U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: N[redacted], A[redacted] K[redacted]... **A [redacted]-792**

Date of this notice: 10/24/2018

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:
Liebowitz, Ellen C
Malphrus, Garry D.
Mullane, Hugh G.

Userteam: Docket

File: A[redacted]-792 – Oakdale, LA

Date: OCT. 24 2018

In re: A[redacted] K[redacted] N[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Allyson Page, Esquire

ON BEHALF OF DHS: John Zachary
Assistant Chief Counsel

APPLICATION: Withholding of removal; remand

The respondent is a native and citizen of Russia. The Department of Homeland Security ("DHS") has appealed the Immigration Judge's August 1, 2017, decision granting the respondent's application for withholding of removal under section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A).[1] The respondent has filed a brief in opposition to the appeal. The record will be remanded for further proceedings.

Prior to being issued a Notice to Appear on May 10, 2017, the respondent had previously been in removal proceedings (IJ at 10; Tr. at 61-65). Those proceedings, however, were terminated (*Id.*). On appeal, the DHS argues, among other things, that the Immigration Judge that presided over the respondent's merits hearing and rendered a decision in this case on August 1, 2017, was counsel for the DHS in the respondent's case during his initial removal proceedings several years before (DHS's Br. at 1, 5-7).[2] The internal record system reflects that the Immigration Judge that presided over these current proceedings was counsel for the DHS in the respondent's case during his initial proceedings.

On appeal, the DHS argues that the Immigration Judge should have recused herself from the respondent's case because she served "'in a governmental employment in such capacity as counsel, adviser, or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy'"; the DHS cites to Memorandum for All Immigration Judges, from Michael J. Creppy, Chief Immigration Judge, EOIR, *Re: Operating Policies and Procedures Memorandum 05-02: Procedures for Issuing Recusal Orders in Immigration Proceedings* at 5 (Mar. 21, 2005) ("OPPM 05-02") in support of its argument (DHS's Br. at 7).

[1] We note that the respondent has not challenged the Immigration Judge's denial of his application for asylum based on the one-year filing deadline, and his request for protection under the Convention Against Torture (IJ at 13-14, 16).

[2] Prior to the respondent's July 25, 2017, hearing and August 1, 2017, merits hearing, two different Immigration Judges presided over the respondent's other master calendar hearings, held on June 20, 2017, and July 11, 2017, respectively.

The DHS also notes in its brief that the Immigration Judge, in her role as counsel for the DHS during the respondent's initial proceedings, reviewed the respondent's case at that time for prosecutorial discretion (DHS's Br. at 6, n.1). The DHS specifically requests that we remand for the Immigration Judge to address its motion to recuse in the first instance.

We acknowledge the respondent's argument that the DHS failed to raise this issue during the proceedings below (Respondent's Br. at 2, 8-12). However, under OPPM 05-02, an Immigration Judge has an obligation to "sua sponte identify those circumstances where recusal may be appropriate" (DHS's Br. at 7). OPPM 05-02 at 2. Thus, based on the circumstances presented in this case, we conclude that a remand is warranted for the Immigration Judge to consider in the first instance whether her recusal in this case is appropriate. *See id.*; 8 C.F.R. § 1240.1(b) ("The Immigration Judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified."); *see also Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982) (stating, in the context of interpreting former section 236(a) of the Act, 8 U.S.C. 1226(a), that an Immigration Judge is precluded from hearing a case if the Immigration Judge has participated in investigative or prosecuting functions involved in that particular case).

In light of our disposition in this matter, we decline to address the remaining issues raised by the DHS in its brief. We express no opinion concerning the respondent's ultimate eligibility for relief.[3] Accordingly, the following order will be entered.

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

FOR THE BOARD

[3] Notwithstanding the above, should the Immigration Judge decide recusal is not warranted, she should consider on remand the parties' appellate arguments regarding the merits of the case.