

permit the expert's opinions. This case does not fit "exceptional circumstances" as the information and opinions gathered by Dr. Rabun drew upon his experience as a psychiatrist and could be reached by another expert psychiatrist. "Entitlement" does not apply in *Cooper* since he already brought his mental well-being into question, and therefore it is not considered as an additional invasion on his person for him to undergo psychiatric examination. When balancing probative versus prejudicial impact in *Cooper*, Dr. Rabun's testimony would have minimal probative value as the court found that his testimony would only be applicable for damages.

Use of Mental Health Evidence in Immigration Court

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Mental Health Conditions Should Be Considered in a Crime Analysis Determining If a Noncitizen Committed a "Particularly Serious Crime" Barring Protection from Deportation

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In *Shazi v. Wilkinson*, 988 F.3d 441 (8th Cir. 2021), the Eighth Circuit Court of Appeals reversed the decision of the Board of Immigration Appeals (BIA). The court found the BIA's categorical ban on consideration of mental health evidence in the analysis determining if a noncitizen had been convicted of a "particularly serious crime" that would bar protection from deportation to be an arbitrary and capricious construction of federal law (8 U.S.C. § 1231 (2006)).

Facts of the Case

Laith Shakir Shazi was born in Baghdad, Iraq on March 20, 1971, and is a citizen of Iraq. He was a

member of an organization that assisted the United States in its efforts to overthrow the regime of Saddam Hussein in the 1990s. As a result of his involvement, Mr. Shazi reportedly experienced PTSD, depression, and anxiety. In October 1996, he was admitted to the United States (Guam) as a parolee. Under immigration law, a parolee is an individual who is "paroled" into the United States under emergency, humanitarian, or other public interest reasons.

In March 1997, Mr. Shazi was granted asylum and eventually moved to Minnesota. His first criminal convictions were in 2007 for assault and making terroristic threats. The Department of Homeland Security began removal proceedings in 2012. Although the Immigration Judge (IJ) sustained the charges, the IJ granted Mr. Shazi's application for withholding of removal, thus allowing him to remain in the United States.

In 2016, Mr. Shazi was driving recklessly with his daughter and significant other as passengers. Following an argument, his daughter and significant other left the car and decided to walk. Mr. Shazi reportedly followed them in the vehicle, held up a knife, and verbally threatened to kill them. Subsequently, Mr. Shazi called home and threatened to hold a gun to his significant other's head. As a result, he was charged and convicted of malicious punishment of a child, felony domestic assault, and terroristic threats.

In 2018, the Department of Homeland Security reopened removal proceedings against Mr. Shazi, and the IJ terminated the bar of deportation. Mr. Shazi opposed the termination and applied for protection under provisions of the United Nations Convention Against Torture and Other Crime, Inhuman, or Degrading Treatment (CAT), 8 C.F.R. § 1208.16(c) (2) (2006), which states that noncitizens seeking protection from removal must show it is more likely than not that they would be tortured if returned to the country. Mr. Shazi's application was denied by the IJ, stating that his conviction of making terroristic threats in 2016 qualified as a "particularly serious crime," which bars withholding of removal. The IJ rejected Mr. Shazi's argument that his mental health conditions mitigated the seriousness of his crime. The IJ's rulings were upheld by the BIA, which concluded that mental health information cannot be included in the analysis of the seriousness of a crime. Mr. Shazi appealed to the Eighth Circuit Court of Appeals.

Ruling and Reasoning

Under immigration law, being convicted of a “particularly serious crime” blocks a noncitizen from invoking a withholding of removal under CAT (8 USC. 1231(b)(3)(B)(ii) (2006)). Mr. Shazi argued that the IJ and BIA erred in concluding that his conviction for terrorist threats was a particularly serious crime. The Eighth Circuit Court of Appeals, using the two-step analysis provided in *Chevron USA Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), reviewed the reasoning that the BIA used to interpret 8 U.S.C § 1231(b)(B)(ii). The two-step analysis under *Chevron* asks courts to first consider whether the statute’s meaning is clear. If so, that meaning is controlling. Second, where the statute’s meaning is not clear, the agency’s interpretation will be upheld if it is reasonable.

