File: (b) (6)

In re: (b) (6)

Date: MAY 30 2012

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Peter C. McCabe III, Esquire

ON BEHALF OF DHS: Kim M. Kucik
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

2012 SEP -7 PM 1:47
IMMIGRATION COURT
CHICAGO, ILLINOIS

US DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

The respondent appeals from the Immigration Judge's October 14, 2010, decision dismissing the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"), and granting the Department of Homeland Security's ("DHS") motion to terminate removal proceedings without prejudice. Sections 208(b)(1), 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. We deny the respondent's request for oral argument. 8 C.F.R. § 1003.1(e)(7). We will dismiss the respondent's appeal.

We review findings of fact made by the Immigration Judge, including determinations regarding credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burdens of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent filed his application before May 11, 2005, and thus review of his application is not governed by the REAL ID Act of 2005. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent's applications for relief are moot because the DHS moved to terminate removal proceedings without prejudice, and the Immigration Judge correctly granted the motion (I.J. at 8-9).[1] The respondent is no longer in the United States, having left voluntarily, and the DHS no longer seeks an order of removal against him (I.J. at 8-9). 8 C.F.R. §§ 239.2(a)(4), (c), 1239.2(c) (the DHS may move to dismiss proceedings when the respondent is no longer in the United States).

[1] Unless otherwise noted, all citations in this decision to the Immigration Judge's order are to the October 14, 2010, order.

Furthermore, the fact that the respondent is no longer physically present in the United States renders him statutorily ineligible for his requested relief (I.J. at 3-5). Sections 208 and 241 of the Act require that the respondent be physically present in the United States to apply for and be granted asylum or withholding of removal. Section 208(a)(1) of the Act ("Any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum"); *see also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173 (1993) (language of the Act envisions that proceedings will be conducted domestically); *accord, INS v. Cardozo-Fonseca*, 480 U.S. 421, 433 (1987) (section 208 of the Act "sets out the process by which refugees currently in the United States may be granted asylum"); *accord*, *Matter of Rodriguez-Palma*, 17 I&N Dec. 465, 470 n.2 (BIA 1980) ("Under the Refugee Act of 1980 both asylum under section 208(a) and relief under section 243(h) may be available to aliens physically present in the United States or at a land border or port of entry").[2]

The respondent's reliance on (b) (6) *v. Holder*, (b) (6) is inapt (Respondent's Brief at 5-6). The court there did not address whether a respondent remains eligible for asylum or withholding when he or she voluntarily departs the United States. Instead, the (b) (6) held that the Board retained jurisdiction over a respondent's motion to reopen or reconsider an order of removal when the respondent was involuntarily removed from the United States. *Id.* at 594-95. Here, in contrast, the respondent departed voluntarily, and he has thus rendered himself ineligible for asylum or withholding of removal. Nothing in (b) (6) (b) (6) *v. Holder*, *supra*, indicates otherwise.[3]

Moreover, allowing applicants to seek asylum from outside of the United States pursuant to section 208 would nullify section 207 of the Act, which establishes a process by which applicants who are outside of the United States may apply for asylum (I.J. at 4). Section 207 of the Act; *see Matter of H-N-*, 22 I&N Dec. 1039, 1041 (BIA 1999) ("a statute or regulation should be construed so that effect is given to all its provisions and no part of it will be inoperative, superfluous, void, or insignificant."); *see also Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 750 (BIA 2009) ("Any ambiguities should be resolved in favor of an interpretation consistent with the statutory and regulatory scheme"). We point out that the respondent may seek admission as a refugee pursuant to section 207 of the Act.

Likewise, a grant of withholding of removal is contingent on an order of removal to El Salvador, which the DHS no longer seeks. "It is axiomatic that in order to withhold removal there must first

---

[2] We agree with the Immigration Judge that although not explicitly addressed in the CAT regulations, physical presence in the United States is also required for CAT protection (I.J. at 4).

[3] The respondent's reliance on *Nken v. Holder*, 129 S. Ct. 1749, 1755-56 (2009) is equally inapt (Respondent's Brief at 6, 12-13). The Court there did not address a respondent's eligibility for asylum or withholding of removal after his or her voluntary departure from the United States. Instead, the Court addressed the factors relevant to determining whether to grant a judicial stay of removal during the pendency of a petition for review in the federal courts of appeal. *Nken v. Holder*, *supra*, at 1756-62.

be an order of removal that can be withheld." *Matter of I-S- & C-S-*, 24 I&N Dec. 432, 433 (BIA 2008).

We further agree with the Immigration Judge's determination that the respondent abandoned his applications for relief both by departing the United States without first obtaining advance parole, and by failing to comply with the regulatory biometrics requirement (I.J. at 4-8). 8 C.F.R. §§ 1208.8(a), 1003.47(c), (d). The respondent left the United States voluntarily, without making any effort to obtain advance parole (I.J. at 6). Moreover, the respondent has since been offered, and has turned down, an offer of parole into the United States (*Id.*; Exhs. 24A, 25A). Furthermore, since departing the United States, the respondent has obtained lawful permanent residence in Chile (I.J. at 6; Exh. 24A - attachment to February 17, 2010, Letter from Peter C. McCabe, Winston and Strawn, LLP, Attorney for Respondent to Kim Kucik, Assistant Chief Counsel, DHS). Thus, the respondent has not rebutted the presumption that he abandoned his applications for relief when he departed the United States without first obtaining advance parole (I.J. at 6-7). 8 C.F.R. § 1208.8(a).

