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

Perez, Andres
Perez & Malik, PLLC
115 E. Travis Street, #301
San Antonio, TX 78205

DHS/ICE Office of Chief Counsel - SNA
8940 Fourwinds Drive, 5th Floor
San Antonio, TX 78239

Name: DHUKA, SOHRAB RAJEBHAI **A 205-164-321**

Date of this notice: 12/23/2015

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:
Miller, Neil P.

Userteam: Docket

File: A205 164 321 – San Antonio, Texas

Date: DEC 23 2015

In re: SOHRAB RAJEBHAI DHUKA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Andres Perez, Esquire

The respondent, who was found to be a native and citizen of India, appeals the Immigration Judge's April 1, 2014, decision denying his motion to suppress the Form I-213 in this case. The Department of Homeland Security has not responded to the appeal. We review the Immigration Judge's factual findings for clear error and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3). The case will be remanded.

According to the respondent, on February 9, 2012, during the course of his employment as a cashier at a store, he was interviewed by local police who inquired as to the names of the owner and manager of the store. The respondent provided the names and was then asked about his own immigration status. He was then handcuffed pending the arrival of an Immigration and Customs Enforcement officer who was summoned by the law enforcement officer. According to the I-213 document which was generated the following day, the respondent was allowed to make a phone call the next day and was read a statement of rights 23 hours after his initial contact with local law enforcement. According to information in the I-213, the respondent is a native and citizen of India who entered the United States illegally. The respondent subsequently filed a motion to suppress the I-213. The motion to suppress was denied by the Immigration Judge.

On appeal, the respondent argues that the Immigration Judge erred by denying the motion to suppress. According to the respondent, without any evidence of illegal activity on his part, he was questioned by law enforcement, solely as a result of racial profiling, and was physically handcuffed, although he had not committed a crime and was not being investigated for the commission of a crime. (Respondent's Brief at p. 11).

In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), the Supreme Court held that the Fourth Amendment exclusionary rule is generally inapplicable to deportation proceedings, but left open the possibility of applying this rule if there are egregious Fourth Amendment violations which transgress Fifth Amendment notions of fundamental fairness and undermine the probative value of the evidence. This Board has recognized that, although the exclusionary rule is generally inapplicable in removal proceedings, suppression is appropriate where the evidence was obtained in a manner so egregious that its use would violate due process by offending the requirements of fundamental fairness. *See, e.g., Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980); *see also Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980); *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979).

An alien seeking the exclusion of evidence based on the Fourth Amendment bears the burden of establishing a prima facie case that the evidence should be suppressed. *See Matter of Tang*, 13 I&N Dec. 691 (BIA 1971). Only when an alien has come forward with adequate evidence in

support of suppression will the burden shift to the Department of Homeland Security (DHS) to justify the manner in which it obtained the evidence. *See Matter of Tang, supra*. This Board has also held that an I-213 is inherently trustworthy and admissible to prove alienage absent any indication that it contains information that is incorrect or was obtained by coercion or duress. *See Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002); *INS v. Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999); *Matter of Barcenas, supra*, at 611.

In these proceedings, the Immigration Judge noted that the respondent's affidavit, submitted in support of his motion to suppress, was "not sufficient at this point to suppress the evidence." (Tr. at p. 14.) The Immigration Judge did not adequately set forth his reasons for reaching the conclusion that the respondent had not established a prima facie case that his constitutional rights were violated (Tr. at 14; I.J. Dec. at 4). Without such factual findings, we are unable to adequately review the Immigration Judge's conclusions. *See Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (given the Board's limited fact-finding function, it is "increasingly important for the Immigration Judge to make clear and complete findings of fact that are supported by the record and in compliance with controlling law.").

This Board's holding in *Matter of Barcenas, supra,* is instructive in this case. We found, therein, that where a party wishes to challenge the admissibility of a document, the mere offering of an affidavit is not sufficient to sustain his burden. However, if the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony. The Immigration Judge, while finding that the respondent's affidavit was "not sufficient at this point," did not provide the respondent an opportunity to offer testimony to provide detail for a proper determination as to whether the facts alleged, if true, would support the exclusion of the Form I-213.

As such, we will remand the record to the Immigration Judge in order that the necessary factual findings can be made to determine whether the Form I-213 should be suppressed and for a determination regarding whether the respondent's allegations, if true, would be egregious under *INS v. Lopez, supra*. The respondent should be afforded an opportunity to testify regarding the circumstances of his arrest in support of the statements made in his affidavit. *Matter of Barcenas, supra.* Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's April 1, 2014, decision is vacated.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA, SUITE 300
SAN ANTONIO, TX 78207

IN THE MATTER OF	)	
	)	
DHUKA, SOHRAB RAJEBHAI	)	Case Number: A205-164-321
	)	
RESPONDENT	)	
IN REMOVAL PROCEEDINGS	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended: An alien present in the United States without being admitted or paroled.

