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

Bretz, Kerry William
Bretz & Coven, LLP
305 Broadway
Suite 100
New York, NY 10007

DHS/ICE Office of Chief Counsel - BUF
130 Delaware Avenue, Room 203
Buffalo, NY 14202

Name: DARWISH , IHAB

A 029-878-318

Date of this notice: 6/2/2015

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:
Mann, Ana
Mullane, Hugh G.
Malphrus, Garry D.

Userteam: Docket

File: A029 878 318 – Buffalo, NY

Date: JUN 02 2015

In re: IHAB DARWISH

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Kerry W. Bretz, Esquire

APPLICATION: Motion to recuse; termination

The respondent, a native and citizen of Jordan, appeals an Immigration Judge's decision dated August 5, 2013, which denied the respondent's motion for recusal, and granted his motion for termination. The Department of Homeland Security ("DHS") has not filed a brief in opposition to the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent asserts error in the Immigration Judge's decision not to recuse himself (Resp. Br. at 12-16). The standards for motions to recuse for Immigration Judges are those set forth in *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982) (recusal requires a demonstration that the "immigration judge has a personal, rather than judicial, bias stemming from an 'extrajudicial' source, which resulted in an opinion on the merits on some basis other than what the judge learned from his participation in the case").

After reviewing the record in its entirety, we conclude that the Immigration Judge did not err when he denied the motion to recuse (I.J. at 6-7). We disagree with the respondent's contention that the fact that his attorney's law firm has filed complaints with the Office of Professional Responsibility and the Office of the Chief Immigration Judge constitutes "extrajudicial" sources which created a bias against his attorney's law firm (Resp. Br. at 13). The Immigration Judge's behavior or statements on the record in this particular case do not support a finding that he was biased or had pre-judged the case. *See Matter of Exame, supra.* Furthermore, while the respondent may not have gotten exactly the outcome he wanted, the Immigration Judge did not rule against him on the most important issue, i.e., removability.

We disagree with the respondent's contention that his motion for a change in venue should have been granted at the outset of proceedings (Resp. Br. at 11-12). Motions for a change of venue may be granted when good cause is shown by the alien. *See, e.g., Romero-Morales v. INS*, 25 F.3d 125 (2d Cir. 1994); *see also* 8 C.F.R. § 1003.20(b). Once removal proceedings are initiated and jurisdiction vested in the Immigration Court, an Immigration Judge possesses discretionary authority to change venue, upon a showing of good cause by the moving party. *See Matter of Rahman*, 20 I&N Dec. 480, 483 (BIA 1992); 8 C.F.R. § 1003.20(b). Good cause is

determined by balancing the factors relevant to the venue issue, including administrative convenience, expeditious treatment of the case, location of witnesses, and costs of transporting witnesses or evidence to a new location. *See Lovell v. INS*, 52 F.3d 458, 460 (2d Cir. 1995); *Matter of Rivera*, 19 I&N Dec. 688 (BIA 1988); *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986). Inasmuch as the Immigration Judge terminated proceedings, he did not need to explicitly rule on the respondent's motion for a change of venue (I.J. at 8-9). Furthermore, as the Immigration Judge noted, a change of venue was previously granted to the Newark Immigration Court, where proceedings were terminated because the charging document was deemed to be insufficient (I.J. at 2-3, 8).

The respondent asserts that proceedings should have been terminated with prejudice rather than without prejudice since the original Notice to Appear (NTA) was deficient, and the second NTA appeared identical to the original NTA (Resp. Br. at 7-10). We disagree. Dismissal without prejudice is not a decision on the merits of the claim. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (dismissal "without prejudice" is dismissal that does not operate as adjudication on the merits, and thus does not have a res judicata effect). In granting the respondent's motion, the Immigration Judge did not make findings of fact or conclusions of law on the substantive issues in the case.

