File: (b) (6) [1] Date: JUL 12 2012

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

ON BEHALF OF DHS: Renae M. Hansell
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 OCT 23 PM 12:44

This case was last before the Board on October 19, 2009, when we remanded the record to the Immigration Judge after the United States Court of Appeals for the (b)(6) vacated our decision affirming the Immigration Judge's adverse credibility finding, and remanded to the Board for reconsideration of the respondent's application for relief.[2] On June 27, 2011, the Immigration Judge again found the respondent to be not credible. The Immigration Judge pretermitted the respondent's asylum application as untimely, and denied his request for withholding of removal and protection pursuant to the regulations implementing the United States' obligations under the Convention Against Torture ("CAT"). The respondent, a native and citizen of Togo, now appeals. The respondent's request for a waiver of the appellate filing fee is granted. *See* 8 C.F.R. § 1003.8(a)(3) (2012). His request for oral argument is denied pursuant to 8 C.F.R. § 1003.1(e)(7). The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2012). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of

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[1] The respondent appeared via video conferencing from the United States Embassy in Switzerland.

[2] The court determined that the inconsistencies on which the Board relied in affirming the Immigration Judge's adverse credibility finding were not inconsistencies at all. (b) (6) *v. U.S. Attorney General* (b) (6)

discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). The respondent's application was filed after May 11, 2005, and thus, is governed by the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent argues that the government's unwillingness to effectuate the respondent's return from Switzerland to appear at the remand hearing violated the respondent's due process (Respondent's Br. filed December 5, 2011, at 3; Respondent's Br. filed November 14, 2011, at 9-11). He asserts that he attempted to facilitate his return through the Office of Immigration Litigation, the Office of Chief Counsel, Detention and Removal Operations, the United States Citizen and Immigration Services, and the Department of Justice (Respondent's Br. filed November 14, 2011, at 10). He further claims that trial counsel was not honest when she stated at the July 27, 2011, hearing that the government offered the respondent parole but he refused the offer because he did not want to be detained (Respondent's Br. filed December 5, 2011, at 3; Respondent's Br. at 10; Tr. dated June 27, 2011, at 10-12).

In a letter to the Law Enforcement Parole Branch (LEPB), a copy of which was submitted on appeal, counsel for the respondent asked to be informed of whether the respondent would be detained, "as this will have a great impact on the disposition of the case, as well as his willingness to risk returning to the United States" (Respondent's Br. filed November 14, 2011, Exh. A, Letter dated March 16, 2010, at 2). Thus, even if trial counsel erred in stating that the government had made an offer of parole, the respondent suggested that he would not return if there were a risk that USCIS would detain him upon his being paroled into this country. His comment that the government's failure to effectuate his return thus seems disingenuous.

Regardless, according to documents submitted on appeal, the Acting Unit Chief for LEPB denied the respondent's request for Significant Public Benefit Parole on June 3, 2010 (Respondent's Br. filed November 14, 2011, Exh. A, Letter from LEPB dated June 3, 2010). *See* section 212(d)(5)(A) of the Act, 8 U.S.C. § 1182(d)(5). The denial of parole did not result in a due process violation, because the respondent was able to appear via video conferencing from Switzerland where he currently resides. The regulations authorize Immigration Judges to conduct hearings through video conference to the same extent as the Immigration Judge may conduct hearings in person. 8 C.F.R. § 1003.25(c). *See also* section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii). The respondent relies on a Ninth Circuit decision for his assertion that video conferencing may make it difficult for an Immigration Judge to make a credibility determination, and diminishes the attorney's effectiveness (Respondent's Br. filed November 14, 2011, at 11). The(b) (6) under whose jurisdiction this case arises, has not so ruled. *See e.g., Richardson v. Reno*, 162 F.3d 1338, 1353, n.62 (11th Cir. 1998) (recognizing the availability of video teleconferencing for immigration hearings). Hence, any claim that the respondent was prejudiced by having to appear via video conferencing is unavailing.

