U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - CHI
55 East Monroe Street, Suite 1700
Chicago, IL 60603

Name: CERVANTES-SANCHEZ, VICTOR **A097-838-854**

Date of this notice: 2/16/2011

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
Miller, Neil P.
Mullane, Hugh G.

File: A097 838 854 - Chicago, IL

Date: FEB 16 2011

In re: VICTOR CERVANTES-SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lisa Koop, Esquire[1]

ON BEHALF OF DHS: David M. Williams
Assistant Chief Counsel

APPLICATION: Termination; remand

The respondent has appealed the Immigration Judge's December 15, 2008, decision which denied his motion to suppress, and which found him removable from the United States. The Department of Homeland Security (DHS) has opposed the appeal. The record will be remanded for further proceedings.

At his hearing, the respondent moved to suppress a Record of Deportable/Inadmissible Alien (Form I-213), which contained information regarding his alienage and his overstay status in the United States, and moved to terminate his removal proceedings. The respondent has argued that the the Form I-213 was obtained under circumstances that violated his due process rights, and that the DHS violated its own regulations. The respondent has also argued on appeal that the Immigration Judge did not provide him with the opportunity to provide his own testimony in support of his motion and did not consider all the evidence in denying the motion to reopen.

On review, we determine that the record should be remanded for further proceedings and the entry of a new decision by the Immigration Judge. On remand, the respondent should initially be given full opportunity to present his motion to suppress the evidence, including his testimony. *See Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). The Immigration Judge should thereafter issue a decision on the motion that considers all relevant evidence and that is in accordance with prevailing law, including the intervening decisions issued by the United States Court of Appeals for the Seventh Circuit in *Gutierrez-Berdin v. Holder*, 618 F.3d 647 (7th Cir. 2010), and *Barradas v. Holder*, 582 F.3d 754 (7th Cir. 2009), and on the respondent's removability and, if necessary, his eligibility for relief from removal. In view of the foregoing, the following orders shall be entered.

[1] The most recent Notice of Entry of Appearance (Form EOIR-27) in the record was filed by Lisa Koop from the National Immigrant Justice Center on December 20, 2010. We note that on December 30, 2010, Amina L. Najib, also from the National Immigrant Justice Center, filed a letter directing all future correspondences to her attention, but did not attach a Form EOIR-27 with the letter. We will, however, provide attorney Najib with a courtesy copy of this decision.

ORDER: The Immigration Judge's decision dated December 15, 2008, is vacated.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing order and for the entry of a new decision.

Ellen Riebowitz
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File A 097 838 854 December 15, 2008

In the Matter of:

VICTOR CERVANTES-SANCHEZ,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 212(a)(6)(A)(i) INA, present without being admitted or paroled.

APPLICATIONS: Motion to suppress evidence; voluntary departure pursuant to Section 240B.

ON BEHALF OF RESPONDENT:	ON BEHALF OF THE DEPARTMENT:
Rose Mraz, Esquire 1817 South Loomis Street 2nd Floor Chicago, Illinois 60608	Alexandra Kostich, Esquire Department of Homeland Security 55 East Monroe, Suite 1700 Chicago, Illinois 60603

ORAL DECISION OF THE IMMIGRATION JUDGE

On about September 14, 2008, the Department of Homeland Security commenced removal proceedings against the respondent by filing a Notice to Appear dated September 14, 2008. See Exhibit 1. The Department charged that the respondent had entered the United States in November of 1998 without being admitted or paroled. Consequently, they lodged the 212(a)(6)(A)(i) charge indicating that the respondent, in their belief, entered the United States without permission. See Exhibit 1.

The respondent on October 30, 2008 was scheduled to

appear for a removal hearing. At his removal hearing on October 30, 2008, the respondent requested additional time within which to contest removal proceedings. Consequently, his hearing was scheduled to December 15, 2008.

The respondent filed various documents in support of a motion to terminate. Initially, the respondent filed a motion to terminate at Exhibit 2, indicating that the Department had not yet filed any documentation, specifically the Form I-213 record of deportable/inadmissible aliens or other documents in order to establish a factual basis for the allegations in the Notice to Appear. On this basis, the respondent requested that proceedings be terminated.

The Government did file, shortly after receiving the motion to terminate, some documents in opposition to that motion to terminate. Specifically, the Department filed Exhibits 3A, B and C; 3A was a record of deportable alien prepared on September 14, 2008 by an Officer Justin Granberry. This document is two pages in length. At Exhibit B, the Service provided a photocopy of a statement to be provided to arrested or detained foreign national. This document purportedly is signed by the respondent and it is dated September 14, 2008. Exhibit 3C is a photocopy, including four photos of the respondent along with a Mexico consular ID card, which purportedly pertains to the respondent, and it bears the photo of Victor Cervantes-Sanchez.

Once the respondent received Exhibit 3A, B and C, the

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respondent did file an additional motion to suppress evidence, including the response to the Department motion opposing termination. See Exhibit 4. This motion is nine pages in length and was accompanied by a separate motion to terminate proceedings, which includes the specific constitutional violations argued by the respondent which the Department violated. See Exhibit 5.

