

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Eloy, Arizona

File No. : [REDACTED]

February 17, 2005

In the Matter of

[REDACTED]

Respondent

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)
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IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) Immigration and Nationality Act, alien unlawfully present, not being admitted or paroled.

APPLICATIONS: Asylum, withholding of removal, relief under Convention against Torture, and-or voluntary departure at conclusion of proceedings.

ON BEHALF OF RESPONDENT:

Pro se

ON BEHALF OF DHS:

Sarah Hartnett
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

This is a removal proceeding brought by Immigration and customs Enforcement against the named respondent when he was served with the Notice to Appear, which was filed with the Court, Exhibit 1. The respondent admitted the allegations and conceded the charge, designating El Salvador for removal should that become necessary. Based upon the admissions and concession, removability was established by clear and convincing evidence. As relief, the respondent seeks asylum in the United States and has submitted an application in support thereof, group Exhibit 6.

This is also considered as a request for the withholding of his removal to El Salvador pursuant to Section 241(b)(3) INA. It is also considered as a request for relief under the Convention against Torture. In the alternative, the respondent seeks at these proceedings conclusion voluntary departure.

A copy of the application was forwarded to the Department of State requesting an advisory opinion, Exhibit 6-A, but no reply was received. The Government avers that all record checks have been completed.

The respondent submitted additional documentary materials in support of his claim, group Exhibit 8. **Additionally**, a copy of documentation from the Government **was** received without objection, group Exhibit 9, as well as articles submitted by the Government on today's date, group Exhibit 10. **No** witnesses other than the respondent testified.

Concerning the respondent's testimony, generally I have found him to be credible.

For asylum, the respondent needs to show that he **has** been persecuted or has a well-founded fear of persecution **based upon** his race, his religion, his nationality, his membership in a particular social group and-or his political opinion. See definition of refugee, Section 101(a)(42) INA. See also Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). See also INS v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987).

Asylum is discretionary in nature.

Requests for relief under Section 241(b)(3) INA **require that** an individual show that it is **more likely than not that** they would face persecution based upon any of the five enumerated grounds. This relief has no element of discretion contained therein. A person is eligible unless they are shown to have been convicted of a particularly serious crime or have persecuted another individual.

For relief under the Convention against Torture, an individual must show that it **is** more likely than not that they would face torture at the hands of the government, government officials or persons acting with the awareness of government officials.. There is no element of discretion **contained** in this form of relief. See also Zheng v. Ashcroft, F.3d , case no. 02-70193 (9th Cir. June 18, 2003). See also Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

An issue in this case, as the respondent is **claiming** eligibility **for asylum**, is the **fact** that he **came** to the United States in 1999 without inspection and never previously applied for asylum in the **United States**. **There is a** requirement that an application be **submitted within** one year of arrival in the United states unless an individual falls within an exception to that filing deadline. Under 8 C.F.R. 208.4(a)(5)(ii), there is an exception for legal disability. Legal disability includes an **applicant** who is an unaccompanied minor or who **suffered from a mental impairment** during the one-year period after arrival. I

find the respondent falls within this exception. The respondent was born January 1, 1936. When he came to the United States in 1939, he was 13 years of age. Therefore, he is not held to the strict filing requirement of filing within one year of arrival to the United States. I find that the respondent is, therefore, not precluded from being considered for asylum.

The respondent's claim is based upon his having been a member in El Salvador of the gang Mara Salvatrucha. He has tattoos that are still visible, although some of the tattoos he has undergone treatment for their removal. See respondent's application, Exhibit 6, attachment from ██████████ High School, letter dated November 29, 2004, from Alan Eskot, director of education, indicating that the respondent "participated in the tattoo removal program. Dr. Frank Ryan is the physician who performed the tattoo removal." The tattoos were not completely removed. As acknowledged by Government counsel, they are still visible. That includes a tattoo on the respondent's forehead, the respondent's right upper arm, left upper arm, and across his center chest. These show the number 13 and MS and Mara Salvatrucha. The respondent claims to have tried to distance himself and leave his association of gang membership. This was after he was shot by another gang that surprised him. He showed evidence of scars in three places on his body that he claims are bullet wounds, and he also claims to have been shot in his rear. This is not challenged by the Government

