



Immigration Update

by Dr. Alicia Triche

When is a DUI “Particularly Serious?”

It may help to put matters in perspective if I first explain the consequences of determining that a given offense constitutes a particularly serious crime. Not only does such a determination override the universal rule concerning refugees—that an alien who faces persecution or even death will not be returned to the land controlled by his persecutors—but it strips the Attorney General of all discretion.¹

—Judge Stephen Reinhardt,
Ninth Circuit Court of Appeals

Under Section 241(b)(3) of the U.S. Immigration and Nationality Act [INA],² a refugee cannot be removed to a country where there is a “clear probability” persecution will occur. However, this relief, called “withholding of removal,” is pretermitted where “the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States.”³ The exception is modeled upon Article 33(2) of the United Nations Refugee Convention,⁴ which denies the protection of nonrefoulement to refugees who constitute either a danger to national security or a danger to the community of the host country.

Whether the latter can be evidenced by a conviction for driving under the influence—especially a “non-aggravated” DUI—remains an open question. Under the INA, the only per se “particularly serious crimes” (PSCs) are aggravated felonies with sentences of five years or more.⁵ And in 2004, the U.S. Supreme Court unanimously held that Florida driving under the influence (DUI) with “serious bodily injury” did not constitute an aggravated felony.⁶ The Board of Immigration Appeals has not issued a published decision regarding DUI as a particularly serious crime, and save for a few cases in the Ninth, there is little guidance at the circuit court level.⁷ That being said, the board has issued significant guidance regarding the general criteria for a PSC analysis.

The first articulation of the PSC criteria occurred in the historic case of *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). Under *Frentescu*, the assessment is whether the nature of the conviction, the underlying facts, the seriousness of the offense, and the sentence imposed indicate the alien is a danger to the community. *Frentescu*, 18 I&N at 247. That basic framework is still in place; but, since *Frentescu*, both statute and precedent have evolved. In 2014, the board in *Matter of G-G-S-* provided a useful overview of these developments. 26 I&N Dec. 339, 341–343 (BIA 2014). Now, it is clear that the only “the nature of the crime and not the likelihood of future serious misconduct” are relevant

to a PSC assessment. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2006). And, although reliable evidence outside the record of conviction may be considered, it is limited only to the issue of the conviction itself. Circumstances indicating future danger or propensity, including specifically the “person’s mental health”, *cannot* be considered. *G-G-S-*, 26 I&N Dec. at 339, 345.

These restrictions pose a real problem for an immigration judge who must accurately determine whether one (or more) DUI convictions render an applicant a danger to the community. On the record, a DUI is typically evidenced by a state judgment and sentence, an arrest report and/or indictment, a course completion certificate, and a receipt for fines paid. Using the Bureau of Indian Affairs (BIA)’s current criteria, to hold that such a standard DUI offense is a “particularly serious crime” would be highly inconsistent with both domestic and international law. As Judge Reinhardt’s concurrence states, a DUI is really a “run-of-the-mill offense,” and it would be inconsistent under U.S. law for a “DUI conviction to qualify as a particularly serious crime” when “even a recidivist DUI” is not a crime of moral turpitude.⁸

At the international level, that argument is even stronger. Nonrefoulement is the cornerstone of international refugee law, and exceptions that justify it are meant to be interpreted very narrowly, because they entail certain persecution or even death for the refugee.⁹ This is why the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Geneva 1992) indicates that particularly serious crimes only exist in “extreme cases.”¹⁰ The late Atle Grahl-Madsen, considering the full *travaux* and State practice, came to similar conclusions regarding the nature of “danger to the community.”¹¹ In his assessment, a crime would only meet the level of seriousness intended by the drafters if it was very grave: “[T]he offense must normally be a capital crime (murder, arson, rape, armed robbery, etc.).” *Id.* The idea is that a PSC must be so very dangerous that it ultimately threatens the peace and stability of the “community” as a whole.

Unless it also involves a vehicular homicide that was somehow not charged—or, as in the case of *Anaya-Ortiz*, a harrowing incident like ramming into an elderly woman’s house—a DUI, if properly assessed under applicable law, within the BIA’s current framework, will almost never meet the standard for a PSC. This is not to say that some DUI offenses might, under the totality of the circumstances, be an indication of serious danger to the community. The problem is that, when it comes to a DUI offender, the only way to accurately determine whether a “dan-

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ger to the community” truly exists is to look to factors well outside of the BIA’s criteria.

