and policy to improve the protection of unaccompanied immigrant and refugee children. KIND also engages in programming in Central America and Mexico to promote the best interests and protection of migrant children throughout the region. Since 2009, KIND has received referrals for more than 20,000 children from 70 countries. KIND has field offices in ten cities: Atlanta, Baltimore, Boston, Houston, Los Angeles, Newark, New York City, San Francisco, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits and relief for which their clients may be eligible. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. Many of KIND's clients have fled severe violence and threats to their lives in their countries of origin and may be eligible for asylum, special immigrant juvenile status, or other forms of humanitarian protection. Most of these children arrived in the U.S. unaccompanied by a parent or legal guardian, but some are members of families separated at the border.

Declaration of Elisa Gahng

1 4. I am the managing attorney overseeing the New York office of Kids in Need of
2 Defense (KIND). I have worked at KIND since 2017.

3 5. KIND's offices in Seattle, Houston, San Francisco, New York, and Boston serve
4 unaccompanied children in the legal custody of the Office of Refugee Resettlement
5 ("ORR"). Since December 2019, KIND's New York office has served unaccompanied
6 children in the legal custody of the Office of Refugee Resettlement ("ORR") who have
7 been placed by ORR at Cayuga Centers ("Cayuga"), a care program within the ORR
8 network of care providers. Since December 2019, KIND has served over 465 youth at
9 Cayuga. Although the majority of these youth come from Mexico, Honduras, Guatemala,
10 and El Salvador, youth placed at Cayuga may come from all over the world.

11 6. As the legal services provider for children at Cayuga, our attorneys provide
12 ongoing presentations concerning the legal rights of detained minors and conduct legal
13 screenings to assess their eligibility for immigration relief. We provide ongoing legal
14 consultations to the children to whom we are providing direct legal representation, and
15 we assist other youth at Cayuga with guidance and by attending court hearings in a
16 capacity that the immigration courts term "friend of the court."

17 Cayuga Centers
18

19 7. I understand that Cayuga is licensed to provide transitional foster care and has
20 capacity for up to 900 youths, from infants through age seventeen. Children in this
21 program live with foster families in the New York City area and go to the shelter during
22 the day, where they receive educational services. The program primarily serves "tender-
23 aged" children, meaning that the majority of the children are under 12 years of age or are
24 especially vulnerable. As of April 7, 2020, the population at Cayuga was about seventy-
25 three children. Of those seventy-three children, forty-seven children are twelve years old
26 or younger with twenty-one of them seven years old or younger. Six children are in
27 custody at Cayuga with their mothers who are also minors.
28

1 Delays in Reunification

2
3 8. ORR has not provided KIND with clear and updated guidance regarding the
4 release of unaccompanied immigrant children during the COVID-19 pandemic. ORR has
5 not explained which circumstances may delay a child's release for reasons related to
6 COVID-19.

7 9. On Friday, March 20, 2020, KIND received notification that ORR had instituted a
8 "stop placement" order earlier that day, ceasing the placement of any unaccompanied
9 children at ORR facilities in New York state. KIND was informed that the order was
10 due, in part, to community spread of COVID-19 outside the facilities and concern that the
11 facilities had thereby been compromised. Along with this notice, KIND was also
12 informed that reunifications of children at Cayuga would be delayed due to staff who
13 process sponsor fingerprints working at home.

14 10. In our capacity as legal services provider, KIND regularly receives from staff at
15 Cayuga a census reporting the total number of children in the program, including any
16 new arrivals or departures. KIND also regularly receives information on the children's
17 expected or actual dates of reunification with a sponsor. On Monday, March 23, 2020, I
18 received the census from Cayuga which reflected that twenty-three children had been
19 reunified with their sponsors over the weekend.

20 11. On April 2, 2020, I received an update on the custody status of the 73 children at
21 Cayuga in a spreadsheet provided to me by an assistant director of case management.
22 That document indicates that:

- 23 a. Fourteen children are designated as "pending release date," indicating that in
24 each case, ORR's requirements for reunification had been completed;
25 b. The cases of five additional children had been submitted to the ORR Federal
26 Field Specialist on either March 25 or March 31, 2020 and were "pending
27 FFS concurrence" or "pending FFS approval"; and
28

1 c. One child had been accepted into a long-term foster care program and was
2 “pending travel arrangements.”

