U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Shin, Steven I., Esq
Law Offices of Steven I. Shin
727 Atlantic Avenue, 3rd Fl
Boston, MA 02111

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: CASTRO-TOLENTINO, EZEQUIA... **A 087-968-919**

Date of this notice: 1/21/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

File: A087 968 919 – Boston, MA Date: JAN 21 2015

In re: EZEQUIAS ENOC CASTRO-TOLENTINO a.k.a. Manuel Martinez-Gonzalez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven I. Shin, Esquire

ON BEHALF OF DHS: Brandon L. Lowy
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Termination; motion to suppress

The respondent appeals the Immigration Judge's decision dated December 11, 2012. The Immigration Judge denied the respondent's October 6, 2011, motion to suppress (Exh. 4), sustained the removability charge in the Notice to Appear (Exh. 1), and ordered the respondent removed from the United States to El Salvador. The record will be remanded.

The respondent claims that on March 14, 2011, he and his aunt were in the Nashua District Court in Nashua, New Hampshire, in order to answer a citation he received on January 28, 2011. *See* Respondent's Br. at 2. After paying a fine, the respondent and his aunt were met by "an unknown individual male" who began asking questions—while presenting a badge identifying himself as an Immigration and Customs Enforcement (ICE) Agent—to the respondent about his identity and legal status. *See id.* at 2-3 (stating that the respondent and his aunt did not feel free to leave the agent). After the respondent's aunt presented documentation verifying her United States citizenship, the agent, who was previously speaking in English, "asked [the respondent] in Spanish for [his] 'papers.'" *See id.* at 3. Thereafter, the agent took the respondent by the arm towards an adjacent door where another agent was standing. *See id.* at 4. After the two agents searched the respondent, one agent handed his belongings to his aunt (who was crying at this point), and escorted the respondent into a waiting room while apparently stating that his aunt "was a stupid woman." *See id.* (the respondent stating that he was placed in a waiting room "with four other individuals, all of Hispanic decent" (sic)).

On appeal, the respondent maintains that his stop and seizure were egregious violations of his Fourth Amendment rights as they were racially motivated (Respondent's Br. at 1, 6-9). He also states that his Fifth Amendment rights were violated as his statements to ICE agents were not voluntarily given, but rather stemmed from the agent's coercive interrogation (Respondent's Br. at 1, 6-9). The respondent further argues that evidence obtained by ICE officials should be excluded because it was procured in violation of 8 C.F.R. § 287 (Respondent's Br. at 1, 6-9).

In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), the Supreme Court held that the Fourth Amendment exclusionary rule is generally inapplicable to deportation proceedings, but left open the possibility of applying this rule if there are egregious Fourth Amendment violations which transgress Fifth Amendment notions of fundamental fairness and undermine the probative value of the evidence. This Board has recognized that although the exclusionary rule is generally inapplicable in removal proceedings, suppression is appropriate where the evidence was obtained in a manner so egregious that its use would violate due process by offending the requirements of fundamental fairness. *See Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980). An alien seeking the exclusion of evidence based on the Fourth Amendment bears the burden of establishing a prima facie case that the evidence should be suppressed. *See Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971). Only when an alien has come forward with adequate evidence in support of suppression will the burden shift to the Department of Homeland Security (DHS) to justify the manner in which it obtained the evidence. *See id.*; *see also Matter of Barcenas*, 19 I&N Dec. 609, 611-12 (BIA 1988).

While the respondent argues that he presented a prima facie case for suppression—by providing specific and detailed affidavits from both himself and his aunt—and that the DHS should have therefore borne the "burden of showing that their actions were not motivated by race" (Respondent's Br. at 8 (*citing Matter of Barcenas, supra,* at 611)), we find that further proceedings are necessary in this case. In particular, the Immigration Judge recited the relevant framework for analyzing a motion to suppress in the removal context but did not make sufficient findings for purposes of our appellate review. First, the Immigration Judge did not make any credibility findings in this matter. Next, despite finding that the "objective measures" in this case "do[] not indicate that the respondent was not free to leave" the aforementioned encounter, the Immigration Judge did not provide any explanation to support her finding (I.J. at 5). The Immigration Judge also did not offer any findings on the manner in which ICE agents learned of the respondent's immigration status (i.e., apparently through the prosecutor in his traffic case who allegedly heard the respondent say that he lacked permission to be in the United States, and thereafter communicated that to the initial ICE agent) (Exh. 6 (Form I-213); DHS's Br. at 2, 9).