Marlen Santana Perez is a licensed clinical social worker who also holds law degrees in Tennessee and Cuba. She has extensive experience with behavioral assessment and substance-abuse counseling, including work in the Nashville branch of Centerstone and in various hospital emergency rooms. Santana Perez states that “every DUI offender is different”¹² and that numerous factors must be assessed to determine whether a person is likely to re-offend or cause injury to others. According to her, those include:

- The circumstances of the crime (including whether the driver was stopped due to racial profiling, or after an accident, or without suspicion)
- The family background (whether parents or other relatives have alcohol problems indicating a genetic propensity)
- The level of family support (such as from parents, a spouse, or children)
- The education and income level of the offender
- Existence of a co-existing mental diagnosis, especially untreated anxiety, trauma, or depression
- The time between offenses
- A willingness to change, evidenced by actions such as joining Alcoholics Anonymous, attending clinical counseling, volunteering, or having a sponsor; and
- Most important, degree of acculturation, including the offender’s capacity to accept the values underlying the criminalization of DUI¹³

To accurately assess the potential danger of a withholding applicant and to fairly assess whether that level of danger warrants return to persecution, an immigration judge must have access to the above criteria. Yet, current case law explicitly denies that possibility. The above cases, and especially *Matter of Carballe*,¹⁴ clearly hold that in a PSC analysis, the only assessment to be made regards the nature of the conviction itself. A separate assessment of “danger to the community” cannot be undertaken.

This is yet another case in which following international refugee law could actually afford the United States more protection. The Refugee Convention was the result of a collective, long-term state effort—an “expression of conviction by the comity of nations,”¹⁵ which was designed from the start with both refugee and state protection in mind. Article 33(2)’s “particularly serious crime” exception is meant to be one of those protections. And, for several years, U.N. High Commissioner for Refugees (UNHCR) has been submitting amicus briefs arguing that, under a correct interpretation of the Refugee Convention, a separate assessment of prospective “danger to the community” is warranted under that clause. Most recently, at the en banc stage of the *Delgado* case, UNHCR provided a documented, forceful argument that the Ninth Circuit should reject the Board’s ruling in *Carballe*, and add a future assessment of danger to the PSC criteria.¹⁶ As yet, that argument has not succeeded—but, in the DUI context, it is certainly worth revisiting. ☉

Endnotes

¹*Delgado v. Holder*, 648 F.3d 1095, 1109 (9th Cir. 2011) (*en blanc*) (Reinhart, J., concurring in part and concurring in judgment).

²8 U.S.C. §§ 1101 *et seq.*

³INA § 241(b)(3)(B)(ii). If the applicant has more than one aggravated felony conviction, the sentences will be considered in the aggregate. *Id.*

⁴United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The U.S. is bound by Article 33 of the Refugee Convention through its incorporation in the 1967 Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁵INA § 241(b)(c)(B).

⁶*Leocal v. Ashcroft*, 543 U.S. 1 (2004).

⁷See *Delgado v. Holder*, *supra*; *Anaya-Ortiz v. Holder*, 394 F.3d 673 (9th Cir. 2010).

⁸648 F.3d at 1110, citing *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). (Reinhart, J., concurring in part and concurring in judgment).

⁹See Guy Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3d ed. 2007) 234.

¹⁰*Id.* at ¶ 154; see also Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, *Ali v. Achim*, S. Ct. Case No. 06-1346 (Cert. to the 7th Cir.) 16–17.

¹¹Atle Grahl-Madsen *Commentary on the Refugee Convention 1951* (UNHCR 1997), Article 33 cmt. 10.

¹²Interview with Marlen Santana Perez, MSW, JD, Mar. 10, 2015 (correspondence on file with author).

¹³*Id.*

¹⁴19 I&N Dec. 357 (BIA 1986).

¹⁵Nehemiah Robinson, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION (1953) 6.

¹⁶U.N. High Commissioner for Refugees (UNHCR), *UNHCR intervention before the United States Court of Appeals for the Ninth Circuit in the case of Delgado v. Holder*, Attorney General, 16 October 2010, available at www.refworld.org/docid/4cbdb45d2.html (last visited Mar. 10, 2015).

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