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

CLAFFEY, DANIELLE MARIA
KUCK BAXTER IMMIGRATION LLC
P.O. BOX 501359
ATLANTA GA 31150

DHS/ICE OFFICE OF CHIEF COUNSEL - ATL
180 TED TURNER DR., SW, STE 332
ATLANTA GA 30303

Name: MUZRAEV, ALEXANDER VIKTO **A 206-289-300**

Date of this Notice: 4/12/2021

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:

O'Connor, Blair
MONSKY, MEGAN
FOOTE
Pepper, S. Kathleen

Userteam: Docket

File: A206-289-300 – Atlanta, GA

Date:

APR 12 2021

In re: Alexander Viktorovich MUZRAEV

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Danielle M. Claffey, Esquire

ON BEHALF OF DHS: Daniel J. Wright
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case was previously before the Board on November 12, 2019. At that time, we remanded the record for the Immigration Judge to enter a new decision after considering additional evidence and for the Immigration Judge to reconsider the respondent's credibility in light of a translation error in the respondent's conviction records. The respondent, a native and citizen of Russia, has appealed from the Immigration Judge's February 12, 2020, decision. The Department of Homeland Security ("DHS") opposes the appeal. The record will be remanded to the Immigration Judge for further proceedings.

In the most recent decision, the Immigration Judge determined that that the respondent's September 28, 2012, conviction for Illegal Deprivation of Liberty in violation of subsections (2)(a) and (c) of Article 127 of the Russian Criminal Code (the "Ugolovnyi Kodeks Rossiiskoi Federatsii" or "UKRF") (as amended on March 1, 2012), constitutes a conviction for a "particularly serious crime" and a "serious nonpolitical crime," which renders him ineligible for asylum under section 208(b)(2)(A)(ii) & (iii) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(ii) & (iii), withholding of removal under section 241(b)(3)(B)(ii) & (iii) of the Act, 8 U.S.C. § 1231(b)(3)(B)(ii) & (iii), as well as protection pursuant to the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT) (IJ1 at 7-9). Alternatively, the Immigration Judge denied the respondent's applications for asylum and related relief on the merits (IJ3 at 9-17).[1]

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

[1] In his February 12, 2020 decision, the immigration Judge affirmed his prior decision, dated May 31, 2019, which was incorporated by reference (IJ3 at 7-9). The February 12, 2020, decision will be referred to as IJ3; the May 31, 2019, decision will be referred to as IJ2 as necessary. The May 31, 2019 decision also incorporates the particularly serious crime determination from the Immigration Judge's decision dated June 5, 2018, which will be referred to as IJ1 as necessary.

Article 127 of the UKRF provides as follows:

> **Article 127. Illegal Deprivation of Liberty**
>
> 1. Illegal deprivation of a person's liberty, which is not related to his abduction, shall be punishable by restraint of liberty for a term of up to two years, or by compulsory labour for a term of up to two years, or by arrest for a term of from three to six months, or deprivation of liberty for a term of up to two years.
> 2. The same deed committed:
> a) by a group of persons by previous concert;
> b) abolished
> c) with the use of violence with danger to human life and health;
> d) with the use of weapons or objects used as weapons;
> e) against an obvious juvenile;
> f) against a woman who is in a state of pregnancy, which is evident to the culprit;
> g) against two or more persons,
> shall be punishable by compulsory labour for a term of up to five years or by deprivation of liberty for a term of three to five years.
> 3. Deeds provided for by the fi[r]st or second parts of this Article, if they have been committed by an organised group or have entailed by negligence the death of the victim, or any other grave consequences,
> Shall be punishable by deprivation of liberty for a term of from four to eight years.

The Immigration Judge's determination that the respondent's Russian conviction categorically constitutes a "crime of violence" aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), and—by extension—a per se "particularly serious crime," is erroneous (IJ3 at 7; IJ2 at 6-7; IJ1 at 4-8). *See* section 208(b)(2)(B)(i) of the Act, 8 U.S.C. § 1158(b)(2)(B)(i). To determine whether the respondent's Russian conviction for illegal deprivation of liberty is an aggravated felony under the Act, we employ the categorical approach, and if the statute is overbroad and divisible, the modified categorical approach. *See Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016); *Descamps v. United States*, 133 S. Ct. 2276, 2281-82 (2013) (setting forth the framework for the categorical approach and modified categorical approach); *see also Vassell v. U.S. Att'y Gen.*, 839 F. 3d 1352, 1356 (11th Cir. 2016) (employing the categorical approach to make an aggravated felony determination).

Here, the Immigration Judge misapplied *Mathis* and *Descamps* by conducting an analysis under the modified categorical approach before first determining whether the statute of conviction is overbroad, and if it is, whether it is divisible. Applying the categorical approach, we conclude that Article 127(2) of the UKRF is overbroad since it punishes some acts that do not involve "the use of violence with danger to human life and health." For example, subsection (2)(e) involves an offense against a juvenile, but does not qualify what constitutes a deprivation of liberty, and subsection (2)(a) solely involves a deprivation of liberty committed by a group of persons by previous concert, without any specification as to the means by which said liberty is deprived. *See* UKRF § 127(2)(a), (c) & (e). Thus, the statute is overbroad as to the generic definition of a crime of violence, and given the considerable differences between United States and Russian criminal law, we are unable to determine whether the statute is divisible or not. Accordingly, we do not find the respondent's Russian conviction to be a per se particularly serious crime.

The Immigration Judge also found that the respondent was barred from asylum and withholding of removal due to his conviction being a non-per se particularly serious crime based, in part, on a finding that the respondent's claim that his Russian conviction was politically motivated and the result of a pretextual prosecution was not credible (IJ3 at 4-7). The Immigration Judge's adverse credibility finding is clearly erroneous, and we will reverse it. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006).