3 12. Among the fourteen children who were identified by Cayuga as having a “pending
4 release date,” eight have sponsors who are a biological parent and three have sponsors
5 who are immediate relatives. The sponsors for these 14 children live in Alabama,
6 Indiana, Louisiana, North Carolina, and Texas.

7 13. The April 2 update document provided by Cayuga expressly refers to “COVID-19”
8 or the “pandemic” as delaying steps in the reunification process, such as fingerprinting of
9 proposed sponsors or home study services, in the cases of at least nine children.

10 14. The April 2 document further indicates that the release of six children, who
11 received removal orders in processes under the so-called “Migrant Protection Protocols,”
12 will be delayed until those children receive decisions on their appeals now pending with
13 the Board of Immigration Appeals (“BIA”). I first emailed the Federal Field Specialists
14 (“FFS”) who review reunification applications on February 27, 2020 to inquire about
15 ORR’s policy of reunifying children with removal orders. I was informed by the FFSs on
16 a phone call that they follow a protocol of consulting with Immigration and Customs
17 Enforcement (“ICE”) prior to reviewing the release of any children at Cayuga who have
18 removal orders, in addition to reviewing evidence of any BIA appeal filings. On March
19 11, 2020 KIND staff attorney Gabriela Mendez emailed the ICE Field Office Juvenile
20 Coordinator (“FOJC”) for New York to confirm that ICE was providing input on the
21 reunification of children who have removal orders. On March 13, 2020, the ICE FOJC
22 responded by stating that ICE does not get involved with the reunification process.
23 Following this email, on March 13, I emailed the FFSs, copying their supervisor, to
24 request further clarity on whether children with removal orders in ORR custody undergo
25 a different family reunification process from children without removal orders. On April
26 2, 2020, I elevated the issue further by emailing ORR Senior Federal Field Specialist
27 Supervisor to again request clarity on ORR’s policy. On April 6, 2020, one of the FFSs
28 acknowledged by email that I was pending a response on my question.

1 15. Between March 24 and April 7, 2020, no children have been released from Cayuga
2 for reunification or transferred to another facility.

3 16. On April 7, 2020, I received a list of nineteen children from an assistant director of
4 case management at Cayuga who “will be discharged in the coming days.” These
5 children include the fourteen children designated as “pending release date” and five
6 children whose cases were either “pending FFS concurrence” or “pending FFS
7 approval.” The list does not include the child who has been accepted into a long-term
8 foster care program and does not include the six children who received removal orders in
9 processes under the so-called “Migrant Protection Protocols.”

10 17. I have made repeated requests for clarity and information about ORR’s policy of
11 reunifying children with removal orders over the course of five weeks and have not been
12 provided any information.

13 18. In the situations described above, ORR has needlessly delayed children’s release
14 for reasons that do not meaningfully protect children’s safety.

15 ORR COVID-19 Protocols
16

17 19. KIND has requested that ORR provide guidance on the steps it is taking to prevent
18 the spread of COVID-19 among children in ORR care and among staff and service
19 providers. On March 10, 2020, KIND, along with many other organizations that serve
20 unaccompanied children in ORR custody, submitted a letter requesting that ORR
21 provide a briefing to address the steps that ORR is taking to ensure the safety of all
22 children in its care, as well as the safety of contractors such as legal service providers
23 like KIND.

24 20. To date, ORR’s published guidance includes information on steps to take if an
25 ORR care provider finds that a child has contracted COVID-19, but does not provide
26 further information about any precautionary measures that ORR facilities must take to
27 protect children, staff, or visitors from COVID-19.
28

1 21. I was not informed by Cayuga or ORR regarding any temperature screenings or
2 other risk screenings being conducted for children, staff or visitors. KIND staff last
3 visited Cayuga on March 12, 2020 to meet with seven children. I understand that KIND
4 staff did not experience any screening or other measures to prevent the spread of
5 COVID-19 upon their arrival at Cayuga; their temperatures were not taken and they
6 entered the facility without additional protocols. Following that visit, KIND
7 commenced providing legal services to children at Cayuga by video conference in an
8 effort to institute our own safeguards for staff and children.

