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 22041

SINGH TOOR, RANDEEP
A201-279-745
1705 E. HANNA RD.
ELOY, AZ 85131

DHS/ICE Office of Chief Counsel - EAZ
P.O. Box 25158
Phoenix, AZ 85002

Name: SINGH TOOR, RANDEEP **A 201-279-745**

Date of this notice: 2/10/2016

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:
Adkins-Blanch, Charles K.
Grant, Edward R.
Guendelsberger, John

Userteam: Docket

File: A201 279 745 – Eloy, AZ

Date: FEB 10 2016

In re: RANDEEP SINGH TOOR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Matthew Hanson
Assistant Chief Counsel

APPLICATION: Termination of proceedings

The Department of Homeland Security ("DHS") appeals the decision of the Immigration Judge, dated October 6, 2015, terminating these removal proceedings. The DHS's appeal, which has not been opposed by the respondent, will be sustained.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

We recognize that the respondent is potentially amenable to expedited removal proceedings, during which he would be permitted to establish a credible fear of persecution to an asylum officer, and, in turn, be placed in removal proceedings. *See* section 235(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1)(A); 8 C.F.R. § 208.30(f). However, in lieu of pursuing expedited removal proceedings, the DHS has decided, as a matter of its unreviewable prosecutorial discretion, to pursue with the present Notice to Appear ("NTA") in these removal proceedings (DHS's Br. at 2-3). Thus, considering the totality of the circumstances presented in this case, we agree with the DHS that the Immigration Judge erred in terminating these removal proceedings. *See Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) ("Once a notice to appear has been properly filed with the Immigration Court, jurisdiction vests."); *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982) ("Once deportation proceedings have been initiated by the District Director, the immigration judge may not review the wisdom of the District Director's action, but must execute his duty to determine whether the deportation charge is sustained by the requisite evidence in an expeditious manner."). Accordingly, we will sustain the DHS's appeal, reinstate these removal proceedings, and remand the record to the Immigration Judge for further proceedings.

Upon remand, the Immigration Judge should take pleadings in this case and provide the respondent with an opportunity to pursue an Application for Asylum and for Withholding of Removal (Form I-589) and other forms of relief from removal. At the present time, we express no opinion regarding the ultimate outcome of these proceedings.

For the reasons set forth above, the following orders are entered.

ORDER: The Department of Homeland Security's appeal is sustained.

FURTHER ORDER: These removal proceedings are reinstated and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 EAST HANNA ROAD, SUITE 366
ELOY, AZ 85131

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
SINGH TOOR, RANDEEP	)	**FILE NO.** A 201-279-745
RESPONDENT	)	**DATE:** FEB 6, 2015

ON BEHALF OF THE RESPONDENT:

Pro Se

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
Department of Homeland Security
1705 East Hanna Road
Eloy, Arizona 85131

DECISION AND ORDER OF THE IMMIGRATION COURT

The proceedings will be terminated. The respondent, alleged to be an Arriving Alien and charged with inadmissibility pursuant to INA § 212(a)(7), expressed a fear of persecution to an immigration officer following his/her apprehension. Exh. 1. When an inadmissible arriving alien expresses a fear of returning to his or her country of removal or the intent to apply for asylum, the immigration officer "***shall*** refer the alien for an interview by an asylum officer." INA § 235(b)(1)(A)(ii) (emphasis added).[1] The INA § 235(b)(1)(A)(ii) requirement of referral for an asylum officer interview is obligatory.[2] The "asylum officer ***shall*** conduct interviews of aliens

[1] While obligatory for arriving aliens determined by an immigration officer to be inadmissible pursuant to INA §§ 212(a)(6)(C) or 212(a)(7) and who have expressed an intention to apply for asylum or a fear of persecution, referral for an asylum officer interview is permissive in its discretionary application to "certain other aliens" who have not been admitted or paroled and who have not established 2 years of continuous physical presence in the United States. INA § 235(b)(1)(A)(iii); *Matter of X-K-*, 23 I&N Dec. 731, 732 (BIA 2005) (noting that two classes of aliens are defined by INA § 235(b)(1) – "arriving aliens" and "certain other aliens;" that each is subject to different statutory requirements; and that while "arriving aliens" are ineligible for bond the restriction does not apply to "certain other aliens"); H.R. Conf. Rep. No. 104-828, at 209 (1996) (the provisions requiring referral of certain arriving aliens who have expressed a fear of persecution or an intent to apply for asylum "may be applied, in the sole and unreviewable discretion of the Attorney General, to an alien who has not been paroled or admitted into the United States and who cannot affirmatively show to an immigration officer that he or she has been continuously present in the United States for a period of 2 years immediately prior to the date of the officer's determination"); *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004) (INA § 235(b)(1) applies to two categories of aliens; "arriving aliens" who "will be interviewed by an asylum officer who will determine whether the alien has a credible fear as defined in section 235(b)(1)(B)(v)," and "certain other aliens" to whom the expedited removal provisions of INA § 235(b)(1) may be applied "in his or her sole and unreviewable discretion").

[2] It is well settled that Congressional use of the word "shall" conveys an imperative, both generally and in

[so] referred." INA § 235(b)(1)(B)(i).[3] "If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview." 8 C.F.R. § 208.30(d)(5). *If* the asylum officer finds that the respondent has a credible fear of persecution,[4] *then* the asylum officer refers the case for further consideration to an immigration judge by issuing a Form I-862, Notice to Appear ("NTA"), against the respondent.[5] INA § 235(b)(1)(B)(i)–(ii); 8 C.F.R. § 235.6(a)(1)(ii); H.R. Conf. Rep. No. 104-828, at 209 (1996).[6]

As explained by the House Conference Report, "the purpose of these provisions is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted to the United States, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims." H.R. Conf. Rep. No. 104-828, at 209 (1996).