The regulations provide for termination of proceedings, but do not require termination to be with prejudice. *See* 8 C.F.R. § 1239.2(f). The respondent has not demonstrated that terminating proceedings without prejudice was fundamentally unfair. *See Matter of Santos*, 19 I&N Dec. 105 (BIA 1984) (an alien in deportation proceedings has been denied a fair hearing only if prejudiced by some deficiency so as to deprive him of due process). The respondent is not unduly exposed to removal if DHS were to file removal charges in the future, it would still be required to prove the respondent's removability by clear and convincing evidence. While the respondent is correct that the DHS has acted inconsistently by saying that he abandoned his status, while allowing him to petition for his wife and children, we decline to speculate on future actions (Resp. Br. at 10). The Immigration Judge's decision to dismiss without prejudice was proper.

The respondent's disagreement with the outcome of the Immigration Judge's decision is insufficient to demonstrate that the outcome was the result of bias or pre-judgment rather than his view of the facts and evidence presented. As such, there is insufficient support for the respondent's claim of bias by the Immigration Judge to warrant the conclusion that a fair hearing required his disqualification. Therefore, his motion to disqualify the Immigration Judge will be denied.

On appeal, the respondent submitted updated but cumulative evidence regarding his motion for recusal which we have addressed above. With his brief, the respondent submitted a new motion to recuse and evidence showing that the complaint his attorney's law firm had filed with the Office of Professional Responsibility was being reviewed (Tabs A, B). The respondent also submitted evidence showing that four of his relatives had permanent resident cards, and that his child had been born in the United States (Tab C; Resp. Br. at 10). With the supplement to his brief, he submitted evidence showing that the complaint his attorney's law firm filed with the Office of Professional Responsibility had been decided (Tabs A, B).

The complaint filed against the Immigration Judge did not involve the current case. Rather, it involved another case that the Immigration Judge had decided involving an attorney from the respondent's attorney's law firm. Furthermore, the Immigration Judge does not seem to have been disciplined in said case. Rather, the Office of Professional Responsibility concluded that the Immigration Judge's "procedural handling" of the case "was inappropriate (Tab A with supplement to brief)." No specific mention was made of the law firm's contention that the Immigration Judge had made defamatory statements against the attorney, and filed an unsubstantiated complaint against him (Tab A with supplement to brief).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BUFFALO, NEW YORK

In the Matter of:		
DARWISH, Ihab **A# 029-878-318**		**IN REMOVAL PROCEEDINGS**
Respondent		

CHARGES: INA § 212(a)(7)(A)(i)(I) Documentation Requirements

MOTIONS: Motion to Recuse
Motion to Change Venue

ON BEHALF OF RESPONDENT
Shari L. Astalos, Esq.
Bretz & Coven, LLP
305 Broadway, Suite 100
New York, New York 10007

ON BEHALF OF THE DHS
Carol Bridge, Esq.
Assistant Chief Counsel
130 Delaware Avenue, Suite 203
Buffalo, New York 14202

DECISION AND ORDER OF THE IMMIGRATION JUDGE

Respondent's motion to recuse is **DENIED**. For the reasons articulated below, these removal proceedings are **TERMINATED WITHOUT PREJUDICE**. Respondent's motion to change venue is therefore **NOT REACHED**.

I. FACTS AND PROCEDURAL HISTORY

Ihab Darwish is not a citizen or national of the United States. (Exh. 1). He is a native and citizen of Jordan. *Id.* He was admitted to the United States as a lawful permanent resident on March 15, 1996. *Id.*

On January 17, 2011, the Department of Homeland Security ("DHS") issued Respondent a Notice to Appear ("Original NTA"), which charged him as subject to removal pursuant to INA § 212(a)(7)(A)(i)(I).[1] Respondent was originally scheduled to

[1] According to INA § 212(a)(7)(A)(i)(I), "Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission— who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a), . . . is inadmissible."

appear before the Buffalo Immigration Court ("Court") on March 18, 2011; however, prior to that hearing, the Court granted Respondent's request to change the venue of Respondent's proceedings to the Newark Immigration Court ("Newark Court").

