U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PEINADO IXPATAC, ELEODORO **A 209-308-396**

Date of this notice: 2/11/2020

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:
Wendtland, Linda S.
O'Connor, Blair
Noferi, Mark

Userteam: Docket

File: A209-308-396 – Philadelphia, PA

Date: FEB 11 2020

In re: Eleodoro Peinado IXPATAC

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rebecca Hufstader, Esquire

ON BEHALF OF DHS: John W. Mazzeo
Assistant Chief Counsel

APPLICATION: Termination

The respondent has appealed from the Immigration Judge's January 18, 2018, decision. In that decision, the Immigration Judge entered an order of removal to Guatemala on the basis of a prior (different) Immigration Judge's determination of removability (IJ at 2-3 (Jan. 18, 2018); Tr. at 9-10). For the following reasons, the respondent's appeal will be sustained in part, and the record will be remanded for further proceedings.

On appeal, the respondent renews his motion to suppress evidence and terminate proceedings. He requests a remand for further development of the evidentiary record and for additional factual findings (Respondent's Br. at 14). He maintains that the Department of Homeland Security ("DHS") has engaged in widespread and egregious violations of the Fourth Amendment. *See generally INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Specifically, he contends that the DHS lacked reasonable suspicion to stop and question him about his immigration status. Thus, he claims that the DHS arrested him in contravention of its own enforcement regulation at 8 C.F.R. § 287.8(b)(2) (Respondent's Br. at 17-18).

The respondent argues that the Immigration Judge did not address these aspects of his exclusionary rule claim, and therefore, that further findings and a new decision are necessary (Respondent's Br. at 17). Finally, he contends that the Immigration Judge erroneously determined that he could not reconsider his exclusionary rule claim due to a previous Immigration Judge's decision denying his motion for suppression of the evidence and termination of the proceedings (IJ at 2 (Jan. 18, 2018); Tr. at 17-18; Respondent's Br. at 15-16).

The DHS counters that the respondent's Fourth Amendment rights have not been violated (DHS's Br. at 3). The DHS asserts additionally that, "assuming *arguendo* that any violation occurred, it was not so egregious as to trigger suppression under" *Oliva-Ramos v. U.S. Att'y Gen.*, 694 F.3d 259 (3d Cir. 2012) (DHS's Br. at 3). *See also Yoc-Us v. U.S. Att'y Gen.*, 932 F.3d 98 (3d Cir. 2019). The DHS opposes the respondent request for remand as well (DHS's Br. at 13-15).

We review the Immigration Judge's findings of fact under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues, including questions of law, judgment, and discretion, under a de novo standard. *See*

8 C.F.R. § 1003.1(d)(3)(ii). For the following reasons, the respondent's appeal will be sustained in part, and the record will be remanded for further proceedings, including an evidentiary hearing on the respondent's suppression claims, and the entry of a new decision.

The instant removal proceedings were initiated with the filing of the Notice to Appear on March 20, 2017, in the York, Pennsylvania, Immigration Court (Exh. 1). The respondent denied that he is removable as charged at the first hearing on March 28, 2017 (Tr. at 1). Following the respondent's release from immigration detention, venue for the proceedings was changed to Philadelphia, Pennsylvania, on May 26, 2017 (Tr. at 12). At the first hearing after the change of venue on July 20, 2017, the respondent sought to renew his motion to suppress the DHS's evidence of identity and alienage (Tr. at 12-15).

As the respondent observes on appeal, neither the first Immigration Judge's May 4, 2017, interlocutory decision, nor the second Immigration Judge's January 18, 2018, final decision contains factual findings (Respondent's Br. at 2, 4-5). *Cf. Matter of Sacco*, 15 I&N Dec. 109, 110 (BIA 1974) ("On appeal from a decision of an immigration judge, we review such interlocutory decisions as may be raised by the parties."). The interlocutory decision sets forth the parties' respective legal arguments and assertions of fact, but it does not contain separate and explicit factual findings based on the evidence and arguments presented (IJ at 1-2, 5 (May 4, 2017)). *Cf. Myrie v. U.S. Att'y Gen.*, 855 F.3d 509, 516 (3d Cir. 2017) ("[T]he Board should review without deference the ultimate conclusion that the findings of fact do not meet the legal standard."); *see also Alimbaev v. U.S. Att'y Gen.*, 872 F.3d 188, 197, 201-02 (3d Cir. 2017); *Kaplun v. U.S. Att'y Gen.*, 602 F.3d 260, 271-72 (3d Cir. 2010).

The importance of complete and accurate factual findings in immigration proceedings has long been recognized. *See, e.g., Mahler v. Eby*, 264 U. S. 32, 44-45 (1924) ("It is essential that, where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."). Under the facts of this case, the omission of any factual finding in the interlocutory decision amounted to "such clear error in the previous decision" that the subsequent Immigration Judge should have reconsidered the issues of suppression and alienage. MaryBeth Keller, Chief Immigration Judge, Operating Policies and Procedures Memorandum 18:01: *Change of Venue* at p. 3 (Jan. 17, 2018), *reprinted in* 95 No. 4 Interpreter Releases 8 (Jan. 22, 2018) Accordingly, on remand the Immigration Judge shall conduct an evidentiary hearing on the respondent's motion to suppress the evidence establishing his alienage and inadmissibility to the United States.

The respondent claims that the DHS agents who stopped him never inquired about Carlos Elivernan Cante (the alleged target of the DHS's enforcement operation). He further asserts that the DHS agents showed him pictures of three women for whom they were searching. These allegations, if true, would support the respondent's claim that stopping a car containing three men, when the DHS agents said they were looking for three women, was pretextual, and warrant an evidentiary hearing on the respondent's motion to suppress. *See Zuniga-Perez v. Sessions*, 897 F.3d 114, 125 (2d Cir. 2018).

Additionally, an evidentiary hearing on remand will enable the respondent to develop his claim that the local U.S. Immigration and Customs Enforcement office engages in widespread violations of the Fourth Amendment by targeting individuals without particularized, articulable facts and prolonging stops beyond the scope of the original justification. *See* Respondent's Br. at 14-17, Tab H. Finally, the evidentiary hearing will enable the Immigration Judge to address the respondent's claim about regulatory violations during the government's stop and search of his vehicle (Respondent's Br. at 17-19). *See Matter of Garcia-Flores*, 17 I&N Dec. 325, 327-28 (BIA 1980).

On remand, therefore, the Immigration Judge should hold an evidentiary hearing on the respondent's motion to suppress the evidence of his unlawful presence in the United States. The Immigration Judge should thereafter reconsider the respondent's admissibility under the charge in the Notice to Appear. If the respondent is found to be subject to removal, then he should be allowed one more opportunity to apply for any relief from removal for which he may be eligible. *See Matter of M-D-*, 24 I&N Dec. 138, 141 (BIA 2007); *Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978); *see also Johnson v. Ashcroft*, 286 F.3d 696, 701-03 (3d Cir. 2002).

The following order will be entered.

ORDER: The respondent's appeal is sustained in part, and the record is remanded for further proceedings and the entry of a new decision.

FOR THE BOARD