The court found that the statute was not clear in its definition of what constitutes a particularly serious crime. The court then looked to whether the BIA’s interpretation was “based on a permissible construction of the statute” or whether it was “arbitrary, capricious, or manifestly contrary to the statute” (*Shazi*, p 449). The court cited *In re N-A-M*, 24 I&N Dec. 336 (BIA 2007), which held that “all reliable information may be considered in making a particular serious crime determination. . . as well as other information outside the confines of a record of conviction” (*N-A-M*, p 342).

The court addressed the BIA’s categorical ban on mental health evidence and whether such evidence should be considered among “all reliable information” in determining the seriousness of a crime. In light of *In re N-A-M*, the Eighth Circuit Court of Appeals found the BIA’s ban on mental health evidence to be arbitrary and capricious. The court addressed the BIA’s decision that mental health evidence is a matter to be addressed in criminal court rather than immigration court. The court clarified that mental health evidence may well have not entered into criminal proceedings in the first place and that the complexities of how mental health evidence affects immigration law may not be appreciated by defense attorneys primarily involved in criminal proceedings. Failing to understand how one’s mental health could never be relevant as stated by the BIA, the court reiterated that all relevant information, including mental health, may be considered in a particularly serious crime analysis. The decision of the BIA was vacated and the case

remanded for further consideration of Mr. Shazi’s mental health evidence in determining whether he committed a particularly serious crime.

Discussion

The court’s ruling in *Shazi* is consistent with the Ninth Circuit Court of Appeals decision in *Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018), which found that the BIA had erred in ruling mental health evidence to be irrelevant in considering what constitutes a particularly serious crime. This bolsters the position that mental health be considered as a possible mitigating factor in the particularly serious crime analysis.

As used in immigration court, the term particularly serious crime is somewhat nebulous. The IJ must weigh a number of factors when arriving at the decision that asylum seeker committed a particularly serious crime. *Shazi* and *Gomez-Sanchez* require that the IJ consider mental health conditions as possible mitigating factors. This result will likely increase the demand for the involvement of forensic psychiatrists.

Forensic psychiatrists who decide to become involved in the asylum process enter a legal system that has marked differences from the criminal justice system. The U.S. Supreme Court has noted that “immigration law can be complex and it is a legal specialty of its own” (*Padilla v. Kentucky*, 559 U.S. 356 (2010), p 369). Immigration courts are part of the Department of Justice and, at the removal hearing, the asylum seeker has the burden of proof, i.e., the burden of proving all elements of the claim. The asylum seeker does not have the right to free representation, and many asylum seekers appear without an attorney. Asylum seekers who do not have legal representation are much less likely to be granted asylum. A forensic psychiatric evaluation in addition to legal representation further bolsters the chances of being granted asylum.

The forensic psychiatrist who evaluates asylum seekers should be familiar with the relevant law and language of immigration court. For example, a parolee in immigration law is an individual who is not eligible to enter the United States as a refugee or immigrant, but whom the Secretary of Homeland Security allows to be “paroled” into the United States for emergency, humanitarian, and public interest reasons. This notably contrasts with the definition of a parolee in the criminal justice system.

Legal Digest

The evaluation of asylum seekers requires the examiner to be aware of the effects of trauma on memory, the diagnosis of PTSD, malingering, and various cultural factors. The evaluation of asylum seekers who report horrific life events (e.g., atrocities, genocide, torture) can create countertransference, resulting in a strong desire on the part of the examiner to help, support, and advocate for the asylum seeker. The forensic psychiatric evaluator must be aware of this potential countertransference and strive for

objectivity. The forensic psychiatrist can play other roles in deportation cases, including teaching attorneys about methods to obtain a detailed trauma history and avoid destabilization of the asylum seeker (Meffert SM, Musalo K, McNiel DE, Binder RL. The role of mental health professionals in political asylum processing. *J Am Acad Psychiatry Law*. 2010; 38:479-89). The role of the forensic psychiatrist in immigration court is evolving. The *Shazi* decision is part of that evolution.