U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: ESPANA, JOSE

A 088-745-137

Date of this notice: 11/25/2014

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:
Greer, Anne J.
Pauley, Roger
Wendtland, Linda S.

Userteam: Docket

File: A088 745 137 – Baltimore, MD

Date: NOV 25 2014

In re: JOSE ESPANA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jonathan S. Greene, Esquire

ON BEHALF OF DHS: Carrie E. Johnston
Senior Attorney

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (sustained)

APPLICATION: Suppression of evidence; termination of proceedings; administrative closure

The respondent appeals from the Immigration Judge's April 17, 2012, decision denying his motion for administrative closure of removal proceedings. The respondent also appeals from the interim decisions denying various motions he filed, including his motion to suppress evidence and terminate proceedings.[1] The Immigration Judge granted the respondent's alternative request for voluntary departure. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7). The record will be remanded.

We review findings of fact, including credibility findings, and (under the law of the Circuit with jurisdiction over this case) determinations as to the likelihood of future events under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Turkson v. Holder*, 667 F.3d 523, 529 (4th Cir. 2012); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues, *inter alia*, that the Immigration Judge erred in declining to suppress evidence that was obtained in violation of the Fourth and Fifth Amendments to the United States Constitution. In particular, the respondent asserts that the actions of Immigration and Customs Enforcement ("ICE") agents in entering his home on June 30, 2008, resulted in an egregious violation of his Fourth Amendment rights, thus warranting suppression of the evidence obtained therefrom, which was submitted in order to establish his removability

[1] The record reflects that the respondent's motion to suppress evidence and terminate proceedings was denied on July 14, 2011; his supplemental motion to suppress evidence and terminate proceedings was denied on August 11, 2011; his motion to dismiss was denied on January 4, 2012; and his motion to vacate order was denied on January 24, 2012.

(Respondent's Brief at 14-16). The respondent also asserts that, while the initial Immigration Judge determined that a Fourth Amendment violation had occurred, she erred in not permitting him the opportunity to testify in order to set forth a *prima facie* showing that the violation was egregious (Respondent's Brief at 15-16).[2]

The "exclusionary rule" arose in the context of criminal proceedings and requires a court to suppress evidence that is the fruit of an unlawful arrest or of other official conduct which violates the Fourth Amendment. It is well-established that the Fourth Amendment exclusionary rule generally does not apply in immigration proceedings. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044-51 (1984); *Matter of Sandoval*, 17 I&N Dec. 70, 77-83 (BIA 1979); *see also United States v. Oscar-Torres*, 507 F.3d 224, 229-30 (4th Cir. 2007).[3] Even evidence that would not be admissible in a state or federal criminal proceeding against an alien may be admitted in a civil immigration proceeding to determine whether the alien is removable. However, such evidence must comport with notions of fundamental fairness and cannot result from an egregious violation of an alien's constitutional rights. *See INS v. Lopez-Mendoza*, *supra*, at 1050-51 (acknowledging that the Court's holding is limited to the issue of admitting credible evidence gathered in connection with peaceful arrests by Service officers, and does not reach egregious violations); *see also Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980) (stating that an egregious Fourth Amendment violation may render evidence inadmissible under the due process clause).

A motion to suppress evidence must be supported by specific and detailed statements based on personal knowledge and must enumerate the articles to be suppressed. *See Matter of Wong*, 13 I&N Dec. 820, 821-22 (BIA 1971); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971). Additionally, the movant for suppression "must come forward with proof establishing a prima facie case." *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975). The submission of an affidavit alone is insufficient to satisfy the movant's burden. *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). In

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[2] The record reflects that the first Immigration Judge assigned to this matter issued the written decision on July 14, 2011 (signed on July 7, 2011), with respect to the respondent's motion to suppress evidence and terminate proceedings. Subsequently, the matter was reassigned to the current Immigration Judge.

[3] On appeal, the Department of Homeland Security ("DHS") argues that, in *United States v. Oscar-Torres*, the Fourth Circuit "held that it would not apply the Fourth Amendment exclusionary rule in civil removal proceedings under any circumstances" (DHS Brief at 25). We do not agree that the Fourth Circuit indicated that the exclusionary rule does not apply in removal proceedings "under any circumstances." Rather, the Fourth Circuit appears to have simply stated the *general* rule of *Lopez-Mendoza*, and not to have made a categorical, unqualified statement. Further, the Fourth Circuit decision in *United States v. Oscar-Torres* relates to a criminal proceeding, and we are not persuaded that its discussion of the exclusionary rule vis-à-vis civil deportation proceedings constitutes anything else than dicta. Additionally, the Fourth Circuit noted that it was "not consider[ing] whether egregious violations of the Fourth Amendment might warrant a suppression remedy where none otherwise exists." *United States v. Oscar-Torres*, *supra*, at 227 n.1 (citing *INS v. Lopez-Mendoza*, *supra*, at 1050-51). Accordingly, we do not interpret the Fourth Circuit's decision as a mandate that suppression of evidence may never be warranted in the context of immigration proceedings.

that regard, where the facts alleged in the affidavit, if true, "could support a basis for excluding the evidence in question, then the claims must also be supported by testimony." *Id.* If a *prima facie* case is established, the burden then shifts to the DHS to justify the manner in which it obtained the evidence at issue. *See id.*; *Matter of Burgos*, *supra*, at 279.