Further, the Immigration Judge held that even if the respondent was formally seized, the exclusionary rule does not apply here because he did not suffer an egregious violation of his Fourth Amendment rights (I.J. at 5). In doing so, the Immigration Judge—while noting the respondent's contention that the ICE agent was "speaking in a harsh voice" and "had a loud tone"—appears to have found dispositive the fact that there was no evidence of physical abuse, physical detention, or overt threats. *See* I.J. at 5-6 (*citing Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006)). However, none of the cases discussed by the Immigration Judge or the DHS on appeal stands for the proposition that physical abuse or overt threats are a minimal threshold before finding that egregious governmental conduct was established (I.J. at 6; DHS's Br. at 6-9). We also note that other jurisdictions have held that "egregious" violations are not limited to cases involving physical brutality. *See Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010).

Moreover, we disagree with the Immigration Judge's decision that "[e]ven assuming that the officer had stopped the respondent solely based on his race or appearance, as the respondent alleges, that would not constitute an egregious violation of the Fourth Amendment." *See* I.J. at 6 (holding that the ICE agent's actions did not constitute an egregious violation of the Fourth

Amendment "even if they were based on an impermissible racial bias"); *cf. Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-37 (2d Cir. 2006) (observing that a seizure that is not especially severe may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration), but finding petitioner's mere assertion, without more, that he was stopped on the basis of race insufficient); *Gonzales-Rivera v. INS*, 22 F.3d 1441, 1448-52 (9th Cir. 1994) (finding a stop to be an egregious constitutional violation where border patrol stopped a deportee solely on the basis of his Hispanic appearance). Also, the Immigration Judge did not address the affidavit filed by the respondent's aunt, who apparently witnessed the respondent being stopped, questioned, and escorted away by ICE agents (Exh. 4-C). *See Che v. INS*, 565 F.2d 166, 168 (1st Cir. 1977) (statements in a motion for suppression must be specific and detailed, based on personal knowledge, and must set forth a prima facie case) (*citing Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971)).

In addition, we are not persuaded by the DHS's argument that it provided a copy of the respondent's passport (Exh. 5-A) to establish his alienage as it has not shown that such information was obtained in any way other than as a result of questioning the respondent in the manner described above, given that the legality of such questioning is at issue in this case (DHS's Br. at 10; Exh. 5 at 2-3). In light of the foregoing, we conclude that further proceedings are necessary as we are unable to adequately review the Immigration Judge's conclusions based on the reasons provided. *See Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002).

In sum, we will remand this case to the Immigration Judge to make the necessary factual and legal findings in the first instance. *See* 8 C.F.R. § 1003.1(d)(3)(iv). Specifically, there remain questions as to the circumstances surrounding the respondent's stop by the ICE agent, the nature of his interrogation at that time and thereafter, and the reliability of statements he allegedly provided that were used by the DHS to establish his alienage. As such, the Immigration Judge should reassess the respondent's motion to suppress and the evidentiary record to determine whether information as to his alienage can and should be suppressed. *See Matter of Barcenas, supra,* at 611-12. Also, in order to avoid a piecemeal adjudication of this case, the Immigration Judge should revisit the respondent's regulatory argument (I.J. at 7; Respondent's Br. at 8-9). *See Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 23-24 (1st Cir. 2004); *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011). Accordingly, the record will be remanded.