While the DHS has discretion as the prosecuting agency to determine whether and by what

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the context of INA § 235(b)(1)(A)(ii) specifically. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (the use of the word "shall" by Congress ordinarily indicates a command or a mandatory requirement); *see also Matter of K-A-*, 23 I&N Dec. 661, 666 (BIA 2004) (employing the systematic use of "may" and "shall" demonstrates Congressional intent that these words "be interpreted in accordance with their ordinary meanings"); *Matter of X-K-*, 23 I&N Dec. 731, 733 (BIA 2005) ("[W]here [an arriving] alien has either indicated a desire to apply for asylum or has expressed a fear of persecution, the alien . . . ***must*** be referred to an asylum officer for a credible fear interview." (emphasis added)). While referral of an arriving alien who expresses a fear of persecution for an asylum officer interview is obligatory, and notwithstanding the imperative "shall" in INA § 235(b)(1)(A)(i), the subsequent prosecutorial decision by the Department whether to pursue expedited removal or place an arriving alien in INA § 240 removal proceedings is discretionary. *Matter of E-R-M-*, 25 I&N Dec. 520 (2011).

[3] The mandatory nature of the statutory requirement is reemphasized in the Federal Register notice titled *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004) ("Any alien who falls within [the INA § 235(b)(1)(A)(i) "arriving alien"] designation, who is placed in expedited removal proceedings, and who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be interviewed by an asylum officer who will determine whether the alien has a credible fear as defined in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v). ***If*** that standard is met, the alien ***will*** be referred to an immigration judge for a removal proceeding under section 240 of the Act." (emphasis added)).

[4] Defined by INA § 236(b)(1)(B)(v) as "a *significant possibility*, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, *that the alien could establish eligibility for asylum* under section 208." (emphasis added). The asylum officer "***shall*** create a summary of the material facts as stated by the applicant," 8 C.F.R § 208.30(d)(6) (emphasis added), and the asylum officer, "***shall*** create a written record of his or her determination." 8 C.F.R. § 208.30(e) (emphasis added).

[5] An asylum officer's authority to issue an NTA is subject to his/her determination that that an alien has a credible fear of persecution or torture following an interview. 8 C.F.R. § 235.6(a)(1)(ii).

[6] The House conferees explained that "An [arriving] alien who states a fear of persecution or an intention to apply for asylum ***shall*** be referred for interview by an asylum officer, who is an immigration officer who has had professional training in asylum law, country conditions, and interview techniques comparable to that provided to full-time adjudicators of asylum applications. . . . ***If*** the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum under normal non-expedited removal proceedings." H.R. Conf. Rep. No. 104-828, at 209 (1996) (emphasis added).

proceedings, whether expedited removal pursuant to INA § 235(b)(1)(A)(i) or removal proceedings pursuant to INA § 240, to seek removal of an alien from the United States, *see E-R-M-*, 25 I&N Dec. at 520, the INA § 235(b)(1)(A)(ii) mandate that certain arriving aliens be referred for interview by an asylum officer is independent of that prosecutorial decision. Here, the Department issued an NTA against the respondent without conducting the requisite credible fear interview. As such, these proceedings were improvidently initiated. *See* INA §§ 235(b)(1)(A)(i) and (ii), (B)(i) and (ii); 8 C.F.R. § 235.6(a)(ii); *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007) (an IJ may terminate proceedings when improvidently initiated).

An Immigration Judge has the authority to terminate removal proceedings which are improvidently initiated, such as in this case. *See id.* When the DHS fails to follow the regulations dictating its procedures in issuing an NTA, the Immigration Judge can without a motion from the parties terminate the case. *See Matter of Kanagasundram*, 22 I&N Dec. 963, 964 (BIA 1999) (finding that an Immigration Judge can terminate a case when DHS does not follow mandated procedures in the regulations, which have the force of law) *affirmed by Matter of E-R-M*, 25 I&N Dec. 520, 520 (BIA 2011).[7] While the DHS exercises its prosecutorial discretion when it decides whether to commence removal proceedings, *see E-R-M-*, 25 I&N Dec. at 520, and what charges to lodge against a respondent, once the Notice to Appear is filed with the Court, the Immigration Judge is authorized and directed to regulate the course of those proceedings.[8] *Matter of Avetisyan*, 25 I&N Dec. 688, 694 (9th Cir. 2012).

ORDER: It is hereby ordered that the proceedings are **TERMINATED**.

Appeal / Waived (A/DHS/B)
Appeal Due By: 11/5/2015

Richard A Phelps
United States Immigration Judge

CERTIFICATE OF SERVICE

This document was served by: Mail (M) Personal Service (P)
To: ( ) Alien (P) Alien C/O Custodial Officer ( ) Alien's Att/Rep (P) DHS
Date: 10/26/15 By: Court Staff: Grace

[7] Another example of an Immigration Judge's authority to terminate proceedings over DHS's objection is when "DHS cannot sustain the charges or in other specific circumstances consistent with the law and applicable regulations." *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012).

[8] The Immigration Judges' ability to exercise independent judgment and discretion in terminating a case as improvidently begun is analogous to the Court's requirement to exercise its independent judgment and discretion in administrative closure proceedings. *See* 8 C.F.R. § 1003.10(b) ("In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."); *Matter of Avetisyan*, 25 I&N Dec. 688, 693–94 (9th Cir. 2012) (discussing an Immigration Judge's authority to administratively close a case based on the Judge's independent judgment and discretion without a motion from either party).