On April 19, 2011, Respondent appeared before U.S. Immigration Judge Amiena A. Khan ("Judge Khan"), of the Newark Court, for a master calendar hearing. At that time, Judge Khan accepted Respondent's pleadings and scheduled the matter for an individual merits hearing. Respondent next appeared before the Newark Court on February 23, 2012. Judge Khan then terminated Respondent's removal proceedings without prejudice, apparently concluding that the government's NTA was factually deficient. *See* Digital Audio Recording of Hearing (Feb. 23, 2012). On the record, the following exchange took place between Judge Khan and government counsel:

> **Judge Khan:** The discussion we had off the record was the Court's concern with the allegations and the charge on the [NTA] because the Court was assuming this had to do with abandonment [of lawful permanent resident status]. But nothing reflected in the allegations or in the charge would lead one to conclude that. It's just based on why this individual was here. I have no supporting documentation. I understand the burden of the respondent in the matter of abandonment or in rescission, and I also understand the burden of the government. But as I noted . . . , this NTA is factually incorrect. I think allegation four is not correct, unless you're alleging, sir, that when he entered or when he attempted, when he sought admission, he no longer had his [lawful permanent resident] status because he had abandoned it. Is that correct?
>
> **Government:** Yes, judge, and the NTA doesn't reflect that.
>
> **Judge Khan:** No.
>
> **Government:** And, agreed, Judge, the NTA is confusing. The problem is this thing, the NTA, should have been either not served . . .
>
> **Judge Khan:** Right.
>
> **Government:** Or amended before it got to us here in Newark.
>
> **Judge Khan:** OK.

Government: I would just tell the Court, this is a change of venue, a case from [Buffalo,] New York. This is also a case where counsel filed for the NTA to be pushed, to be served on the Court. And as such, I don't know the review process that occurred. Because this is not an NTA that's issued by us. It was issued by [U.S. Customs and Border Protection] at the border. So I don't know what they were going to do, or what. So there's a lot of issues here. My contention is, just terminate the NTA without prejudice.

Judge Khan: I'm fine with that. Let's do that. Without prejudice, counsel, obviously. . . . So at this time, based on the information before the Court, and based on the position by the Department of Homeland Security, the Court will terminate the Notice to Appear, dated January 17, 2011, without prejudice and terminate proceedings against Respondent at this time.

Id. On April 3, 2012, the DHS issued Respondent a second NTA ("Second NTA") (Exh. 1), again charging him as subject to removal pursuant to INA § 212(a)(7)(A)(i)(I). The Second NTA—which does not explicitly allege that Respondent abandoned his lawful permanent resident status—is allegedly identical to the Original NTA. *See* Respondent's Motion to Terminate Proceedings at ¶4 (Oct. 24, 2012).

These proceedings were commenced in Buffalo, New York, with the filing of the Second NTA with the Court on April 3, 2012. *See* (Exh. 1). On June 1, 2012, Respondent filed a motion to change venue. The government filed its opposition to the motion on June 7, 2012, and the Court denied the motion on June 14, 2012. Order of the IJ (Jun. 14, 2012). Respondent filed a renewed motion to change venue on August 30, 2012, and the government filed its opposition on September 11, 2012. The Court denied the motion on October 30, 2012. Order of the IJ (Oct. 30, 2012).

On October 24, 2012, Respondent filed a motion to terminate proceedings or, in the alternative, to change venue. The government filed a response on November 6, 2012, stating that it was opposed to Respondent's motions to terminate or change venue. The Court initially deferred judgment on Respondent's motions, but ultimately the motions were denied after a hearing held on November 16, 2012. *See* Order of the IJ (Nov. 14 (*sic*), 2012).

Respondent is scheduled to appear before the Court on February 4, 2014; however, on April 9, 2013, Respondent filed a motion to change venue. Also on April 9, 2013, Respondent filed a motion to recuse. On April 11, 2013, the DHS filed its response, stating that it was unopposed to Respondent's motions. On July 29, 2013, Respondent filed renewed versions of both of his motions.

