U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: CISSE, NEVANLY

A 077-943-726

Date of this notice: 4/1/2019

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:
Donovan, Teresa L.
O'Connor, Blair
Wendtland, Linda S.

Userteam: Docket

File: A077-943-726 – New York, NY Date: APR - 1 2019

In re: Nevanly CISSE a.k.a. Mamadou Aziz Cisse a.k.a. Bakary Soumare

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nene T. Samb, Esquire

ON BEHALF OF DHS: Meida S. Powery
Assistant Chief Counsel

APPLICATION: Reopening

On May 22, 2017, the Immigration Judge granted the respondent preconclusion voluntary departure and deemed all applications for relief waived. The respondent, a native and citizen of Cote D' Ivoire, argues that he received ineffective assistance of counsel during his prior proceedings, did not knowingly waive his right to appeal, and was unaware that his prior attorney was going to withdraw all applications for relief. On December 27, 2017, this Board set a briefing schedule to allow the respondent the opportunity to elaborate on his claim. The Department of Homeland Security ("DHS") argues that the Immigration Judge's decision is correct and should be affirmed. The appeal will be sustained and the record remanded for further proceedings consistent with this decision.

Initially, the DHS argues that this Board lacks jurisdiction. We disagree. This case is properly before us as the respondent has persuasively demonstrated that his decision to waive appeal was not a knowing and voluntary one. *See* 8 C.F.R. § 1003.3(a)(1) ("A Notice of Appeal may not be filed by any party who has waived appeal . . ."); *Matter of Shih*, 20 I&N Dec. 697 (BIA 1993); *see also Matter of Patino*, 23 I&N Dec. 74 (BIA 2001) (stating that a party wishing to challenge the validity of an appeal waiver may file either a motion to reconsider with the Immigration Judge or an appeal directly with the Board); *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1322 (BIA 2000) (explaining that a waiver of the right to appeal must be knowing and voluntary to be effective). Though the Immigration Judge's form decision indicates that the respondent's right to appeal was waived, the transcript does not contain an explanation that accepting preconclusion voluntary departure requires a waiver of his right to appeal (Tr. at 50-54, 57, 59). At no time did the Immigration Judge or either party raise the issue of appeal or discuss the right to appeal. We do not observe either an oral notification or a written stipulation reflecting the respondent's awareness of the requirement to waive his right to appeal. Thus, the Immigration Judge lacked the authority to grant voluntary departure prior to the completion of proceedings. *Matter of Ocampo-Ugalde*, 22 I&N Dec. 1301, 1303-04 (BIA 2000). Because the record does not establish that the respondent knowingly and voluntarily waived appeal, the respondent's appeal is properly before us.

Additionally, we are persuaded by the respondent's argument that he was prejudiced by ineffective assistance of counsel who withdrew his applications for relief without trying to establish eligibility and failed to inform the respondent about the repercussions of accepting

preconclusion voluntary departure. The respondent complied with the procedural requirements for a claim of ineffective assistance of counsel as outlined in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), and established that his former attorney's actions were prejudicial to his case. *See Matter of Lozada*, 19 I&N Dec. at 640. Concerning prejudice, the respondent's counsel, among other things, withdrew the respondent's withholding of removal application without explanation (Tr. at 50). The respondent argues on appeal that he had a claim based upon both his political opinion and membership in a particular social group, but that his attorney failed to advance that claim.

Additionally, the respondent's former counsel conceded pretermission of his application for cancellation of removal (Tr. at 40-42, 50). The DHS and Immigration Judge concluded that because the respondent married a woman after his first marriage dissolved, but prior to their divorce, he engaged in polygamy and cannot establish good moral character (IJ at 40-42). *See* section 101(f)(3) of the Act (good moral character); section 212(a)(10)(A) (practicing polygamists). While we agree that the respondent wrongfully married his second wife prior to a legal divorce from his first wife, either knowingly or unknowingly, it is unclear that his actions fall within section 212(a)(10)(A) of the Act. *See generally* USCIS Policy Manual, Vol. 12, Part F, Ch. 5(H) (Oct. 2014) ("An applicant who has practiced or is practicing polygamy during the statutory period is precluded from establishing GMC [good moral character]. Polygamy is the custom of having more than one spouse at the same time. . . . Polygamy is not the same as bigamy. Bigamy is the crime of marrying a person while being legally married to someone else. An applicant who has committed bigamy may be susceptible to a denial under the 'unlawful acts' provision."). Without further evidence, testimony, and findings from the Immigration Judge, we conclude that there are insufficient facts before us to determine if the respondent's cancellation of removal claim was appropriately pretermitted.

Based on the foregoing, the record will be remanded to the Immigration Judge for further findings consistent with this decision. The respondent should be provided the opportunity to reapply for any available relief. Both parties should be allowed to present additional evidence on remand.

ORDER: The appeal is sustained and the record remanded to the Immigration Judge for further findings consistent with this decision.

Teresa L. Dowe

FOR THE BOARD