



U.S. Department of Justice

Executive Office for Immigration Review

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Name: R [REDACTED], N [REDACTED] N [REDACTED]

A [REDACTED]-122

Date of this notice: 1/24/2020

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:
Noferi, Mark
O'Connor, Blair
Greer, Anne J.

Userteam: Docket

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RC

Falls Church, Virginia 22041

File: A-122 – Dallas, TX

Date:

JAN 24 2020

In re: N N

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian K. Bates, Esquire

APPLICATION: Termination; asylum; withholding of removal; Convention Against Torture; cancellation of removal

The respondent, a native and citizen of Pakistan, is a lawful permanent resident of the United States. The respondent appeals from an Immigration Judge's August 8, 2019, decision finding that the Department of Homeland Security ("DHS") established, by clear and convincing evidence, that he is removable under section 237(a)(2)(C) of the Act, 8 U.S.C. § 1227(a)(2)(C). See 8 C.F.R. § 1240.8(a). The Immigration Judge further denied the respondent's applications for asylum pursuant to section 208 of the Immigration and Nationality 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 pursuant to the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18; and cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The record will be remanded.

This Board reviews the Immigration Judge's factual findings, including credibility findings and predictions as to the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS alleged that on September 12, 2017, the respondent was convicted of unlawfully carrying a handgun in violation of section 46.02(b) of the Texas Penal Code ("TPC") and discharging a firearm pursuant to TPC § 42.12(b) (IJ at 1; Exh. 1). The respondent argues that the Immigration Judge did not provide him a fair opportunity to oppose the DHS's charge that he is removable under section 237(a)(2)(C) of the Act as a result of these convictions (Respondent's Br. at 16-18). See *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992) (stating that deportation proceedings must be conducted in accordance with "due process standards of fundamental fairness"). We agree.

In the decision currently under review, the Immigration Judge indicates that she sustained the charge based on the respondent's "admissions, concessions, and the documentary evidence submitted by the [DHS]" (IJ at 1-2). The transcript shows that on May 9, 2019, the Immigration Judge continued the proceedings to allow the DHS to obtain certified conviction documents (Tr. at 2-6). During the ensuing hearing on May 23, 2019, the Immigration Judge overruled the respondent's objection that the conviction documents acquired by the DHS had not been properly certified pursuant to 8 C.F.R. § 1003.41 (Tr. at 8-11; Exhs. 3-4A). The respondent then denied the charge, but the Immigration Judge did not permit him to present substantive argument in support of terminating these removal proceedings (Tr. at 11-12). Furthermore, the

respondent has presented substantive argument on appeal challenging his removability pursuant to section 237(a)(2)(C) of the Act (Respondent's Br. at 20-27). See *Bouchikhi v. Holder*, 676 F.3d 173, 180 (5th Cir. 2012) (an alien must establish prejudice to prevail on a due process claim). We will remand the record to provide the respondent an opportunity to raise these contentions before the Immigration Judge and for the entry of a new decision on the issue of removability.

The respondent also persuasively argues that a remand is required on due process grounds because the transcript is incomplete (Respondent's Br. at 18-19). See *Olabanji v. INS*, 973 F.3d at 1234. Specifically, the transcription of the respondent's testimony on direct examination ends with the notation "off the record" (Tr. at 115-25). The notation "on the record" then appears and the Immigration Judge states that support services were able to assist in the fixing of the recording system (Tr. at 125). The transcription of testimony then resumes at some point during cross examination, establishing that the remainder of the respondent's testimony on direct examination and the beginning of his testimony on cross examination was not recorded (Tr. at 125). On remand, the Immigration Judge should take appropriate steps to ensure the preparation of a full transcript, which may include permitting the respondent to testify at a de novo hearing.

Additionally, the Immigration Judge ruled that the respondent has established past persecution in light of his showing when he was previously granted asylum in October of 2005 that he was persecuted by members of the Muttahida Qaumi Movement on account of his father's affiliation with the Pakistan Peoples Party (IJ at 2, 5). The Immigration Judge concluded that the respondent no longer has an objectively reasonable well-founded fear of persecution on account of imputed political opinion (IJ at 5-6). However, as the respondent states in his Notice of Appeal, Form EOIR-26, in light of his showing of past persecution on account of political opinion, he is presumed to have a well-founded fear of persecution on account of the same basis and the burden of proof shifts to the Department of Homeland Security to rebut this presumption by showing either: (a) there has been a fundamental change in circumstances; or (b) the respondent could avoid persecution by relocating within Pakistan and it would be reasonable to expect him to do so under all the circumstances. See 8 C.F.R. § 1208.13(b)(1), (b)(1)(ii); see also 8 C.F.R. § 1208.16(b)(1)(ii) (the same burden-shifting process applies in the context of withholding of removal). On remand, the Immigration Judge should determine the respondent's eligibility for asylum and related relief in a new decision which clearly allocates the burden of proof to the DHS.

Pending the remand, we withhold ruling on the respondent's argument that the Immigration Judge erroneously denied his application for protection under the Convention Against Torture (IJ at 9-10; Respondent's Br. at 30-32). Likewise, we do not address the Immigration Judge's alternative denial of asylum on discretionary grounds (IJ at 7-8).¹

Accordingly, the following order is entered.

¹ On remand, the Immigration Judge and the parties may address the Attorney General's recent decision in *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) and its impact on the question of whether the respondent is deserving of cancellation of removal as a purely discretionary matter. See *id.* at 670-71.

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



FOR THE BOARD