The respondent has also abandoned his applications by failing to comply with the biometrics requirement set forth in the regulations (I.J. at 7-8). 8 C.F.R. §§ 1003.47(c), (d). The respondent's contention that he may fulfill the biometrics requirement in Chile is without merit (I.J. at 7-8; Exh. 24A - *see* attached July 30, 2010 Letter from Peter C. McCabe, Winston and Strawn, LLP, Attorney for Respondent to Kim Kucik, Assistant Chief Counsel, DHS). The DHS has established specific procedures governing compliance with the biometrics requirement, and the respondent does not have the authority to dictate if and when the DHS should depart from those requirements (I.J. at 7-8).[4] Moreover, the respondent has not demonstrated "good cause" for failing to comply with the biometrics requirement, particularly given that he was offered and turned down an offer of parole into the United States (I.J. at 8). 8 C.F.R. §§ 1003.47(c), (d). Thus, we agree with the Immigration Judge that the respondent has abandoned his applications for relief (I.J. at 4-8). 8 C.F.R. §§ 1208.8(a), 1003.47(c), (d).

Finally, we do not agree with the respondent's contention that in remanding the record to the Board, the United States Court of Appeals for the (b) (6) implicitly held that the respondent need not be physically present in the United States to pursue his asylum claim, or that his departure did not result in abandonment of his applications (Respondent's Brief at 12-14). The (b) (6) remanded the record for further factual findings regarding the respondent's role in the November 1989 killings of 6 Jesuit priests, their housekeeper, and her daughter by an El Salvadoran military unit, the legitimacy of his murder conviction, and whether the respondent has demonstrated a well-founded fear of return to El Salvador. (b) (6) [5] Nothing in

---

[4] The DHS has not agreed to the respondent's request that he be allowed to comply with the biometrics requirement in Chile (Exh. 25A).

[5] The record reflects that the U.N. Report of the Commission on the Truth for El Salvador found that the respondent had accompanied the military unit on its deadly mission, and recommended that he be pardoned given that the men who the Commission found had planned and ordered the murders were not convicted of murder (Exh. 12 at 53-54). During the pendency of his appeal at the Board, the respondent filed a copy of a May 30, 2011, writ of indictment issued by the Spanish National (continued...)

the (b) (6) opinion addresses the respondent's departure from the United States and its impact on his removal proceedings or his eligibility for relief. In fact, it is not clear whether the Seventh Circuit was aware that the respondent had departed the United States during the pendency of his petition for review before the court. Thus, the fact that the (b) (6) remanded the record to the Board cannot be read as a holding, implicit or otherwise, that the respondent may maintain his request for relief while remaining outside of the United States.

For these reasons, we will dismiss the respondent's appeal.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

[5] (...continued)
Court of Justice charging the respondent and 19 others with "eight acts of terrorist murders" and "one case of crime against humanity against the rights of people" based on the murders.

IMMIGRATION COURT

In the Matter of

(b) (6)

Respondent

Case No.: (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the ~~oral~~ written decision entered on 11-14-2010. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[X] Asylum was ( )~~granted~~ (X)denied ( )withdrawn.

[X] Withholding of removal was ( )~~granted~~ (X)denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[X] Proceedings were terminated, without prejudice

[X] Other: CAT denied

Date: Oct 14, 2010

Robert D. Vinikoor

ROBERT D. VINIKOOR
Immigration Judge

Appeal: ~~Waived~~ Reserved Appeal Due By:

Resp 11-15-2010

File: (b) (6) Date:

In re: (b) (6)

JAN 28 2008

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mollie M. Pawlosky, Esquire

ON BEHALF OF DHS: Thomas O'Malley
Assistant Chief Counsel

IMMIGRATION COURT
CHICAGO, ILLINOIS
2008 FEB -5 AM 10:37
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

This case was last before us on September 11, 2003, when we summarily affirmed an Immigration Judge's decision denying the respondent's applications for asylum, withholding of removal, protection under the Convention Against Torture, and for voluntary departure. In a decision dated (b) (6) the United States Court of Appeals for the (b) (6) vacated our decision and remanded for reconsideration of the respondent's claims for relief. (b) (6) (b) (6)

In remanding, the court indicated numerous issues which were underdeveloped or unclear and which, depending on their outcome, would have a material effect on the respondent's eligibility for relief and whether he had met his burden of proof. Because these issues involve issues of fact and questions of law in the first instance, we will remand to the Immigration Judge for further analysis of the respondent's claims for relief. Accordingly, the Immigration Judge should direct his or her attention to the questions raised by the circuit court involving whether the respondent is barred from relief as someone who engaged or participated in persecution of others, as well as whether he is barred for having been convicted of a particularly serious crime. *Id.* at (b) (6) With regard to the first bar to relief, the court noted not only legal issues of first impression, but also factual discrepancies which had not been addressed. *Id.* at (b) (6) As for the issue of whether the respondent was convicted of a particularly serious crime, the (b) (6) specifically found the

[1] The respondent's family was riding with his case, but their cases were apparently severed by agreement of the parties and by order of the circuit court (Respondent's Br. at 2).

Immigration Judge's refusal to consider the possibility that the respondent's conviction was based on a farcical trial was in error. *Id.* at (b) (6) In fact, as noted by the respondent in his brief following the remand, the (b) (6) was fairly clear in its opinion that the respondent's conviction could not serve as a bar to relief (Respondent's Br. at 6).

At any rate, both of these issues, as well as the final issue to reconsider–whether there was documentary evidence of record to support a well-founded fear of persecution and/or torture–may require the Immigration Judge to schedule an evidentiary hearing. *See id.* at (b) (6) We leave this to his or her discretion, although we note that the (b) (6) clearly mandated that there should be an updated assessment of current political conditions which would likely require the submission of additional evidence. *Id.* at (b) (6)

ORDER: The record of proceedings is remanded to the Immigration Judge for further proceedings consistent with this order and the (b) (6) remand.

FOR THE BOARD