APPLICATION: Motion to Suppress Evidence.

ON BEHALF OF THE RESPONDENT
Andres Perez, Atty.
115 E. Travis St., #105
San Antonio, TX 78205

ON BEHALF OF THE GOVERNMENT
Grace Garza, Atty.
Office of the Chief Counsel
8940 Fourwinds Drive, 5th Fl.
San Antonio, TX 78239

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Removal proceedings were initiated against the respondent, Sohrab Rajebhai Dhuka, by the filing of the Notice to Appear (NTA) dated February 10, 2012, charging him with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act). *See* Exhibit #1.

At a master hearing on April 8, 2013, the respondent acknowledged receipt of his NTA. At a master hearing on July 29, 2013, the respondent, through counsel, denied the four allegations and charge of removability contained therein. *See* Exhibit #1. The respondent also declined to designate a country of removal. *See* Section 241(b)(2) of the Act. The respondent has applied for no relief should he be found removable.

II. Legal Standards

A. Burden of Proof

The burden of proof in establishing alienage in removal proceedings is on USICE. *See United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923). Where alienage is an issue, "there must be an evaluation of all the evidence and a finding with regard to its credibility before the clear, convincing and unequivocal burden of proof test, as set forth in *Woodby v INS*, 385 U.S. 276 (1966), comes into play." *See Matter of Lugo-Guadiana*, 12 I&N Dec. 726 (BIA 1968).

In the case of an alien who entered the United States without inspection, USICE need only show alienage, which may be demonstrated through the admission into evidence of a Form I-213. *See Matter of Ponce-Hernandez,* 22 I&N Dec. 784 (BIA 1999). The burden then shifts to the alien to show by "clear and convincing evidence" that he is lawfully present in the United States. *See* Section 240(c)(2) of the Act.

An alien who seeks to suppress evidence has the burden of proving a *prima facie* case for suppression. *See Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971); *see also Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *see also Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975). The alien's motion to suppress must be made in writing and state with particularity the grounds therefore. *See* 8 C.F.R. § 1003.23(a). It also must be supported by specific and detailed affidavits based on personal knowledge, identifying a basis for suppression, and enumerating the articles to be suppressed. *See Matter of Wong*, 13 I&N Dec. at 821-22. If the affidavit is such that the facts alleged, if true, could support a basis for excluding the submitted material, then the alien must support his claims through testimony. *See Matter of Barcenas*, 19 I&N Dec. at 611-12.

Once the respondent has established a *prima facie* case, the burden shifts to the DHS to justify the manner in which the evidence was obtained. *See Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).

B. Legal Standard for Suppression

The suppression of evidence in a removal proceeding is an exceptional remedy. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). As such, the exclusionary rule does not apply in deportation proceedings. *Id.* Generally, evidence will be admissible in removal proceedings if it is probative and its use is fundamentally fair so as not to deprive the alien of due process. *See Mendoza-Solis v. INS*, 36 F.3d 12, 14 (5th Cir. 1994).

An alien may merit suppression of evidence in a removal proceeding, however, if he can show that the evidence was obtained through an egregious violation of the Fourth Amendment or other liberties that transgresses "notions of fundamental fairness and undermines the probative value of the evidence obtained." *See INS v. Lopez-Mendoza*, 468 U.S. at 1050–51. Not every Fourth Amendment violation will result in a finding that

the admission of evidence is fundamentally unfair; the violation must be particularly egregious. *See Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). Examples of egregious violations meriting suppression include coerced confessions, the repeated denial of access to counsel, and extremely intrusive searches and seizures that "shock the conscience." *See Matter of Garcia*, 17 I&N Dec. 319, 320 (BIA 1980) (suppressing statements made after a lengthy period in custody and after alien had been denied contact with an attorney and led to believe he had no rights); *see also INS v. Lopez-Mendoza*, 468 U.S. at 1032.

Evidence concerning an alien's identity may never be suppressed, even if obtained through an unlawful arrest, search, or interrogation. *See INS v. Lopez-Mendoza*, 468 U.S. at 1051; *see also United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999). Similarly, an alien's DHS file is not suppressible. *See United States v. Roque-Villanueva*, 175 F.3d at 346.

As to the admissibility of Form I-213s, the Board has held that a Form I-213, Record of Deportable Alien, is "inherently trustworthy" and admissible into evidence to prove removability. *See Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976). Furthermore, statements in the Form I-213 taken directly from the respondent are not hearsay and may be admitted without the testimony of the officer who filled out the form. *See Bustos-Torres*, 898 F.2d 1053, 1056 (5th Cir. 1990). An alien may only overcome this presumption of admissibility by demonstrating that the Form I-213 contains material information that is incorrect or information that was obtained through coercion or duress. *See Matter of Mejia*, 16 I&N Dec. at 8.