The Immigration Judge based his adverse credibility finding on discrepancies between the respondent's testimony and supporting documentary evidence (IJ3 at 5-6). Specifically, the Immigration Judge concluded that the respondent's claim of being falsely convicted was implausible in light of the 2017 Department of State Human Rights Report for Russia not demonstrating that the Russian government targets Yabloko party members with similar positions as the respondent (IJ3 at 5). In addition, the Immigration Judge observed that the respondent's claim that his criminal conviction was politically motivated was inconsistent with criminal records that reflect an investigation of the crime was conducted, detailed legal documents covered the course of the proceedings, the respondent was represented by counsel, and the Russian court noted mitigating circumstances when sentencing the respondent (IJ3 at 6-7; Exh. 3 at K-N).

On appeal, the respondent argues that he testified credibly to being falsely convicted of the crime and that independent evidence corroborates his claim (Respondent's Br. at 10, 21-22; Exh. 3 at Tab D-J, O-Z, AA-EE; Respondent's Submission of evidence (May 6, 2019)). The respondent properly notes that the investigative packet lacks any photographs of the purported injuries to the victim, despite including numerous photographs of the crime scene (Respondent's Br. at 10, 21-27; Exh. 8; Respondent's Submission of Evidence (May 6, 2019), Tab B). Further, the record shows that the respondent explained that he confessed to the crime after being subjected to a 7-8 month detention, where he endured numerous physical beatings as a means of coercing him to confess to the crime, culminating in a beating so severe that he was rendered unconscious and required a one-week hospital stay (Tr. at 94-109). Also, the respondent's wife credibly testified that the respondent was home the night he allegedly committed the crime (Tr. at 225-230; Exh. 3, Tab V, p. 332). Lastly, the undisputed evidence reflects that Russian authorities misuse Interpol Red Notices as a mechanism to request the return of political opponents seeking asylum and related protection in other countries, including the United States, and that the Red Notice in the respondent's case was not issued until 5 years after he had left Russia (Respondent's Submission of Evidence (May 6, 2019), Tab A: *Spotlight on a Critical Threat: The Abuse and Exploitation of Red Notices, Interpol and the U.S. Judicial Process by Russia and Other Authoritarian States* (dated November 28, 2018), George Mason University's Schar School of Policy and Government). *See Matter of W-E-R-B-*, 27 I&N Dec. 795, 800 n. 5 (BIA 2020) (recognizing that the Russian government has been known to "abuse[] Red Notices for political reasons").[2]

[2] Moreover, while the Immigration Judge made much of the fact that the Russian court noted mitigating circumstances when it sentenced the respondent, we find it quite convenient that the sentence to confinement for time actually served corresponded to the exact time the respondent had already served at that point, which was an unusually lenient sentence give the alleged severity of the respondent's crime.

These discrepancies identified by the Immigration Judge are insufficient, without more, to support an adverse credibility finding under the totality of the circumstances, particularly as the respondent's account of his past experiences has been very consistent overall (IJ3 at 5). Section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C) (stating that credibility determinations must be evaluated "[c]onsidering the totality of the circumstances"); *see Xiu Ying Wu v. U.S. Att'y Gen.*, 712 F.3d 486, 494 (11th Cir. 2013) (holding that an Immigration Judge's speculation and conjecture cannot support an adverse credibility finding). Based on the record evidence, we find that the adverse credibility finding is clearly erroneous and we reverse that finding.

The respondent has credibly established that his conviction was pretexual in nature and on account of his political opinion. As a result, we conclude that the respondent's conviction does not constitute a non-per se particularly serious crime. *See Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007) (providing that the court may makes its determination regarding whether a crime is particularly serious by "examin[ing] the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction").[3] For the same reasons, we reverse the Immigration Judge's determination that the respondent committed a serious nonpolitical crime in Russia (IJ3 at 7-9). We do not find serious reasons to believe that the respondent committed a serious non-political crime outside of the United States. *See Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012).

The Immigration Judge also found that, assuming the respondent was credible, the respondent's mistreatment did not rise to the level of persecution (IJ3 at 11-12). Finding the respondent credible, we disagree. The respondent presented evidence that his home was searched by police officers and he was detained for 7-8 months, during which time his life was threatened and he was subjected to various physical beatings, the last of which rendered him unconscious and resulted in a one-week hospitalization (Tr. at 77-109). Given the evidence presented, we conclude that the respondent has demonstrated that he suffered persecution under the Act. *See Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1235-36 (11th Cir. 2013); *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 861-62 (11th Cir. 2007) (in determining whether an alien has suffered past persecution, the Board considers the cumulative impact of the alleged incidents of persecution). The Immigration Judge's adverse credibility finding is vacated, and because we have found that the respondent suffered past persecution on account of his political opinion, the record will be remanded to allow the DHS an opportunity to rebut the presumption of a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1)(ii). We express no opinion regarding the outcome on remand.

Accordingly, the following order will be entered.

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

---

[3] The particularly serious crime bars, as set forth in sections 208(b)(2)(A)(ii) and 241(b)(3)(B)(ii) of the Act, may not be relevant to foreign convictions. We are aware of no precedential decision from any court or administrative tribunal, or any regulatory language, suggesting that these bars so apply to such convictions. Given our finding that the respondent is not subject to the bar, however, we find it unnecessary to resolve this issue in the present matter.

FOR THE BOARD

Appellate Immigration Judge Megan Foote Monsky respectfully dissents without opinion.