9 22. On March 20, 2020, I received a phone call from Cayuga's vice president who
10 informed me that moving forward, Cayuga would be required to keep a maximum of
11 eight children in a room at any given time. For every four children, one Cayuga staff
12 member would be required to be present in the room. Therefore, there would be a
13 maximum of ten individuals in any given room.

14 23. On March 31, 2020, Cayuga's vice president called me to share that beginning on
15 April 1, Cayuga would cease providing on-site services to the children in their custody.
16 She informed me that foster families were instructed to keep the children at home and
17 not to bring children to Cayuga for educational and other services.

18 24. I have been informed by Cayuga staff that the following individuals have tested
19 positive for COVID-19:

- 20 a. Two staff members, including one case manager;
- 21 b. One foster parent, who subsequently died due to COVID-19 while two
22 unaccompanied children were in their care; and
- 23 c. One foster parent's partner who had exposure to two unaccompanied
24 children.

25 In the case of the foster parent who died due to COVID-19, the two unaccompanied
26 children in his or her care were not removed from the home until after the foster parent's
27 death. In the case of the foster parent's partner who had exposure to two children, I was
28 informed that the children would remain in that foster parent's care. When I inquired

1 about whether the children would be isolated from the individual who tested positive,
2 Cayuga staff stated that the children would be quarantined from the adult in question.
3 Cayuga has declined to share the identities of the above children, so KIND has not been
4 able to talk to the children to hear whether they have been appropriately quarantined
5 according to local and state officials' guidance.

6
7 I declare under penalty of perjury that the foregoing is true and correct. Executed on this
8 7th day of April, 2020, at Brooklyn, New York.

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Declaration of Elisa Gahng

EXHIBIT F



U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section

P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 532-4824
Fax: (202) 616-8962
Email: Sarah.B.Fabian@usdoj.gov

September 12, 2017

Carlos Holguin
Center for Human Rights and Constitutional Law
256 S. Occidental Blvd
Los Angeles, CA 90057

Via Email

Re: Flores, et al., v. Sessions, et al., No. CV 85-4544 DMG (AGRx)

Dear Carlos:

On July 24, 2017, you sent *Flores* Defendants a letter regarding Plaintiffs' positions regarding implementation of the district court's order of January 20, 2017 and the Ninth Circuit's order of July 5, 2017. On July 31, 2017, you and I spoke regarding Defendants' responses to your letter, and at the conclusion of that call you requested that Defendants put those responses into writing. Accordingly, please see below a non-exhaustive description of the policies and procedures Defendants are putting into place in order to implement the District Court's January 20, 2017 order and the Ninth Circuit's July 5, 2017 decision affirming that order, requiring the application of Paragraph 24.A of the *Flores* Settlement Agreement ("Agreement") to unaccompanied alien children ("UAC") in the custody of the U.S. Department of Health and Human Services ("HHS"), Office of Refugee Resettlement ("ORR"). Following that description are Defendants' responses to the positions raised in your July 24, 2017 letter.

A. Defendants' Policies and Procedures to Implement the Courts' Orders.

Paragraph 24.A of the Agreement requires that "[a] minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing." Agreement ¶ 24.A. The District Court made clear that the purpose of the bond hearing is to "answer[] the threshold question of whether the child should be detained in the first place[,]" but that "HHS can still exercise its coordination and placement duties under the TVPRA." Order

at 6. Likewise, the Ninth Circuit found that “[i]mmigration judges may assess whether a minor should remain detained or otherwise in the government’s custody, but there must still be a separate decision [by HHS] with respect to the implementation of the child’s appropriate care and custody.” *Flores v. Sessions*, 862 F.3d 863, 878 (9th Cir. 2017).