II. DOCUMENTARY EVIDENCE

The following documents are included in the record of proceedings:

Exhibit 1: Notice to Appear, dated April 3, 2012.

Group Exhibit 2: Documents Submitted by the DHS on November 16, 2012

- **2A:** Memorandum of Creation of Record of Lawful Permanent Residence, dated March 15, 1996 (indicating that Respondent was admitted to the United States as a lawful permanent resident on March 15, 1996)
- **2B:** Record of Deportable/Inadmissible Alien ("Form I-213"), dated January 20, 2011
- **2C:** Record of Sworn Statement in Administrative Proceedings, dated January 17, 2011

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent's Motion to Recuse

In support of the motion to recuse, Respondent's counsel argues that the Court should recuse itself because "the immigration judge ha[s] a personal, rather than judicial bias stemming from [an] 'extrajudicial source." Motion to Recuse at 2-3 (Apr. 9, 2013) (citing *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982)). According to Respondent's counsel, this bias stems from the fact that the Court "initiated a disciplinary complaint . . . against a Bretz & Coven attorney" and "[i]n response, Bretz & Coven filed a cross-complaint against Judge Montante." *Id.* In support of the renewed motion to recuse, Respondent's counsel repeated this allegation and also claimed that "IJ Montante has exhibited pervasive bias against Bretz & Coven." *See* Renewed Motion to Recuse at 2-3 (Jul. 29, 2013) (stating "IJ Montante absolutely cannot act impartially toward matters represented by this firm.").

Preliminarily, the Court notes that its disciplinary complaint against a Bretz & Coven attorney is no longer pending. *See id.* at Tab A. Contrary to Respondent's present assertion, however, the complaint was neither "frivolous" nor "without substantial reasoning." *Id.* at 2; *see also* Ballentine's Law Dictionary (2010) (defining frivolous as, "So clearly and palpably bad and insufficient as to require no argument or illustration to show the character as indicative of bad faith upon a bare inspection"). In fact, the complaint was dismissed because the Office of General Counsel was "unable to find *clear and convincing* evidence of a violation of the Rules [and Procedures of Professional Conduct for Practitioners]." Renewed Motion to Recuse at Tab A (Jul. 29, 2013) (emphasis added) (noting that the "clear and convincing" standard in disciplinary proceedings is "more than a preponderance [of the evidence], the standard in civil cases").

Furthermore, although the Office of General Counsel dismissed the charge of misconduct, disciplinary counsel did advise Bretz & Coven that:

> [W]e note that [the Bretz & Coven attorney involved] could have attempted to avoid the circumstances that led to the *in absentia* order against [his client]. Knowing [the client's] medical and financial situation, [the attorney] could have moved for a telephonic appearance for [the client] with the motion to change venue, as he did for himself. Judge Montante may have granted that motion as he did for [the attorney], and [the client's] appearance as well at the hearing may have been excused. However, [the attorney] did not seek a telephonic appearance for [the client] in that matter, and Judge Montante then ordered him removed *in absentia* when he did not appear.

Id. at Tab A at 3.

In regards to the removal proceedings that were at the heart of the Court's disciplinary complaint, the Court notes that the Board of Immigration Appeals ("BIA") recently issued a decision on an appeal filed by the respondent in those proceedings (who was represented by a Bretz & Coven attorney). *See* Earl Shettlewood Matthews A201 219 191 (BIA Jul. 23, 2013). The BIA sustained that respondent's appeal; however, its decision can hardly be characterized as a rebuke of the Court's actions:

> In this case, *the respondent's attorney erred* in assuming that his motion to change venue would be granted. . . . Furthermore, *the Immigration Judge did not err* in denying the motion to reopen and in expecting that the respondent would appear in person given that the motion to change venue only requested permission for his counsel to appear by telephone.

Id. at 3 (emphasis added and citations omitted). The Board found the matter to be a "close case" and opted to "reopen in light of the totality of the circumstances." *Id.*

In at least two other recent matters (unrelated to these proceedings), Respondent's counsel has filed motions to recuse along the lines of her present argument. The Court continues to find that it would be inappropriate to cross-cite to other matters in unrelated decisions. However, the Court is compelled to point out that those decisions directly contradict counsel's unfounded assertion that the Court "is unable to act in an impartial manner toward the members of this firm while there is a complaint filed against him." Renewed Motion to Recuse at 2 (Jul. 29, 2013). In both of those matters, the Court denied the motions to recuse, but *granted* the respondents' motions to change venue on their merits.

For the benefit of both parties in these proceedings, the Court will once again repeat the reasoning and legal conclusions that lead it to believe that recusal is neither merited nor appropriate under these circumstances:

Respondent correctly cites *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982) as the case governing recusal of immigration judges; however, the Court strenuously disagrees with Respondent's interpretation of the phrase "judicial bias stemming from [an] 'extrajudicial source'." *See* Motion to Recuse (Apr. 9, 2013). Even assuming that all of the accusations leveled against the Court were true, no judge is required to recuse himself from a case merely because he has disciplined the current attorney (or his or her associates) in the past.

Exame holds that recusal requires a demonstration that 'the immigration judge has a personal, rather than judicial, bias stemming from an 'extrajudicial' source, which resulted in an opinion on the merits on some basis other than what the judge learned from his participation in the case." 18 I&N Dec. at 306 (stating that an exception exists where the judge's conduct is pervasively prejudicial). The phrase 'extrajudicial source' is a term of art that exists outside of the immigration courts. District and circuit courts have frequently rejected the argument that a judge's referral of an attorney to a disciplinary committee constitutes grounds for recusal. *See Gwynn v. Walker*, 532 F.3d 1304 (11th Cir. 2008) (holding that a district court did not err in denying a motion for recusal after referring the attorney to a state bar for investigation).

There has been no suggestion that the Court has relied upon any extrajudicial information or improper basis in deciding any issue in this matter. *See Liteky v. United States*, 510 U.S. 540, 555-56 (U.S. 1994) ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."). Rather, Respondent asks for a presumption of impartiality based upon an unrelated disciplinary complaint. Such a presumption would be irrational in light of the fact that "the majority of . . . jurisdictions have held that judicial referrals of counsel for disciplinary review do not, in themselves, constitute grounds for disqualification." *Conklin v. Warrington Twp.*, 476 F. Supp. 2d 458, 464 (M.D. Pa. 2007). As the *Conklin* court correctly noted, there has been widespread agreement in this regard:

> [I]n *Curley v. St. John's University*, 7 F. Supp. 2d 359 (S.D.N.Y. 1998), [for example], plaintiff suggested that the court's Rule 11 sanction against his attorney in an unrelated proceeding constituted a sufficient basis for disqualification. The court denied plaintiff's motion to recuse, opining that "Without more, the imposition of sanctions does not warrant a recusal." *Id.* at 363 (citations omitted). As part of the *ratio decidendi*, the court observed that the plaintiff's motion failed to present any extrajudicial facts, i.e. facts independent of the sanction itself. *Id.* In the

absence of such evidence, the court held that the sanction of counsel was patently insufficient to show the requisite personal bias or prejudice necessary for disqualification. *See also Honneus v. United States*, 425 F. Supp. 164 (D. Mass. 1977) (denying motion to recuse where judge referred attorney to bar association grievance committee as a result of unprofessional conduct); *Joyner v. Commissioner of Correction*, 55 Conn. App. 602, 740 A.2d 424 (Conn. 1999) (referring trial counsel to statewide grievance committee and follow-up inquiries as to status of investigation did not require disqualification of judges in habeas proceeding); *Martin v. Beck*, 112 Nev. 595, 915 P.2d 898 (Nev. 1996) (finding that judge's filing of perjury complaint against counsel does not constitute grounds for recusal); *State v. Mata*, 71 Haw. 319, 789 P.2d 1122 (Haw. 1990) (referring attorney to disciplinary board and responding to inquiries of board are not grounds for disqualification).