Based upon the total circumstances surrounding his arrest, the respondent asserts that evidence obtained and submitted by the Government at Exhibit 3A, 3B and 3C had been obtained in violation of his constitutional rights and should be suppressed, as its use in these proceedings would be fundamentally unfair.

It is well-established that statements in a motion to suppress must be specific and detailed. They must be based upon personal knowledge and must set forth a prima facie case. See Matter of Gonzalez, 16 I&N Dec. 44 (BIA 1976); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980). However, in challenging the admissibility of the document, the mere offering of an affidavit is not sufficient to sustain the respondent's burden. Rather, the affiant must also support his claim by specific testimony. See Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988).

The Department began examining the respondent. However, the respondent through counsel objected based upon the questions being asked of the respondent. Specifically, the

respondent through counsel objected that questions be asked to begin with because it was the respondent's position that the statements, which he provided and formed a basis of the Government's case at Exhibits 3A, B and C, were obtained in violation of his constitutional rights. After having denied the respondent's objections on two occasions, this Judge determined that, reviewing the respondent's affidavit which was attached to his motion to suppress at Exhibit 4 along with an attachment from a news release provided by the U.S. Immigration and Customs Enforcement Service on September 17, 2008, it was the opinion of this Judge that reviewing the declaration of the respondent himself, which is sufficiently specific, four pages in length, consisting of 25 paragraphs, this Court reaches the conclusion that the respondent has failed to set up a prima facie case in order to establish that any evidence offered against him should be suppressed.

In his declaration, the respondent sets out the facts as they occurred on September 13, 2008. The respondent indicates that he had gone on a trip to Wisconsin with his friend Paolo Diaz. Paolo and the respondent worked together. Unbeknownst to the respondent, Paolo Diaz was someone who was in fact wanted by ICE agents, specifically the ICE fugitive operations team.

According to the respondent in his statement, he was giving Paolo a ride home from the trip. And when Paolo attempted to get out of the respondent's car in front of his house, Paolo

was arrested. He was arrested immediately by plainclothes individuals who were carrying some papers.

According to the respondent's statement, he did not realize that his friend Paolo had any problems with the Immigration Service or the law. But he had imagined that the officials who arrested him were from police. Respondent writes that he had no idea that they were from Immigration. Shortly afterward, one of the officials walked over to the respondent and asked him to get out of his car. Respondent got out of his vehicle and asked, "What have I done?" in English. The officer then continued to speak with the respondent in English and asked if the respondent knew if Paolo had an arrest warrant. The respondent responded he did not know. The official asked where he and Paolo had come from. The respondent indicated that he was returning from Darlington, Wisconsin.

The official then asked the respondent for identification and the respondent simply answered, "No." The respondent was asked his name and he gave them his name of Victor Cervantes. The officers then asked him if he had papers. The respondent replied with, "No"/"I don't know" with his body by shrugging. See Exhibit 4, declaration of respondent.

The respondent writes that he responded to all of the officer's questions, because he was afraid and did not know what to do. He writes that he was very nervous and responded out of intuition. He remembers that in school the teachers told him

that when they were stopped by police that they should give their names and addresses and nothing more. Respondent indicated that he did not know who these two officials were, but immediately assumed that they were the police because they had handcuffed Paolo.

The respondent and Paolo were eventually taken to Milwaukee where they were processed by the Immigration and Custom Enforcement agents. Once seated, the same individual who had arrested him began filling out paperwork and asking the respondent questions. Respondent was asked about how much time he had spent in the United States, where he was working, the date in which he entered the United States. He was also asked about his religion and if he had problems with other religions and questioned about political asylum. During all of this, apparently the respondent was signing various documents that they were putting in front of him.

The respondent notably indicates that he did not feel free to leave or be silent. He was no longer in handcuffs, but he felt that the interrogation was very forceful and intimidating, with one question after the other. According to the respondent, the Immigration official was armed, that he was nervous knowing that he was in a detention facility. And all the interrogation took place in English because he had said that he understood English and he in fact did.

The respondent's declaration further reflects that he

was told he had three options: Deportation, voluntary departure or court before the Judge. Despite the officer's telling the respondent that deportation might be the best option, the respondent decided that he would sign for court because he believed this was the best option. Consequently, the respondent was processed by being given a $5,000 bond and nonetheless felt apprehensive, because everyone was placed in handcuffs and individuals had metal chains around their waists.

The respondent concludes his declaration by indicating that he is of the belief that the ICE officers acted egregiously in violation of his constitutional rights under the Fifth Amendment of the U.S. Constitution, due to potential charges arising from any admission of alienage or entry without inspection. The respondent also, in his motion to terminate, indicates that on September 14, 2008 he was seized without an arrest warrant or specific facts that reasonably warranted that he was present in the United States in violation of immigration law. This action, according to the respondent, constitutes an egregious violation of his Fourth Amendment right to be free from unreasonable searches and seizures.