In accordance with Paragraph 24.A and the decisions of the District Court and the Ninth Circuit, Defendants are serving notice of “bond hearings” on some UAC, and generally are providing such hearings to UAC who request them. As discussed previously, and agreed to by you, ORR affirmatively provides notice of the availability of bond hearing only to those in secure and staff-secure care; UAC in non-secure shelter care are unlikely to benefit from a hearing as ORR likely would concede to an immigration judge that such UAC are not a danger and may be released upon the determination of a suitable sponsor. However, if a minor in non-secure care requests a bond hearing that request will be forwarded to the immigration court.

Minors placed in secure or staff secure care currently sign a placement notification document when placed into one of those two types of facilities. Because UAC in secure or staff-secure facilities may have been placed in such facilities based on some finding of danger, ORR intends to modify the notice of placement in a secure/staff secure/residential treatment center to include language about the possibility of continued custody occurring on the basis of a finding of danger. For UAC placed in non-secure care providers, the “Know Your Rights” presentations already instruct minors regarding their placement in the least restrictive setting. This notification will be modified so that children are alerted that they are not considered a danger by ORR, and will not be held in ORR custody on that basis.

Where a minor is referred to an immigration judge for a bond hearing, the immigration judge conducts the bond hearing consistent with the regulations and caselaw governing bond hearings conducted under 8 U.S.C. § 1226(a). *See* 8 C.F.R. §§ 1003.19; 1236.1(d). Notably, the District Court and the Ninth Circuit both recognized that bond hearings under Paragraph 24.A of the Agreement should be conducted consistent with these standards and procedures. *See* Order at 2 (discussing 8 C.F.R. §§ 1003.19, 1236.1 and *Matter of Guerra*, *supra*, and explaining that the Flores Agreement appears to be consistent with these authorities including the “requirement [that] an alien in a custody determination must establish that he or she does not present a danger to persons or property and is not a flight risk.”). Consistent with these authorities, a minor who seeks a change in custody status must establish to the satisfaction of the immigration judge that he or she does not pose a danger to the community or is not otherwise a flight-risk. *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). In making this determination, the immigration judge is guided by the factors set forth in BIA caselaw and may consider any evidence in the record that is probative and specific. *See* 8 C.F.R. § 1003.19(d) (“determination of the Immigration Judge as to custody or bond may be based on any information that is available to the immigration judge”); *see also Matter of Guerra*, 24 I. & N. Dec. at 40 (providing non-exhaustive list of bond factors).

At the conclusion of the bond hearing, the immigration judge will make his or her findings as to whether or not the minor presents a danger to community. If the immigration judge finds that the minor is not dangerous, that decision is binding on ORR. ORR will then release the UAC as soon as it determines that a potential sponsor is a suitable custodian in accordance with the TVPRA.¹ Because ORR does not make findings of “flight risk,” (that is, that the UAC is likely to not appear for his or her removal proceeding), and does not retain custody of UAC on such basis, there is no need for an immigration judge to issue findings on “risk of flight,” as this factor does not figure in to ORR determinations on release. Both the District Court and the Ninth Circuit recognized that ORR retains full authority regarding “implementation of the child’s appropriate care and custody.” ORR nonetheless will take into account the immigration judge’s findings – including any findings regarding flight risk – when making placement decisions for the minor for so long as the minor must remain in ORR custody.

B. Defendants’ Responses to Plaintiffs’ Positions

1. Prompt hearings upon request

ORR promptly files with EOIR the bond hearing requests made by children in secure and staff-secure facilities, and a bond hearing will be scheduled in accordance with the immigration court’s standard operating procedures and the interim guidance issued by the Office of the Chief Immigration Judge.² If a UAC declines a bond hearing, but later requests one, the request will be promptly forwarded as soon as it is made. A minor also may make an oral request for a bond hearing to an immigration judge. If a minor is found to be a danger by the immigration judge he or she may request a new bond hearing at any time based on a showing of a material change in circumstances.