The Court is also cognizant of an advisory opinion authored by the Judicial Conference's Advisory Committee on Codes of Conduct which opines that judicial referral for disciplinary review is not grounds for recusal. Specifically, the Committee state:

"[W]hen a judge files a complaint of unprofessional conduct against a lawyer, . . . in compliance with . . . Canon 3B(3), and the lawyer is before the judge as counsel in the case giving rise to the unprofessional conduct, or in a later case, it is not required that the judge recuse on grounds of bias or prejudice simply because the complaint was filed."

Guide to Judiciary Policies and Procedures IV-149 (1998).

Conklin, 476 F. Supp. 2d at 464-65. As previously stated by the Court (in the separate matters mentioned above), the Court is not able to further comment on confidential complaints that have been filed by or against the Court. However, the Court states for the *third* time now that it is not prepared to take the extraordinary step of recusing itself from all "matters represented by [apparently *any* attorney at] Bretz & Coven." *See* Motion to Recuse at 3 (Apr. 9, 2013). Despite the fact that the Court previously informed Respondent's counsel of the above-cited case law, which overwhelmingly rejects counsel's position in this regard, Respondent has once again not articulated any specific facts that would merit recusal. Accordingly, Respondent's motion to recuse is **DENIED**.

B. Respondent's Removal Proceedings

The parties appear to be in agreement that the appropriate venue for these proceedings is the Newark Immigration Court. *See Motion to Change Venue* (Apr. 9, 2013) *and* DHS Memorandum in Response to the Motion (Apr. 11, 2013). As indicated above, however, the Court previously granted a change of venue to the Newark Court, with the result that the proceedings were terminated because the charging document was deemed to be insufficient. *See, supra* at 2-3. The Second NTA appears to be identical to the Original NTA, as alleged by Respondent. Therefore, it is very likely that changing the venue of these proceedings back to the Newark Court would ultimately lead to the same outcome. The DHS has not explained why it reissued the same NTA after government counsel in Newark conceded to Judge Khan that the document was "confusing" and insufficient. *Id.*

The confusion in this matter appears to stem from a disagreement over whether or not the government is required to explicitly allege in the NTA that an alien lawfully admitted for permanent residence in the United States "has abandoned or relinquished that status," in order to charge the alien as inadmissible under INA § 212(a). *See* INA § 101(a)(13)(C). In practice, this Court does not ordinarily require such an explicit allegation (at least where the context of the proceedings makes clear that the government has implicitly alleged abandonment). Nonetheless, the Court finds no error in Judge Khan's decision to terminate without prejudice.[2] The Court is not in the practice of second-guessing the sound decisions of another U.S. Immigration Judge.

Accordingly—and strictly limited to the facts and circumstances of this case—the Court will terminate Respondent's removal proceedings *without prejudice*, to allow the government (if it so chooses) to file a Notice to Appear that comports with Judge Khan's instructions and concerns. *See, supra* at 2-3. The Court makes no finding as to Respondent's removability or as to the proper venue of these proceedings.

The Court shall enter the following orders:

[2] In fact, the Court does agree that it would be preferable and advisable for the government to be more explicit in its allegations. This is especially true in light of the fact that an alien lawfully admitted for permanent residence can be regarded as seeking admission into the United States for more than one reason. *See* INA § 101(a)(13).

Orders

IT IS ORDERED that Respondent's motion to recuse is **DENIED**;

IT IS FURTHER ORDERED that these proceedings are **TERMINATED** without prejudice; and

IT IS FURTHER ORDERED that Respondent's motion to change venue is not reached.

8-5-2013
Date

Philip J. Montante, Jr.
U.S. Immigration Judge