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

Board Member Patricia A. Cole respectfully dissents. The Immigration Judge properly denied the respondent's motions to suppress evidence and to terminate these removal proceedings. Contrary to the majority's assertion, the Immigration Judge accepted the respondent's account of his government encounter as credible and found no objective evidence that the respondent was unlawfully detained. I also would affirm her holding that even if the respondent was detained, there was not sufficient evidence of egregious governmental conduct (I.J. at 5). The majority's reliance on cases from other Circuit Courts of Appeals to find egregious violations of the 4th Amendment is not consistent with the controlling Kandamar-v. Gonzales, 464 F.3d 65 (1st Cir. 2006) decision. I would dismiss the respondent's appeal.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A087-968-919 December 11, 2012

In the Matter of

EZEQUIAS ENOC CASTRO-TOLENTINO	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: INA 212(a)(6)(A)(i) - present without admission or parole.

APPLICATIONS: Motion to suppress evidence; motion to terminate.

ON BEHALF OF RESPONDENT: STEVEN SHINN

ON BEHALF OF DHS: BRANDON LOWY

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of El Salvador who was issued a Notice to Appear on March 14, 2011.

In pleadings submitted through counsel, the respondent denies allegations 1 through 4 in the Notice to Appear and denies removability. As relief, the respondent seeks termination and has filed a motion to suppress evidence and terminate proceedings.

PARTIES CONTENTIONS

In the motion to suppress, the respondent argues that all evidence, including the I-213 and statements contained therein obtained as a result of his arrest on March 14, 2011, and all papers, information or testimony obtained or taken from him on that date, should be suppressed. The respondent argues that ICE officer violated the Fourth and Fifth Amendments and DHS regulations.

The Department of Homeland Security has filed a memorandum on removability and argues that suppression and termination is not appropriate in this case.

STANDARDS OF LAW: MOTIONS TO SUPPRESS

A motion to suppress must be made in writing and be accompanied by a detailed affidavit that explains the reasons why the evidence in question should be suppressed. Matter of Wong, 13 I&N Dec. 820 (BIA 1971). The individual seeking to suppress evidence initially bears the burden of proof and must establish a *prima facie* case that the evidence should be suppressed. To establish a *prima facie* case for suppression, the individual seeking suppression must provide specific detailed statements based upon personal knowledge to support their allegations. Their statements cannot be general, conclusory or based on advice or guidance from counsel. See Matter of Barcenas, 19 I&N Dec. 609 (BIA 1998).

Even if the alien alleges that he suffered from a

technically effective arrest, that does not necessarily render the removal proceeding null and void and it will generally not lead to a suppression of evidence. See Westover v. Reno, 202 F.3d 475 (1st Cir. 2000). Only when the respondent comes forward with proof establishing a *prima facie* case of suppression will DHS be called upon to assume the burden of justifying the manner in which it obtained the evidence. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1998).

In order to implicate the Fourth Amendment, the respondent must show that he has been subject to an unlawful search or seizure by a Government agent. A person has been seized within the meaning of the Fourth Amendment only if, in the context of all of the circumstances of the incident, a reasonable person in the same situation would have believed that he or she was not free to leave. However, the Supreme Court ruled in INS v. Lopez-Mendoza that the exclusionary rule does not apply in removal proceedings, finding that the "balance between cost and benefits comes out against applying the exclusionary rule in civil deportation hearings held by INS." See INS v. Lopez-Mendoza, 468 US 1032, 1050 (1984).

In reaching this conclusion, the Court notes a myriad of factors inherent in the process itself which would suggest that it would be unnecessary to apply the exclusionary rule in removal proceedings. The plurality of the Supreme Court, however, did leave the door open by stating that they made no

determination as to situations where there are "egregious" Fourth Amendment violations and abuses of other essential liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained or cases where there is "good reason to believe that Fourth Amendment violations by INS officers were widespread." Id. at 1050. The Supreme Court expressly contemplated egregious violations in the vein of an invasive physical assault and other conduct that would be "shocking to the conscience."

The First Circuit Court of Appeals, focusing on the egregious language from Lopez-Mendoza, has found that an alien was not deprived of due process when he appeared at his national security entry/exit registration system interview and was interviewed without the presence of legal counsel. See Kandamar v. Gonzalez, 464 F.3d 65 (1st Cir. 2006). The Court noted that the petitioner in this case did not proffer specific evidence of "any Government misconduct by threats, coercion or physical abuse" and that he did not ask to leave, was not told that he could not leave and was not restrained from leaving during the interview. Id. at 71. This case insinuates that physical abuse, detainment and threats are all factors that the First Circuit would weigh in their calculus when determining whether actions rises to the level of an egregious violation.