Defendants do not agree with Plaintiffs’ assertion that Paragraph 24.A requires that bond hearings are the mechanism by which ORR must conduct its monthly reviews of any secure placement under 8 U.S.C. § 1232(c)(2). There is no basis on which to find that the *Flores* Agreement was intended to dictate the procedures to be followed by ORR in complying with the TVPRA, which was implemented more than a decade after the Agreement was signed. Moreover, Paragraph 24.B. and Exhibit 6 of the *Flores* Agreement recognize that the issue of level of

¹ If there is a material change in circumstances – for example, the UAC engages in violent, aggressive acts after receiving the immigration judge determination – ORR reserves the right to make a new determination.

² EOIR’s Chief Immigration Judge disseminated the interim guidance regarding implementation of *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) to the Immigration Courts on July 21, 2017. Undersigned counsel shared a copy of that guidance with you on August 9, 2017.

placement is not the subject of a bond hearing. Finally, the TVPRA specifically delegates the Secretary of HHS as the entity that prescribes procedures for such reviews. 8 U.S.C. § 1232(c)(2).

2. Notice to class members re detention based on a determination of dangerousness

As discussed above, ORR will modify the placement notification for secure/staff-secure placement to note the possibility that the UAC may not be released on the ground that the minor is dangerous.

3. Notice to class members regarding availability of bond hearings

ORR is in receipt of Plaintiffs' proposed revisions to the notice form, which is currently available in English and Spanish. ORR intends to modify the form to include information about consulting with an attorney, but does not intend to adopt the modifications proposed by you.

ORR agrees that neither ORR nor care provider staff should provide legal or other advice on requesting a bond hearing. However, staff may provide assistance to the minor in reading the form if such assistance is needed. Also, please note that legal service providers explain the form and the availability of bond hearings to minors in secure or staff-secure custody during the "Know Your Rights" presentation.³

4. Legal representation during bond hearings

Plaintiffs, in this section, appear to be raising issues regarding the requirements of the TVPRA which are outside the scope of Paragraph 24.A of the Agreement. ORR disputes Plaintiffs' reading of the TVPRA, and further contends that any alleged compliance or non-compliance with the TVPRA, enacted in 2009, is not relevant to Defendants' implementation of the District Court and Ninth Circuit decisions regarding Paragraph 24.A of the 1997 *Flores* Agreement.

5. Burden of proof during bond hearings

As discussed above, bond hearings are conducted consistent with regulations and applicable Board of Immigration Appeals case law, all of which squarely place the burden on a detainee in government custody to establish that he or she is not a danger. Plaintiffs have provided no basis to find that the bond hearings anticipated by Paragraph 24.A of the Agreement should not be conducted consistent with the applicable regulations and governing case law. Instead, the

³ For UAC placed in non-secure care providers, the "Know Your Rights" presentations already instruct minors regarding their placement in the least restrictive setting. This notification will be modified so that children are alerted that they are not considered a danger by ORR, and will not be held in ORR custody on that basis.

District Court and Ninth Circuit recognized that immigration judges can conduct bond hearings under Paragraph 24.A of the Agreement consistent with standards and procedures that apply to bond hearings conducted under 8 U.S.C. 1226(a), its implementing regulations, and case law. *See* Order at 2 (discussing 8 C.F.R. §§ 1003.19, 1236.1 and *Matter of Guerra, supra*, and explaining that the Flores Agreement appears to be consistent with these authorities including the “requirement [that] an alien in a custody determination must establish that he or she does not present a danger to persons or property and is not a flight risk.”).

6. Effect of a finding by an immigration judge regarding dangerousness or flight risk.

As discussed above, an immigration judge’s decision that a UAC is not a danger to the community is binding on ORR, and if ORR determines a potential sponsor is a suitable custodian, it will then release the UAC to the custodian (assuming no material change in circumstances).

