U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted], K[redacted] **A[redacted]**

Date of this notice: 8/27/2013

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:
Pauley, Roger
Wendtland, Linda S.
Donovan, Teresa L.

schwarzA
Userteam: Docket

File: A[redacted] - Elizabeth, NJ

Date: AUG 27 2013

In re: K[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Steven H. Goldblatt, Esquire

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 (found)

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure; remand

The respondent, a native and citizen of Ghana, appeals from the Immigration Judge's November 30, 2012, decision, denying his applications for asylum under section 208 of the Immigration and Nationality Act (Act), 8 U.S.C. § 1158; withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); protection under Article 3 of the Convention Against Torture, *see* 8 C.F.R. §§ 1208.16-.18; and voluntary departure under section 240B(b) of the Act. The respondent does not challenge the Immigration Judge's ruling that his asylum application is time-barred, nor her ruling that he does not qualify for voluntary departure because he lacks a passport. The respondent's request for a waiver of the appellate filing fee is granted. *See* 8 C.F.R. § 1003.8(a)(8). His appeal will be sustained and the record will be remanded for further proceedings consistent with this decision.

We review factual findings, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent initially filed for asylum on August 28, 2012, and in his application, as amended, he alleged fear of persecution in Ghana on account of (1) his homosexuality and (2) an incident in Ghana where a gun was held to his head based on the political activities of a family member (I.J. at 2-3, 15; Tr. at 10, 78-79, 104-05; Exh. 2). Accordingly, his case is governed by the amendments to the Act brought about by the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42, 44-45 (BIA 2006) (explaining that the REAL ID Act applies to all applications for relief filed on or after May 11, 2005).

In considering the respondent's claim for protective relief, the Immigration Judge found his asylum application time-barred, in that he did not file for asylum within a year of his 1994 entry

into the United States[1] and he did not establish "changed" or "extraordinary" circumstances excusing his failure to comply with the generally applicable filing deadline (I.J. at 2, 10; Tr. at 9, 15, 102-03; Exh. 2). *See* sections 208(a)(2)(B), (D) of the Act, 8 U.S.C. §§ 1158(a)(2)(B), (D); 8 C.F.R. § 1208.4(4); *see also Matter of A-M-*, 23 I&N 737 (BIA 2005). In addition, although the Immigration Judge found that the respondent and his aunt credibly established his sexual orientation, the Immigration Judge ultimately denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture because she concluded that he did not carry his burden of proof in establishing that he will likely experience the requisite level of harm should he return to Ghana (I.J. at 14-22; Exhs. 2, 3D).

The respondent initially perfected a timely appeal *pro se* wherein he raised various substantive challenges to the Immigration Judge's decision and asserted his statutory eligibility for various other forms of relief (Notice of Appeal; Resp. Opening Brief at 1-7, 12-14).[2] After filing his opening brief, the respondent retained current counsel and through his attorney he has filed supplemental briefing, in which he raises various due process concerns as to the manner in which his proceedings were conducted (Resp. Suppl. Brief at 13-26). Specifically, the respondent maintains, *inter alia*, that, like in *Leslie v. Attorney General of the United States*, 611 F.3d 171 (3d Cir. 2010), the Immigration Judge did not provide the respondent with adequate advisals regarding his right to counsel or furnish him with a reasonable opportunity to obtain counsel for his removal proceedings (Resp. Suppl. Brief at 22-26). *See* 8 C.F.R. §§ 1240.10(a)(1)-(3), 1240.11(c)(1)(iii).

In *Leslie v. Attorney General of the United States*, *supra*, the United States Court of Appeals for the Third Circuit, the jurisdiction in which this case arises, discussed the general regulatory advisals for unrepresented aliens set forth at 8 C.F.R. §§ 1240.10(a)(1)-(3). These advisals include (1) furnishing the respondent with a list of *pro bono* legal services provided within the district where the removal hearing is occurring and (2) advising the respondent of his right to be represented by counsel in his removal proceedings at no cost to the government. *See id.* In *Leslie,* the Third Circuit held that where the foregoing regulations are breached, a respondent is not required to demonstrate actual and substantial prejudice in order to prevail on his due process claim. *See id.* at 180-82.

This case is distinguishable from *Leslie* inasmuch as, here, the Immigration Judge advised the respondent of his right to counsel and confirmed that the respondent had received the legal services list during his first two hearings (Tr. at 1-2, 4-6). *See e.g.*, *Mensah v. Attorney General of the United States*, 405 F. App'x 631, 634 (3d Cir. 2010) (distinguishing *Leslie v. Attorney General of the United States*, *supra*, on similar facts in finding no due process violation);

[1] The 1-year filing period actually did not begin to run until the pertinent statutory provision's effective date of April 1, 1997 (*see* 8 C.F.R. § 1208.4(a)(2)(ii)), but the respondent does not argue that he met the resulting deadline of April 1, 1998. Rather, as noted *supra*, he does not challenge the Immigration Judge's untimeliness ruling.

[2] The respondent's *pro se* brief filed on February 19, 2013, will be referred to hereinafter as his Opening Brief, and the brief filed by counsel on April 13, 2013, will be referred to as his Suppl. Brief. We acknowledge that the respondent, through counsel, also filed a motion to remand and supplemental authorities on April 13, 2013, and April 25, 2013, respectively.