FINDINGS AND CONCLUSIONS OF LAW

The respondent, in his affidavit, describes the

circumstances surrounding his interactions with ICE agents on March 14, 2011. Accepting the respondent's account of the events as true, the Court finds that there has not been an egregious violation of the Fourth Amendment. The Court is not persuaded that the respondent was unlawfully detained within the meaning of the Fourth Amendment. While the respondent's affidavit states that he personally felt that he could not leave because the officer was standing in the pathway toward the exit, the legal analysis does not depend on subjective criteria, but instead looks to objective measures which, in this case, does not indicate that the respondent was not free to leave. More importantly, even if the respondent was seized within the meaning of the Fourth Amendment, the Court finds that the exclusionary rule does not apply to any evidence in his case because he did not suffer an egregious violation of his Fourth Amendment rights.

The respondent alleges that the ICE officer stood close to him, was speaking in a harsh voice and had a loud tone and used the same loud voice and harsh tone with he and his aunt. The Court finds that this case falls far short of the type of conduct that has been considered egregious by higher Courts. See Lopez-Mendoza, 468 US at 1050; Kandamar, 464 F.3d at 71 (implicitly stating that physical abuse, physical detention and overt threats may be considered egregious).

The respondent does not allege that the ICE officer in this

case used any force, threats or physical abuse. Rather, he stated that he stood very close, spoke in a harsh voice with a loud tone and stood in the pathway toward the exit of the building.

The respondent further contends that the ICE officer violated his Fourth Amendment rights because the only reason the officer stopped him was because of his race and the respondent claims in his motion that race was improperly used as a factor in the stop and questioning of him. Even assuming that the officer had stopped the respondent solely based on his race or appearance, as the respondent alleges, that would not constitute an egregious violation of the Fourth Amendment. As previously stated, the First Circuit has indicated that an encounter would be considered egregious if the Government agent used physical force, detention or overt threats in the encounter. See Kandamar, 464 F.3d at 71.

Accordingly, the Court finds that the officer's actions did not constitute a Fourth Amendment violation and even if they were based on an impermissible racial basis, they would not constitute an egregious violation of the Fourth Amendment. Thus, the respondent's motion to suppress based on the violation of the Fourth Amendment must be denied.

The respondent also cites the Fifth Amendment in his motion to suppress. Suppression is still possible under the Fifth Amendment if there is a coerced confession and that has been

held to be suppressible. Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977). Also, evidence may be suppressed under the Fifth Amendment that is derived from illegal electronic surveillance. Matter of Hemblen, 14 I&N Dec. 739 (BIA 1974).

The respondent did not present any evidence of a coerced confession or illegal electronic surveillance. Thus, the respondent's motion to suppress under the Fifth Amendment must be denied.

Finally, the respondent argues in his motion to suppress that the ICE agents violated Agency regulatory provisions codified at 8 C.F.R. 287 and that the motion to suppress should be granted for this reason.

The First Circuit has found that even if a DHS regulation were applicable and were violated, they do not and are not intended to and shall not be construed to and may not be relied upon to create any rights, substantive or procedural and forcible by law by any party in any matter, civil or criminal, and, accordingly, are not enforceable. Thus, the respondent's claim that suppression is appropriate because regulations were violated must be rejected and denied. See Navarro-Shalon, 359 F.3d at 23.

For these reasons, the respondent's motion to suppress evidence is hereby denied.

With respect to the request to terminate proceedings, the Court notes that the Department of Homeland Security has

established by clear and convincing evidence that the respondent is removable under INA Section 212(a)(6)(A)(i) by way of Group Exhibit 5 and Exhibit 6.

Based on the foregoing, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to suppress be denied.

IT IS FURTHER ORDERED that the respondent's motion to terminate proceedings be denied.

IT IT FURTHER ORDERED that the respondent shall be ordered removed from the United States to El Salvador based on the charges in the Notice to Appear.

BRENDA O'MALLEY
Immigration Judge