With respect to placement in a secure facility, ORR policy already indicates that the immigration judge finding on dangerousness or flight risk may be a consideration in placement if ORR is continuing in its efforts on reunification. However, Defendants reject Plaintiffs’ request to impose additional procedures beyond the confines of the *Flores* Agreement. The *Flores* Agreement at paragraph 24.B. and Exhibit 6 already recognize that the level of placement is not an issue for the bond hearing. Moreover, the TVPRA explicitly delegates to the Secretary of HHS the authority to “prescribe” procedures by which a secure placement is reviewed monthly. 8 U.S.C. § 1232(c)(2). Such direct Congressional delegations of authority indicate that broad deference is owed to the government agency’s interpretations. *See e.g., United States v. Mead Corp.*, 533 U.S. 218, 229 (“Congress manifested its intent that the Secretary’s determinations, based on interpretation of the relevant statutory provisions, have the force of law.”). Finally, the District Court and the Ninth Circuit also recognized that decisions regarding the care and placement of UAC remain squarely within the authority of ORR.

7. Prompt completion of custodian or (sponsor) evaluations

This request is outside the scope of Paragraph 24.A, as well as the District Court and Ninth Circuit decisions. Immigration judges lack expertise for adjudging the suitability of a potential sponsor, and both the District Court and Ninth Circuit recognized that such determination must remain with ORR.

Sincerely,

s/ Sarah B. Fabian
SARAH B. FABIAN
Senior Litigation Counsel
U.S. Department of Justice

EXHIBIT G

1 I, Dr. Julie DeAun Graves, declare as follows:
2

3 1. This declaration is based on my personal knowledge, except as to those
4 matters based on information and belief, which I believe to be true. If called to testify
5 in this case, I would testify competently about these facts.

6 2. My name is Julie DeAun Graves. I am a physician licensed to practice
7 medicine in the states of Florida, Maryland, New Jersey, South Carolina, Texas,
8 Virginia, Wisconsin, and in the District of Columbia. I am currently working in family
9 medicine and public health private practice as the Associate Director of Clinical
10 Services at Nurx. I have been certified by the American Board of Family Medicine
11 since 1989. I obtained my medical degree at the University of Texas Southwestern
12 Medical School in Dallas, Texas, and earned a Master's degree in Public Health and a
13 Doctor of Philosophy in Management, Policy, and Statistics at the University of Texas
14 School of Public Health. I previously served as Regional Medical Director for the
15 Texas Department of State Health Services for the Houston region (during the health
16 crises caused by the Ebola virus, highly pathogenic avian influenza, and Zika virus),
17 as Medical Services Coordinator for the Texas Department of Aging and Disability
18 Services, and as a medical consultant to the Texas Medical Board. The rest of my
19 qualifications were set forth in paragraphs 3-5 of my prior declaration submitted on
20 March 24, 2020 (Exhibit C).

21 3. I have reviewed the Defendants' Supplemental Response to Plaintiffs'
22 Request for a Temporary Restraining Order and Preliminary Injunction (Dkt. 746) and
23 Exhibit I (ORR Field Guidance #4, COVID-19 Discharge Guidance April 6, 2020)
24 (Dkt. 746-11).

25 4. Page 1 of the ORR Field Guidance states that "If an ORR care provider
26 facility (or in the case of transitional foster care, for individual foster homes)
27 experience one or more confirmed cases of active COVID-19 infection in either
28 children or staff, releases are temporarily postponed for all children at the care

1 provider facility or in the foster care home until ORR's Division of Health for
2 Unaccompanied Children (DHUC) lifts the hold on release or allows the release of
3 specific children on a case by case basis following CDC recommendations." Unless
4 DHUC can provide this review almost instantly, the policy of automatically
5 postponing release for any child in a facility with a confirmed COVID-19 case does
6 not align with public health practice and only further serves to increase these
7 children's risk of exposure.

8 5. People who are believed to have had contact with a person who is infected
9 with COVID-19 should maintain quarantine for 14 days. These individuals should not
10 be quarantined with other potentially exposed individuals, as this renders it nearly
11 inevitable that many more people in the potentially-exposed group will eventually
12 contract COVID-19.

13 6. Further, there is no way to quarantine a congregate care facility that has
14 rotating staff members. Quarantine is the physical separation of a person reasonably
15 believed to have been exposed to a communicable disease, but not yet symptomatic, in
16 order to prevent the spread of disease. ORR-contracted congregate care facilities are
17 not capable of maintaining adequate quarantine. Instead, staff members come in and
18 out of the facility every day, presenting a revolving door of exposure risk. Each time a
19 staff member enters the facility or a child or staff member contracts COVID-19, the
20 "quarantine" is broken and the exposure time clock resets.

21 7. Both children known to be exposed to COVID-19 as well as children not
22 known to be exposed to COVID-19 can be safely released to sponsors. Children who
23 have been exposed can wear appropriate personal protective equipment (PPE) during
24 transit and then quarantine at their sponsor's home for 14 days. The ORR Field
25 Guidance already requires all children who are released to quarantine at their
26 sponsor's home for 14 days. ORR Field Guidance at 2.

27 8. In their Supplemental Response, Defendants discuss children's release and
28 state that "many sponsors are located in states that are currently under 'shelter in

1 place' in which residents' freedom of movement has been significantly curtailed in an
2 effort to control the spread of COVID-19, such as California, Washington, and New
3 York." Supp. Response at 30-31. As of April 7, 2020, the vast majority of states had
4 implemented either shelter in place or stay at home orders. These orders should not be
5 construed as reasons not to release children to sponsors in these states. In fact, states
6 with shelter in place and stay at home orders are safer for children and their families
7 than states that have not implemented these appropriate public health orders. Those
8 states have greater exposure risk due to a higher proportion of people continuing to
9 expose each other.

10 9. As noted on page 4 of the ORR Field Guidance, there are precautions that
11 can be taken to ensure the safety of the child and the staff escort when traveling for
12 the purpose of release. These include adhering to current recommendations for
13 prevention measures such as handwashing, as well as using alternative transport
14 locations where escorts would not be required to self-quarantine. There is no question
15 that requiring children to remain detained in congregate care facilities is more
16 dangerous than the travel required to release children to their sponsors. While there is
17 level of risk in traveling at this time, the risk of exposure in congregate care
18 environments—especially environments that already have confirmed COVID-19
19 cases—is much higher.

20 10. I declare under penalty of perjury that the foregoing is true and correct.
21 Executed on April 7, 2020 in North Bay Village, Florida.

22 
23 Julie DeAun Graves
24
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EXHIBIT H

DECLARATION OF HANNAH P. FLAMM, ESQ.

I, Hannah P. Flamm, declare as follows:

1. This declaration is based on my personal knowledge. If called to testify in this case, I would testify competently about the following facts.

2. My name is Hannah Flamm, and I am an attorney licensed to practice law in the State of New York. This declaration describes my experiences and observations working with unaccompanied migrant youth detained at The Children's Village and Abbott House in New York.

Experience Serving Youth in ORR Custody

3. Since October of 2017, I have been an attorney at The Door, a legal service provider that works primarily with immigrant youth. Since December 2019, I have been the Managing Attorney of The Door's Detained Minors Project. Since December 2019, The Door has served unaccompanied children in the legal custody of the Office of Refugee Resettlement ("ORR") who have been placed by ORR at The Children's Village and Abbott House in New York, two care programs within the ORR network of care providers. Over the last four months, The Door has served over 400 youth in ORR custody. Although the majority of these youth come from Mexico, Honduras, Guatemala and El Salvador, youth placed at these facilities may come from all over the world.

4. As the legal service provider for The Children's Village and Abbott House, our attorneys and staff maintain regular contact with the youth at the facilities. We provide ongoing consultations and presentations concerning the legal rights of detained minors, as well as direct legal representation to youth who request it.

The Children's Village

Background

1 5. The Children's Village serves unaccompanied migrant youth between the ages of
2 12 and 17. It is my understanding that The Children's Village is licensed to provide
3 shelter-level care for up to 157 youth. The Children's Village also operates a staff-secure
4 setting with capacity to detain up to 28 youth. The current population of the shelter
5 setting is approximately 85 youth. The current population of the staff-secure setting is
6 approximately 10 youth.

7
8 *Delays in Reunification*

9 6. Between March 25, 2020, and April 2, 2020, no minors were discharged from The
10 Children's Village, with the exception of one age redetermination case on April 1, 2020.
11 On April 3, 2020, The Door observed that discharges had commenced again.