The respondent next argues that the Immigration Judge erred in concluding that the respondent's asylum application was time-barred, and that the respondent previously waived consideration of his asylum application (I.J. dated June 27, 2011, at 5, 8; Respondent's Br. filed November 14, 2011, at 11-12). An alien must file an asylum application within 1 year after the date of the alien's arrival in the United States, or by April 1, 1998, whichever is later, unless the alien can demonstrate either changed circumstances or extraordinary circumstances warranting an exception to the deadline.

Sections 208(a)(2)(B), (D) of the Act, 8 U.S.C. §§ 1158(a)(2)(B), (D); 8 C.F.R. §§ 1208.4(a)(2), (4), (5). The respondent was admitted to the United States on July 31, 2004. Thus, he was required to file the asylum application not later than July 31, 2005. The respondent filed his application on August 11, 2005.

The record indicates that on July 12, 2006, there was a discussion between the respondent's counsel and the Immigration Judge regarding the late filing of the respondent's asylum application (Tr. dated June 27, 2011, at 19, 21; Tr. dated July 12, 2006, at 25-29). The Immigration Judge asked counsel whether the respondent would seek asylum, to which counsel replied, "No, he can't" (Tr. dated July 12, 2006, at 29). Thus, we find no clear error in the Immigration Judge's factual determination that the respondent did not apply for asylum, and only applied for withholding of removal and protection under the CAT (I.J. dated June 27, 2011, at 5). *See* 8 C.F.R. § 1003.1(d)(3)(i).

Furthermore, the record reflects that the respondent did not appeal the Immigration Judge's July 12, 2006, determination that the respondent elected not to seek asylum and his conclusion that the asylum application was time barred (I.J. dated July 12, 2006, at 3-4). Hence, the respondent has waived any challenge to the Immigration Judge's decision to pretermit the asylum application as untimely, including the current argument that the respondent established exceptional circumstances warranting an exception to the filing deadline because he had F-1 status when he filed the application (Respondent's Br. filed November 14, 2011, at 12; Tr. dated June 27, 2011, at 20-21). *See* 8 C.F.R. § 1208.4(a)(5)(iv).

The respondent challenges the Immigration Judge's adverse credibility finding (I.J. dated June 27, 2011, at Respondent's Br. at 12-14). He argues that because the (b) (6) found that the three inconsistencies cited by the Board in affirming the Immigration Judge's prior adverse credibility finding were not inconsistencies at all, the respondent must be considered to have testified credibly at his prior hearing (Respondent's Br. filed November 14, 2011, at 14). Thus, he asserts that the Immigration Judge erred in referring to the respondent's prior testimony as incredible and in basing his adverse credibility finding on remand on non-existent inconsistencies (Respondent's Br. filed November 14, 2011, at 14).

The (b) (6) did not foreclose a reconsideration of the respondent's credibility. (b) (6) *v. U.S. Attorney General*, *supra*, at (b) (6). Rather, it only foreclosed an adverse credibility finding based in whole or in part upon the three alleged inconsistencies discussed in its opinion. *Id.* Thus, the respondent incorrectly states that he must be considered to have testified credibly at his prior hearing.

In making the credibility determination on remand, the Immigration Judge considered the respondent's updated asylum application in which he states "I was hospitalized *for two days* after the government released me for treatment of the injuries I sustained from the severe beatings. . .." (I.J. at 7; Exh. 11, Tab A at 5) (emphasis added). The Immigration Judge noted that the (b) (6) in assessing the prior credibility finding, determined that the Immigration Judge and the Board added the word "for" to the respondent's original statement that he "was hospitalized two days" after his release, thus creating an inconsistency with the respondent's testimony that he

was hospitalized for 3 weeks (I.J. at 6-7; Exh. 2 at 5). (b) (6) *v. U.S. Attorney General*, *supra*, at (b) (6) stated, "With the addition of this word ["for"], there is an inconsistency. However, the natural reading of (b) (6) statement, without the addition of the word, means that two days after his release he was hospitalized." *Id.* The court found the "natural reading" of the statement to be consistent with medical documents contained in the record showing that the respondent was treated at a clinic for 2 days after his release, and then was brought to a hospital where he stayed for 3 weeks. *Id.*