Respondent also indicates that his statements to Immigration agents were involuntary and, consequently, they were subject to being suppressed in an immigration hearing. To do otherwise would violate the notions of fundamental fairness and due process clause of the Fifth Amendment. Finally, the

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respondent indicates that any evidence of removability obtained by agents of the Department of Homeland Security or other Government agents in this matter had been obtained through egregious violations of the respondent's constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and applicable statutes under the INA and regulations issued by the DHS and consequently, should be suppressed.

ANALYSIS OF RESPONDENT'S CLAIM

As indicated above, the respondent details his statement articulating his position that the Government has acted egregiously in arresting him. As indicated previously in Lopez v. Mendoza, 468 U.S. 1032 (1984), the Supreme Court held that the exclusionary rule need not apply in civil deportation proceedings. However the Court hinted that, where there were egregious violations of the Fourth Amendment in obtaining evidence or where the use of such evidence would be fundamentally unfair and in violation of due process for requirements of the Fifth Amendments, it could be excludable.

Turning to the facts in this case, it is the assessment of this Judge that the ICE agents who were members of the fugitives operations team acted in a manner that was not egregious. According to the respondent, it is undisputed or he takes no issue with the fact that his friend Paolo Diaz was in fact a fugitive from the Immigration Service. The respondent

happened to be an individual who was giving Paolo a ride home in the same vehicle, and they were apparently good friends when he was arrested. The agents reasonably would have an opportunity to ask the respondent about an individual whom he has been driving in his car. The agents asked the respondent about his identity. The respondent knew that Paolo Diaz had been arrested by someone whom he believed to be police officers. Consequently, the respondent was on notice that Paolo Diaz had violated some law, whether it was Immigration or criminal.

Consequently, the officers asked the respondent questions about his relationship with Paolo Diaz, because he in fact was transporting him in his vehicle. And the Immigration agents knew that Paolo Diaz was in fact the individual with whom the respondent was driving, because they had a photograph of him. Reasonable issues and facts can be inferred from the fact that the respondent is driving Paolo Diaz in his personal vehicle. And this information may be particularly relevant to the Immigration agents, specifically they may want to know if the respondent was aware that Paolo Diaz himself was wanted by the Immigration agents. The Immigration agents would reasonably want to know what his relationship was with Paolo Diaz, and they questioned him about his own identity.

The respondent in pertinent part refused to give them an identification card. He simply answered no. However, he did provide the Immigration agents with his name, Victor Cervantes.

When they asked him if he had papers, respondent said no and/or I do not know with his body by shrugging. This then provided the agents with the information to ask the respondent about his immigration status.

The respondent in his statement indicates that he felt intimidated because he was questioned by having the officers ask one after another. There is nothing improper about this. The respondent was asked questions during the course of an interrogation that did not involve any type of physical threats, physical violence. The respondent was asked questions, and generally they are asked one after the other. The Immigration official was armed and the respondent was also intimidated in part because he was being held in a detention facility. All of these facts took place after the respondent's initial detention and arrest on the street in front of Paolo Diaz's home. It is the assessment of this Judge that the respondent's constitutional rights were not violated when he in fact was asked questions. He responded to them.

In fact, the Government's submissions at Group Exhibit 3B include a statement to be provided to an arrested or detained foreign national. The respondent was given a copy of this document in English and Spanish, which he apparently acknowledged receiving by signing his name to the bottom of the document. The document does advise an individual who is arrested or detained as a non-U.S. citizen who is being arrested or detained, and that

individual's entitled to have the Immigration Service or ICE notify his country's consular representatives here in the United States. The notice further indicates that a consular or official from the respondent's country may be able to help him obtain legal counsel and may contact the family and visit him in detention, among other things. The notice includes that, if the detainee would want the Government to notify his consular officials, this could be done immediately or at any time in the future. After those consular officials are notified, they may call or visit the respondent. The final question which the respondent answered yes, was do you want the Government to notify your country's consular officials.

In short, it is the assessment of this Judge that Exhibit 3A, 3B and 3C should be admitted into evidence, despite the respondent's assertion that it was obtained in violation of his constitutional rights. Consequently, after having admitted the record of deportable alien at Exhibit 3A, the statement to be provided to arrested or detained foreign nationals at 3B and the respondent's Mexican consular ID card and photos at Exhibit 3C, it is the assessment of this Judge that the Government has established removability by clear and convincing evidence as required by 8 C.F.R. Section 1240.8(2008).

The respondent has requested voluntary departure in the alternative. Consequently, this request will be granted. Accordingly, the following order will be entered.

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IT IS HEREBY ORDERED that the respondent be granted voluntary departure up until January 14, 2009, upon the payment of $500 voluntary departure bond within five business days.

IT IS FURTHER ORDERED that, if the respondent fails to timely depart the United States or fails to pay the $500 voluntary departure bond, this order is converted without further notice or proceedings to an order of removal and deportation from the United States to Mexico on the charge contained in the Notice to Appear.

CARLOS CUEVAS
U.S. Immigration Judge

Date: December 15, 2008