The respondent fears harm if returned to El Salvador from the police and authorities, from his own former gang, and from rival gang members. Not only did the respondent submit articles concerning the problem of gangs in El Salvador and how they are treated and viewed by society there and the authorities, but also on today's date the Government submitted articles. I will refer to the Government's articles, because I think that they are most telling, especially in light of the Government seeking to submit them presumably to show the problems that gangs cause to society in El Salvador and in Central America. But with that showing, it also shows what the respondent may expect in the way of treatment if he is returned to El Salvador, See group Exhibit 10. Under tab 1, the first article, it states, "Since the iron-fist plan and the anti-Maras law were put into practice in the second half of 2003, the Salvadoran police have arrested 11,654 supposed gang members, often based on whether or not the arrested individual has numerous tattoos."

That same article in the next paragraph states, "According to data from the country's judiciary, only 5% of arrested gang members have been tried, in spite of government claims that the gangs commit 100 homicides a month and are responsible for most of the country's crime. Activists and gang experts question the government's claim."

On the second page of that article, it states, "The police have intensified their crackdown of suspected gang members,

arresting an average of 30 a day, in spite of the fact that the judicial and legal authorities **quickly** release them for lack of evidence."

Under the second article, **it** states, "In July, **police began** the 'iron-hand plan' to target suspected gang members. According to police, by August 15, 943 suspected gangsters had been detained. Many were released due to lack of **proof**."

Under tab 5, **the** article states, "Increasingly Central American governments are instituting tougher measures to **crack** down on **the** violent bands. Honduras and **El** Salvador have implemented '**zero** tolerance' laws that allow police to arrest youth just for sporting gang tattoos. The crackdowns have dispersed members into neighboring countries, where legislatures are studying similar measures."

I am satisfied from **the** evidence presented that the respondent at this **point** meets the definition of a refugee. He does so for various reasons. There is a strong indication of imputed membership in a **particular** group, **in** other words, a situation of where an individual tries to disassociate himself from being a **member** of a particular social group, that being a specific gang, the Mars Salvatrucha, and has tried to **do** that by **having** tattoos removed or attempted to. Whether or not the respondent, in fact, has removed himself **from all** gang activities **is**, frankly, in question by the **Court** in light of the **respondent's** continued criminal behavior while in the United

States, even as a juvenile and up to being an adult. In **this** regard, see also the **rap** sheet submitted by the Government, group Exhibit 9, tab 2. But for the sake of argument, if the **respondent**, in fact, has attempted to no longer be a member of the gang, if he is returned to El **Salvador**, he argues **that** the police are likely to harass and arrest him and harm him. He cites incidents in the **past** of where police had rounded him up shortly after having **tattoos** placed on him, and they tried to scrape the **tattoos** off with a knife. They have detained him, pushed him to the ground and beaten him on different occasions. Similarly, he **has** been shot by other gang members. His own gang, when he told them that he wanted to leave, also were not happy and threatened him with harm. He fears rival gang members, he fears the police, and he fears his own former gang.

I find his claim of **fear of harm to be** reasonable, from the submissions of the **respondent** as well as the submissions of the Government. Now, it is true that arrests do not necessarily mean that a person will be harmed, but there is also an argument concerning Matter of McMullen of uncontrollable groups. See 17 I&N Dec. 543 at 544-5 (BIA 1980). In other words, if he is not fearing harm by the government, then he is fearing harm by groups the government cannot control. The groups the government is trying to control are the very groups that the respondent claims not to be a member of any longer, but yet, it is imputed that he is a member because of his still **noticeable tattoos**. In a sense,

if he is trying not to be a member of the group, then he is harmed by his own group. Or no longer wanting to be a member or he is harmed by the other uncontrollable gangs, such as Gang No. 18, who had shot the respondent. Simply because the tattoos are visible, he risks this harm. And if he is still a member of the gangs, he faces the same problems.