Miller v. Attorney General of the United States, 397 F. App'x 780, 783 (3d Cir. 2010) (same); *Mayne v. Attorney General of the United States*, 392 F. App'x 94, 97 (3d Cir. 2010) (same). Specifically, in the instant proceedings, the respondent was advised at his August 1, 2012, hearing that he had a right to be represented by an attorney at no cost to the government and he was offered, and accepted, a continuance to seek counsel (Tr. at 1-2, 4). The Immigration Judge also asked the respondent if he needed the legal services list and confirmed that he had received it (Tr. at 2). At his continued removal hearing, conducted on August 16, 2012, the Immigration Judge noted that the case had been previously continued for the respondent to seek counsel, the respondent advised the Immigration Judge that he wished to have more time to retain an attorney, and the Immigration Judge granted a further continuance until August 28, 2012 (Tr. at 5-6).

Notwithstanding the fact that this case is distinguishable from *Leslie v. Attorney General of the United States*, *supra*, the respondent is not foreclosed from establishing that his hearing was fundamentally unfair where the record indicates that, following his August 28, 2012, filing of his asylum application, the Immigration Judge did not comply with the separate regulatory requirements to advise the respondent of his right to counsel in connection with his pursuit of asylum and related forms of relief, and to provide him with a list of persons who have indicated availability to provide pro bono representation in *asylum* proceedings (Resp. Suppl. Brief at 22-26; Tr. at 5,7, 8-49; Exh. 2). *See id.* at 181 (noting that a due process violation may occur where an alien is reasonably prevented from fully presenting his claim); *see also* 8 C.F.R. § 1240.11(c)(1)(iii) (explaining that where an alien expresses a fear of return to his home country, he shall be advised of his right to be represented by counsel at no cost to the government and provided with the list of *pro bono* legal services available "in asylum proceedings" within the relevant jurisdiction); *cf. Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 376 (3d Cir. 2003) (explaining that an individual's right to a fundamentally fair hearing is not violated simply because the individual is unable to secure counsel).

In reviewing the record of proceedings in this regard, we note that at the respondent's August 16, 2012, hearing, the Immigration Judge advised him that she would proceed with his case at the next setting, whether or not he had an attorney (Tr. at 5-7). Then, on August 28, 2012, the respondent again appeared without counsel, and the Immigration Judge noted the previous adjournments and confirmed that the respondent understood that she would go forward with his case on that date (Tr. at 8). The Immigration Judge also discussed the removal charge and the respondent's desire to pursue asylum during the course of that hearing (Tr. at 8-18). The case was then continued to October 4, 2012, and November 9, 2012, to allow the respondent to submit additional evidence in support of his asylum application (Tr. at 19-48). Finally, on November 30, 2012, the Immigration Judge considered the merits of the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture (Tr. at 49). The respondent appeared at each of his hearings *pro se*, and the Immigration Judge did not discuss with him on the record the respondent's right to counsel after the August 16, 2012, hearing.

We agree with the respondent that 8 C.F.R. § 1240.11(c)(1)(iii) was breached because the Immigration Judge did not advise the respondent of his right to counsel specifically in connection with pursuit of asylum-related relief, nor provide him with a legal services list relating to asylum proceedings, after he expressed a fear of return to Ghana (Resp. Suppl. Brief at 22-24). In so doing, we decline to ultimately address whether the regulatory breach implicates

a fundamental statutory or constitutional right. *See Leslie v. Attorney General of the United States*, *supra*, at 180 (noting that no showing of prejudice is required where a procedural breach involves a fundamental statutory or constitutional right). Instead, we conclude that the respondent has carried his burden of proof in establishing actual and substantial prejudice, as he has presented extensive documentation, through counsel, aimed at carrying the objective component of his burden with regard to the future likelihood of harm (Resp. Suppl. Brief at Tabs C-D, F, H-K). Although we possess limited fact-finding authority, we note that the documents submitted on appeal include government reports from the United Kingdom and Canada, along with press accounts, recounting harassment, physical violence, and extortion of gay individuals in Ghana, sometimes at the hands of police or other state agents or with the encouragement of Ghanian political leaders (Resp. Suppl. Brief at Tabs C-D, F, H-K). *See* 8 C.F.R. § 1003.1(d)(3)(iv) (limiting our appellate fact-finding authority to "taking administrative notice of commonly known facts such as current events or the contents of official documents"); *Matter of S-H-*, *supra*, at 465-66. Although we express no opinion as to the sufficiency of this evidence in carrying the respondent's burden of proof, we note that his claim below was denied based on his failure to provide this type of evidence (I.J. at 15-22). Accordingly, we conclude that remand of the record is necessary to allow the Immigration Judge to evaluate the evidence offered through the respondent's current counsel, in conjunction with the evidence offered below, and to further develop the record as she may deem appropriate in assessing whether the respondent has carried his burden of proof in qualifying for withholding of removal or protection under the Convention Against Torture.

In light of our disposition of this matter, we decline to reach most of the respondent's additional due process arguments or his motion to remand. However, to the extent that the respondent maintains that he is not subject to mandatory detention, we remind him that bond and removal proceedings are distinct and separate, such that any issues regarding his custody status are not properly before us in the context of this appeal (Resp. Opening Brief at 8-11). *See* 8 C.F.R. §§ 1003.19(f), 1003.38; *Matter of R-S-H-*, 23 I&N Dec. 629, 630 n.7 (BIA 2003); *Matter of P-C-M-*, 20 I&N Dec. 432, 433 (BIA 1991); *Matter of Balderas*, 20 I&N Dec. 389, 393 (BIA 1991).

Accordingly, the following order shall be entered.

ORDER: The respondent's appeal is sustained and the record is remanded for further proceedings consistent with this decision.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would affirm the decision below. The Immigration Judge was extremely solicitous of the respondent's rights (see Tr.28 et seq.), and the majority cite nothing to support their view that the Immigration Judge was again required to advise the respondent of his right to counsel after he decided to seek asylum, especially in light of the fact that the application is time-barred.