In the present case, the respondent seeks to suppress the admission of the February 10, 2012 Form I-213 (Form I-213) and any other statements or records resulting from his arrest. *See* Respondent's Motion to Suppress at 2. The respondent argues that the arrest constituted an egregious violation of his Fourth and Fifth Amendment rights because the San Antonio Police Department (SAPD) officers were not authorized to make an arrest for a civil immigration violation. *See* Sections 287(a) & 287(g) of the Act; *see also* Respondent's Motion to Suppress at 5.

III. Findings of Fact and Conclusions of Law

A. Authentication of the Government's Records

Under 8 C.F.R. § 1287.6, an official record shall be evidenced by an official publication or a copy attested to by the official having legal custody of the record or by an authorized deputy.

As to the Form I-213, Record of Deportable Alien dated February 10, 2012, the Court finds that the copy of the document is properly authenticated under 8 C.F.R. § 1287.6 through the signatures of Immigration Enforcement Agent, Mark A. Garza, and Examining Officer, Carlos A. Trevino, who had legal custody over the original document.

B. Arrest of the Respondent

After careful consideration, the Court finds that the respondent has not established that the Form I-213 and other records obtained through his arrest were the result of an egregious violation of his Fourth or Fifth Amendment rights.

As to his arrest, neither the respondent's Form I-213 nor the evidence obtained through his arrest is suppressible absent a finding that his Fourth or Fifth Amendment rights were egregiously violated. *See INS v. Lopez-Mendoza,* 468 U.S. at 1032; *see also United States v. Roque-Villanueva*, 175 F.3d at 345. Under an evaluation of all the records, the Court does not find that the arrest was an egregious violation of his constitutional rights. *See Matter of Lugo-Guadiana*, 12 I&N Dec. at 726.

The respondent states in his affidavit that an officer from the SAPD entered the respondent's place of employment and "began to ask me about the gaming machine in the store." *See* Respondent's Motion to Supress, Tab A at 3. The respondent asserted that the SAPD officer asked the respondent for his identification and immigration status. *Id.* The respondent's affidavit states that he replied to the SAPD officer that "I did not have a passport." *Id.*

Indeed, the Form I-213 indicates that Detective John Saenz of the SAPD encountered the respondent while executing a search warrant for illegal gambling at the respondent's place of employment. *See* Form I-213 at 2. The Form I-213 continues, stating that the respondent was unable to provide Detective Saenz with valid local, state, or U.S. Government issued identification. *Id.* However, after the respondent claimed to have a passport issued from India that was not in his possession, Detective Saenz contacted the local DHS office to investigate the respondent. *Id.* The DHS officers took custody of the respondent and determined that the respondent entered the United States illegally on or about October of 2011 at or near Blaine, Washington by crossing the United States/Canada International Border. *Id.* As a result, the DHS officers had reason to believe the respondent was unlawfully in the United States. *See* Section 287(a) of the Act.

Even if the Court assumes, *arguendo*, that the arrest was unlawful, the USICE was not involved in the encounter with the respondent that led to the request that Federal officers assist in identification of the respondent and verification of his identity document. In responding to a request for assistance from a local authority conducting a separate investigation when an international identity document came up, the USICE agents made no committed no violation of the respondent's rights. There was certainly no egregious violation of the respondent's rights by the USICE officers. It is Noted that there is no derivative suppression in these removal proceedings where the application of the exclusionary rule is limited, as noted above. *See INS v. Lopez-Mendoza*, 468 U.S. at 1032.

Accordingly, the Court denies the respondent's motion to suppress and admits the Form I-213 and other documents obtained subsequent to his arrest into the record.

C. Removability

As evidence of removability, the DHS has produced a Form I-213, Record of Deportable Alien (dated February 10, 2012), indicating that the respondent is a native and citizen of India. *See* Form I-213. The respondent has not produced any evidence to demonstrate an admission to show that he is lawfully present in the United States. *See* Section 240(c)(2) of the Act.

As a result, the Court finds that the information contained in the Form I-213 submitted by the DHS establishes the allegations of fact which are contained in the NTA. *See* Form I-213; *see also* Exhibit #1. The Court thus finds the respondent removable by "clear and convincing evidence" under Section 212(a)(6)(A)(i) of the Act.

At the September 9, 2013 hearing, the respondent acknowledged that he is not presenting any application for any form of relief available. Therefore, the Court will order the respondent removed from the United States to India.

Accordingly, the following orders shall be entered:

ORDER

IT IS ORDERED that the respondent be **REMOVED** from the United States to **INDIA.**

Date: April 1, 2014

Gary Burkholder
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[ ] ALIEN'S ATT/REP [ ] DHS
DATE: 4-1-14 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other