I also think it reasonable to believe that if a person is deported from one country to another country, that the person will likely be placed into the custody of the receiving country. At least the person will be available to those authorities to inspect. From the new laws that apparently have been promulgated in El Salvador and other surrounding countries in Central America trying to deal with gangs, I do not think it is a far stretch of the imagination that the respondent would be subjected to enhanced scrutiny and harm.

However, because of the respondent's acknowledged gang activity and membership in El Salvador prior to coming to the United States and also because of his continuing antisocial behavior after arriving in the United States, as evidenced by his numerous contacts with the criminal justice system as a juvenile and then even as an adult, most recently saying that he "found a pistol by a bush" and was convicted of carrying a concealed weapon, I do not think that he is deserving of favorable discretion. Therefore, his request for asylum is denied in my discretion. His request for voluntary departure is denied in my

discretion.

However, discretion does not come into play with withholding of removal under the Immigration and Nationality Act. I am satisfied from the totality of **the** evidence that **it** is more **likely** than not (at least a 51% chance) that the respondent would face persecution if **returned** to El Salvador for his imputed membership in a particular social group. **There is** nothing **that** disqualifies him from withholding of removal. Withholding of removal under Section 241(b)(3) is, therefore, granted to El Salvador.

As to the relief under the Convention against Torture, I do not find the evidence to show that it is more likely than not that he would be **tortured** if sent to El Salvador by the government, government officials or persons acting with the awareness of government **officials**. Moreover, as **this** relief is, in essence, as extensive as a grant of withholding under the Immigration and Nationality Act, it becomes moot. But to the extent that it is an application before me, it is denied. I am satisfied that he would face persecution and harassment, but this does not rise to the level of a showing of likelihood of torture.

ORDERS

IT IS THEREFORE ORDERED that the respondent be removed from the United States to El Salvador on the charge brought against him.

IT IS FURTHER ORDERED that removal to El Salvador be withheld pursuant to Section 241(b)(3) INA.

JEFFREY ZLATOW
Immigration Judge

CERTIFICATE PAGE

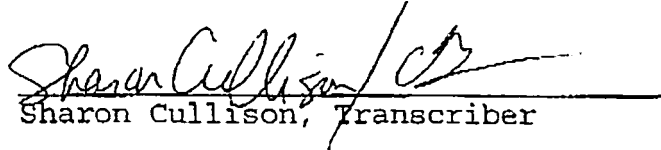
I hereby certify that the attached proceeding before
JUDGE JEFFERSY ZLATOW, in the matter of:

[REDACTED]

A [REDACTED]

Eloy, Arizona

is an accurate, verbatim transcript of the cassette tape as
provided by the Executive Office for Immigration Review and that
this is the original transcript thereof for the file of the
Executive Office for Immigration Review.


Sharon Cullison, Transcriber

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April 26, 2005
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies
that a Scny BEC/T-147, 4-channel transcriber or equivalent, as
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to transcribe the Record of Proceeding shown in the above
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U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [REDACTED]

Date: JUN 28 2005

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

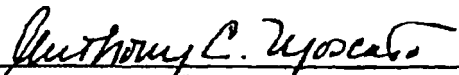
ON BEHALF OF RESPONDENT: Rajesh S. James, Esq.

ON BEHALF OF DHS: Paul R Foster
Assistant Chief Counsel

APPLICATION: Withholding of removal, Convention Against Torture

ORDER:

PER CURIAM. The Immigration Judge's January 13, 2005, decision, granting the respondent's application for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), as well as granting his request for deferral of removal under the Convention Against Torture, is adopted and affirmed based upon and for the reasons set forth in that decision. See *Matter of Burbano*, 201 & N Da. 872,874 (BLA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision.") Furthermore, we find the Immigration Judge's decision to grant the respondent's application for withholding of removal and relief pursuant to the Convention Against Torture supported by the record and applicable law. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) raises no arguments on appeal that would cause us to reverse the Immigration Judge's decision. Accordingly, the Immigration Judge's decision is affirmed and the appeal is dismissed.



FOR THE BOARD