The Immigration Judge cited the (b) (6) statement that the inclusion of the word "for" results in an inconsistency regarding the time the respondent was hospitalized (I.J. dated June 27, 2011, at 6). Because the respondent in his updated asylum statement indicated that he was hospitalized *for* 2 days, the Immigration Judge concluded that the respondent was not credible (I.J. dated June 27, 2011, at 6, 9). Based on the record before us, including the (b) (6) decision, we do not find clear error in this conclusion. *See* 8 C.F.R. § 1003.1(d)(3)(i). The updated asylum application indicates that the respondent was hospitalized for 2 days after the Togolese government released him (I.J. dated June 27, 2011, at 6, 9; Exh. 11, Tab A at 5). This statement conflicts with his testimony on July 12, 2006, that he was hospitalized for 3 weeks after his release (I.J. dated June 27, 2011, at 6, 9; Tr. dated July 12, 2006, at 55). Thus, the respondent's updated asylum application provides the inconsistency that the (b) (6) stated did not exist in the prior proceeding.[3]

In affirming the Immigration Judge's adverse credibility finding, we conclude that the respondent did not demonstrate his eligibility for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). The respondent also failed to meet his burden with respect to protection under the CAT because he has not demonstrated that he more likely than not will be subjected to torture if returned to Togo. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

[3] The Immigration Judge also based his credibility determination on the respondent's testimony regarding whether he worked in Switzerland or was in a volunteer position (I.J. dated June 27, 2011, at 7-8). The Immigration Judge found the respondent to be evasive in answering questions regarding his indication in the updated asylum application that he was working in a sales position (I.J. dated June 27, 2011, at 7-8). The respondent does not challenge this aspect of the decision. Hence, in light of our conclusion that the respondent is not credible based on an inconsistency regarding his hospitalization stay, we decline to address this aspect of the Immigration Judge's decision.

IMMIGRATION COURT

[redacted]

In the Matter of

[redacted]

Respondent

Case No.: [redacted]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on June 27, 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 Togo. ~~or in the alternative to~~ WKHiR.

[ ] 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:

[✓] Asylum was ( )granted (✓)denied( )withdrawn time Barred

[✓] 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: _____.

Date: Jun 27, 2011

Wayne K Houser Jr

WAYNE K. HOUSER, JR.
Immigration Judge

Appeal: Waived/Reserved Appeal Due By: 7-27-2011

By Respondent

File: (b) (6)

Date: OCT 19 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

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: Withholding of removal; Convention Against Torture

This case was last before the Board on February 29, 2008, when we dismissed the respondent's appeal from an Immigration Judge's July 12, 2006, decision denying his applications for withholding of removal and protection under the Convention Against Torture. On (b) (6) the United States Court of Appeals for the (b)(6) vacated our decision, and remanded the case to us for reconsideration of the respondent's applications. The record will be remanded to the Immigration Judge for further proceedings.

In its order, the (b) (6) found that the three inconsistencies cited by the Board in affirming the Immigration Judge's adverse credibility finding were not inconsistencies at all. While the (b) (6) held that the rationale upon which the Board relied in its credibility determination was not supported by the record, it did not foreclose a reconsideration of the respondent's credibility on remand. In light of our limited fact-finding authority, we find it necessary to remand the record to the Immigration Judge for further proceedings. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). While the Immigration Judge found that the respondent failed to submit sufficient evidence in support of his claim, he did not identify the reasonably available evidence to which he referred (I.J. at 15). On remand, the parties must be permitted to update the record and speak to any new material and its relevance to the respondent's claim. Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD