File: (b) (6) [redacted] Date: APR 23 2012

In re: (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Kerri Calcador
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(F))

APPLICATION: Convention Against Torture

The respondent appeals from the Immigration Judge's October 26, 2011, decision[1] denying his application for deferral of removal under the Convention Against Torture ("CAT"). 8 C.F.R. §§ 1208.17 - 1208.18. The respondent also appeals from the Immigration Judge's October 27, 2011, Order denying his Motion to Admit Evidence. The Department of Homeland Security ("DHS") has filed an opposition in response. The respondent also moves the Board to appoint him counsel. We will grant the respondent's motion for a waiver of the fee associated with filing his appeal. We will deny the respondent's motion to appoint counsel and dismiss his appeal.

We review findings of fact made by the Immigration Judge, including the determination of 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 for deferral of removal after May 11, 2005, and thus review of his application is governed by the REAL ID Act of 2005. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). The Immigration Judge found the respondent not credible (October 27, 2011, I.J. at 12-18).

We will deny the respondent's motion for appointment of counsel. Although the respondent has a statutory right to counsel at no expense to the government, he does not have a right to appointed counsel. Section 292 of the Act, 8 U.S.C. § 1362.

---

[1] The Immigration Judge issued her decision in court on October 26, 2011, but dated the written decision October 27, 2011, for purposes of commencing the period for appeal. Since the written decision is dated October 27, 2011, it will be referred to hereafter by that date.

(b) (6)

We will dismiss the respondent's appeal. The Immigration Judge properly denied the respondent's September 23, 2011, Motion to Admit Evidence on the grounds that the respondent did not explain why the attached evidence, a May 22, 1998, arrest warrant was not discovered and submitted earlier in the case (October 27, 2011, Order). This case has been pending for almost 8 years, and the respondent was specifically advised of his need to corroborate his claim in March of 2006 (October 27, 2011, I.J. at 8). Moreover, the United States Court of Appeals for the (b) (6) remanded the case in (b) (6) to give the parties an opportunity to supplement the record with evidence relevant to the respondent's claim for CAT deferral. *See* (b) (6) (b) (6)

The respondent was given numerous opportunities to present his case in full to the Immigration Court, and there is no explanation for why he waited until the eve of the Immigration Judge's decision to move for the admission of new evidence (October 27, 2011, Order). Furthermore, the attached evidence is not properly authenticated (*Id.*). 8 C.F.R. § 1287.6(b); *see also Vatyan v. Mukasey*, 508 F.3d 1179, 1182-86 (9th Cir. 2007) (foreign documents may be authenticated pursuant to requirements of 8 C.F.R. § 1287.6 or any recognized procedure). The respondent was given a full and fair hearing below, and the Immigration Judge's decision to exclude the new evidence submitted on the eve of her decision did not violate the respondent's due process rights. *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (due process requires that the respondent be provided a full and fair hearing).

The Immigration Judge also correctly denied the respondent's application for CAT deferral. The Immigration Judge's adverse credibility finding is not clearly erroneous. Section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii). The finding was based on identified discrepancies between the respondent's testimony and record evidence (October 27, 2011, I.J. at 12-14). Contrary to the respondent's argument on appeal, the inconsistencies cannot be attributed to translation errors (Respondent's Brief at 37). Moreover, the respondent incorrectly argues that the inconsistencies cannot support an adverse credibility finding because they are trivial (Respondent's Brief at 37). We do not agree that they are trivial. Also, under the REAL ID Act, an adverse credibility finding may be based on any discrepancy, regardless of whether it goes to the heart of the claim (Respondent's Brief at 37). Section 208(b)(1)(B)(iii) of the Act.

Furthermore, the respondent's contention that the discrepancies are attributable to the ineffective assistance of his prior counsel is not supported by the record (October 27, 2011, I.J. at 14-16; Respondent's Brief at 37-38). In raising this argument, the respondent has not complied with *Matter of Lozada*. 19 I&N Dec. 637, 639 (BIA 1988). His prior counsel has also submitted a declaration explaining her version of events and explicitly denying his claim that she advised him to omit relevant information from his application and testimony before the court (October 27, 2011, I.J. at 15-16).

The adverse credibility finding is further supported by record evidence reflecting that the respondent submitted fraudulent documents in support of his claim (October 27, 2011, I.J. at 12-14, 16-18; Exhs. R-13, R-18; November 4, 2009, Tr. at 299–314; Jan. 6, 2011, Tr. at 353-70; April 11, 2011, Tr. at 396-432; May 10, 2011, Tr. at 442-88). *Matter of O-D-*, 21 I&N Dec. 1079, 1082-84 (BIA 1998) (submission of fraudulent identity documents is a strong ground supporting

adverse credibility finding); *Desta v. Ashcroft*, 365 F.3d 741, 745 (9th Cir. 2004) (submission of fraudulent documents that go to the heart of the respondent's claim is one ground supporting adverse credibility finding); *Don v. Gonzales*, 476 F.3d 738, 742-44 (9th Cir. 2007) (inconsistencies that weaken an asylum claim accompanied by other indications of dishonesty support an adverse credibility finding).

The respondent does not contest that the documents submitted were fraudulent, but instead contends that they were ancillary to his claim (Respondent's Brief at 33). On the contrary, the fraudulent arrest warrants are central to the respondent's claim that he will be tortured upon return by the Kenyan police, and thus his submission of fraudulent documents supports the Immigration Judge's denial of his claim.

We do not agree with the respondent that the DHS attorney inappropriately became a fact witness with respect to this issue (Respondent's Brief at 33). The overseas investigation of the three documents was authenticated by the comprehensive testimony of the five witnesses who participated in the investigation, and not by the DHS attorney (November 4, 2009, Tr. at 299–314; Jan. 6, 2011, Tr. at 353-70; April 11, 2011, Tr. at 396-432; May 10, 2011, Tr. at 442-88). Furthermore, there is no record evidence to support the respondent's contention that the findings of the investigators should be ignored (Respondent's Brief at 10-11). Although the country conditions reports in the record reflect a certain level of official corruption in Kenya, there is no evidence that the investigators in this case were bribed or that their findings are otherwise flawed (Exh. R-3 at 1, 4, 7; Exhs. R-13, R-18; November 4, 2009, Tr. at 299–314; Jan. 6, 2011, Tr. at 353-70; April 11, 2011, Tr. at 396-432; May 10, 2011, Tr. at 442-88).

The Immigration Judge also correctly denied the respondent's argument that the DHS violated the confidentiality requirement of 8 C.F.R. § 1208.6 by providing identifying information to the Kenyan police during the course of its investigation into his documents (October 27, 2011, I.J. at 18-19; Respondent's Brief at 28-33). There are no errors in the Immigration Judge's findings and conclusions as to confidentiality (I.J. at 19). It is speculative as to whether, many years after the alleged events which the record reflects did not occur, the Kenyan police would infer from the documents that the respondent is seeking asylum-related relief in the United States (I.J. at 19). *See Lyashchynska v. U.S. Att'y Gen.*, ___ F.3d ___ 2012 WL 1107991 at 6-7 (11th Cir. 2012) (no breach when, among other things, the government investigator did not disclose any facts that would lead to the conclusion that the respondent had applied for asylum).

In fact, the respondent's cousin went to the Kenyan police herself to obtain information regarding his arrest record (October 27, 2011, I.J. at 9-11, 13, 16-17, 19; September 10, 2010, Tr. at 95-102, 130-31). Moreover, the respondent has publicly discussed the grounds of his asylum claim within both the United States and Kenya (October 27, 2011, I.J. at 18; March 6, 2006, Tr. at 92-96; September 10, 2010, Tr. at 167-70; Exh. R-4 at 2-6 - Sandra Hernandez, *Rulings Don't End Immigrants Detention*, L.A. TIMES, Dec. 14, 2009; Exh. R-7, Exh. C, at 8 - December 26, 2009, Letter from Michael Nasubo to Respondent). Furthermore, there is no evidence that Kenya seeks to harm or persecute putative asylees. *See Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1162-63 (8th Cir. 2005) (no breach of confidentiality when respondent fails to show how he may be harmed as a result of the disclosure).

Finally, the facts here are not like those presented in the opinions of *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 262-68 (2d Cir. 2006) and *Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008), where the courts held that government investigators had violated the confidentiality requirement of 8 C.F.R. § 1208.6. In *Lin v. U.S. Dep't of Justice, supra*, the document that was disclosed - a certificate of release from a Chinese prison for "conspiracy of anti-revolution" - gave rise to a "strong inference" that the respondent was seeking asylum. *Lin v. U.S. Dep't of Justice, supra*, at 265. The documents disclosed to the Kenyan police in this case do not identify the purposes of the respondent's alleged arrests, and they do not lead to a "strong inference" that the respondent has applied for asylum-related relief.

In *Anim v. Mukasey, supra*, the government provided only a short letter that failed to adequately explain the procedures followed by the investigators. *Anim v. Mukasey, supra*, at 254. Here, in contrast, the investigators testified in great detail with respect to the procedures that they followed in investigating the three documents submitted by the respondent (Tr. at 299-488). As the Immigration Judge explained, the DHS officials did not disclose the fact that the respondent had filed an asylum-related application or the factual assertions underlying his claim (I.J. at 19).

In sum, the record does not support the respondent's claim that the DHS's investigation of the three documents breached the confidentiality requirement of 8 C.F.R. § 1208.6, and the Immigration Judge correctly denied the respondent's argument (October 27, 2011, I.J. at 18-19).

Finally, we agree with the Immigration Judge that the record as a whole, including the country conditions reports and various articles, does not support the respondent's claim for CAT deferral (October 27, 2011, I.J. at 19-22). 8 C.F.R. § 1208.17(a). Contrary to the respondent's argument on appeal, the Immigration Judge considered all of the record evidence in rendering her decision (Respondent's Brief at 35; October 27, 2011, I.J. at 19-22). The record supports the Immigration Judge's decision.

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

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

IMMIGRATION COURT

(b) (6)

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 decision entered on October 26, 2011. 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 the United Kingdom
If the United Kingdom will not accept Respondent then Removal Shall be to Kenya

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to KENYA.

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

Respondent's application for:

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

[ ] Withholding of removal was ( )granted ( )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.

[✓] Proceedings were terminated.

[✓] Other: Security Investigations Completed 8 C.F.R 1003.47.

Date: Oct 26, 2011

Z. DiPaolo

ZSA ZSA DEPAOLO
Immigration Judge

Appeal: Waived/Reserved Appeal Due By: Nov 28, 2011

File: (b) (6) Date: SEP 03 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Kerri Calcador
Senior Attorney

APPLICATION: Convention Against Torture

The respondent is a male native and citizen of Kenya whose case was last before us on August 2, 2006, when we dismissed his appeal of an Immigration Judge's denial of his application for protection under the Convention Against Torture. The respondent filed a petition for review of that decision with the United States Court of Appeals for the (b) (6) In an order dated (b) (6) the (b) (6) remanded the case to the Board for consideration of the respondent's Convention Against Torture claim, on an open record, under the REAL ID Act standards. The Department of Homeland Security (DHS) has filed a motion to remand as further fact-finding is required. The motion will be granted and the record remanded. At the remanded hearing, both parties shall be afforded an opportunity to present additional evidence, both testimonial and documentary.

Accordingly, the following order shall be entered:

ORDER: The motion to remand is granted and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion, and not inconsistent with the (b) (6) order, and the entry of a new decision.

FOR THE BOARD