12 7. It is my impression that during the nine days when no minors were discharged
13 from The Children's Village, this pause on releases (aside from the age redetermination)
14 was *not* a reflection of the shelter failing to prepare minors' cases for submission to ORR
15 or failing to submit cases to ORR. Instead, it is my impression that The Children's
16 Village staff worked expeditiously to prepare minors' cases for submission to ORR and
17 that in some instances, ORR in fact approved minors' cases for release. However, it
18 appears that ORR was declining to authorize The Children's Village to physically
19 discharge minors from their custody. It is my understanding that some minors with
20 ORR-approved sponsors nonetheless remained at The Children's Village between March
21 25, 2020, and April 2, 2020, because ORR did not authorize their physical discharge.

22 8. Between the evening of Friday, April 3, 2020, and Monday, April 6, 2020, 15
23 minors were discharged from The Children's Village. At least three more were
24 discharged on Tuesday, April 7, 2020. Collectively, these minors were discharged to
25 Alabama, California, Florida, Georgia, Indiana, Kansas, Maryland, New Jersey, and
26 North Carolina. It is my understanding that these discharges occurred as a result of a
27 change in ORR's reunification policies or practices.

1 *Age-outs*

2 9. Further, as recently as March 24, 2020, minors who have aged out of ORR custody
3 at The Children's Village have been transferred to ICE detention, including to a detention
4 center where at least four detainees have tested positive for COVID-19.

5 10. Age-out cases average one or more per week. If ORR again categorically declines
6 to approve physical discharges for any period, as apparently occurred between March 25,
7 2020, and April 2, 2020, minors whose 18th birthdays fall in that interval are at
8 heightened risk of being transferred to ICE custody, even in cases where they have viable
9 or even ORR-approved sponsors.

10 11. If one of the minors released on the evening of Friday, April 3, 2020, had not been
11 released before aging out of ORR custody this past weekend, he would have faced
12 transfer to ICE custody despite having a parent approved as an ORR sponsor.

13
14 Abbott House

15 *Background*

16 12. Abbott House detains unaccompanied migrant youth between the ages of zero (US
17 citizens born to minors in ORR custody while at Abbott House) and 17. It is my
18 understanding that this facility is licensed to provide shelter care for up to 51 youth. The
19 current population of this facility is approximately 30.

20
21 *Delays in Reunification*

22 13. During the month of March, minors have continued to be discharged in low
23 numbers: approximately eight between March 12, 2020, and March 19, 2020; and
24 approximately three between March 19, 2020, and March 31, 2020. One minor for whom
25 The Door is the legal service provider was released from Abbott House between April 1,
26 2020, and April 8, 2020.

27 14. At this time, of the 30 minors in Abbott House's shelter program, it is my
28 understanding that approximately a quarter are pending ORR approval for discharge only.

1 It is my understanding that approximately another third of the cases have advanced to the
2 stage of pending fingerprints.

3 15. Therefore, any future categorical moratorium on physical discharges would mean a
4 significant number of minors in custody with cases submitted to ORR, pending approval,
5 or, by then, perhaps approved—including to biological parents—may be forced to remain
6 in a congregate care setting for no individualized, child welfare-related reason.

7
8 *Conclusion*

9 16. The Door has not received any formal COVID-related guidance directly from ORR
10 regarding any changes in policies affecting the safety, welfare, and release of our clients
11 to their sponsors. The most comprehensive, formal, COVID-related guidance we have
12 seen has come from ORR's court filings in response to the *Lucas R.* and *Flores*
13 temporary restraining order motions, including the "ORR Field Guidance #4, COVID-19
14 Discharge Guidance" that ORR filed with the Court on April 6, 2020. ORR did not share
15 this guidance with The Door prior to the court filing. ORR's failure to provide The Door
16 guidance has left our attorneys, staff, and clients ill-informed, confused, and anxious
17 because ORR has not told either our staff or, to my knowledge, our clients for how long
18 our clients must remain in ORR custody.

19
20 I declare under penalty of perjury that the foregoing is true and correct. Executed on this
21 8th day of April, 2020, at New York City, New York.

22
23 

24
25 _____
Hannah P. Flamm