Upon *de novo* review, we conclude that the respondent is entitled to a hearing in support of his motion for suppression of evidence. In that regard, we conclude that the statements in the respondent's affidavit, if accepted as true, establish that evidence which he seeks to suppress was obtained as the result of an egregious Fourth Amendment violation (July 14, 2011, I.J. Decision at 3-5; Respondent's Affidavit, filed February 6, 2009). *See Matter of Barcenas*, *supra*, at 611. The Immigration Judge properly determined that, based upon the respondent's claims, the actions of ICE agents on June 30, 2008, in entering his home without either a warrant or consent, and in the absence of exigent circumstances, violated "the Fourth Amendment's prohibition of unreasonable searches and seizures" (July 14, 2011, I.J. Decision at 11). *Cf. INS v. Lopez-Mendoza*, *supra*, at 1040 (observing that "[t]he general rule . . . is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible"). However, the Immigration Judge further determined that the claimed actions of ICE agents did not amount to an "egregious" Fourth Amendment violation, where "the operation was carried out during the daytime, [] was generally peaceful[,]" and "there [wa]s no indication that the arresting agents used excessive physical force or behaved in a threatening manner" (July 14, 2011, I.J. Decision at 11).

We do not agree with the Immigration Judge's analysis of the facts alleged by the respondent. Instead, we conclude that the alleged facts regarding the unlawful search and seizure, as set forth in the respondent's affidavit, constitute an egregious violation of the Fourth Amendment. The respondent asserts that he was apprehended by ICE agents after they burst open the front door of his home around 6:00 a.m. and discovered him in his living room wearing only a towel (July 14, 2011, I.J. Decision at 3). He states that he then stepped into his bathroom, attempted to put on clothing, and locked the door; however, agents broke open the door and shattered a glass mirror (July 14, 2011, I.J. Decision at 4). He states that he was told to jump out of the bathroom and was subsequently grabbed by a man with a gun, who twisted his arms behind his back, while pushing his head down and placing him in handcuffs (July 14, 2011, I.J. Decision at 4). The respondent also contends that he was pushed against a wall after being questioned by agents in broken Spanish (July 14, 2011, I.J. Decision at 4). He asserts that, after he was escorted outside his home, he asked if his sister could stay in the home with his son (who was then 1 year old); however, he was told that his son would stay with Olga Lopez, who was another resident of the home (July 14, 2011, I.J. Decision at 4; Respondent's Affidavit). The respondent further asserts that Ms. Lopez stated in Spanish that she would not be responsible for his son, but the ICE agents did not seem to understand her (July 14, 2011, I.J. Decision at 4). The respondent contends that he was then transported from his home in a van and was given a shirt, but was not permitted to put it on (July 14, 2011, I.J. Decision at 4-5).

We conclude that the foregoing factual allegations present a prima facie case that the ICE agents did not conduct their operation in a "generally peaceful" or non-threatening manner (July 14, 2011, I.J. Decision at 11). Rather, the respondent's account presents a scenario in which ICE agents forcefully entered his home at an early morning hour and pursued him into his bathroom, where he was not fully clothed (July 14, 2011, I.J. Decision at 4). Moreover, based on the

respondent's assertions, ICE agents used physical force both in arresting him and upon questioning him (July 14, 2011, I.J. Decision at 4). Also, of significance to our inquiry is the respondent's assertion that, after he was arrested, he was taken from his home and forced to leave behind his young son, without knowing if the child would be in the care of a responsible adult (July 14, 2011, I.J. Decision at 4). Based on the totality of the circumstances set forth in the respondent's affidavit, we conclude that the asserted Fourth Amendment violation (if proven) rises to the level of an egregious violation sufficient to support a claim for the suppression of evidence. *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (indicating that "brutal conduct," which "shocks the conscience" and "offend[s] the community's sense of fair play and decency," constitutes an egregious constitutional violation); *see also INS v. Lopez-Mendoza*, *supra*, at 1051 (citing *Rochin v. California*, *supra*.); *Cotzojay v. Holder*, 725 F.3d 172 (2d Cir. 2013).

Therefore, we will vacate the Immigration Judge's determination that the respondent did not establish a *prima facie* case for suppression and remand the record for further proceedings with respect to that issue (July 14, 2011, I.J. Decision at 12). To that end, we conclude that, because the respondent's affidavit statements, if true, provide a basis for suppression, he must be allowed the opportunity to testify in support of his claim in order to satisfy his initial burden in moving to suppress. *See Matter of Barcenas*, *supra*, at 611 ("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."). Further, the respondent should be afforded a reasonable opportunity to cross-examine any witnesses presented by the DHS (see section 240(b)(4)(B) of the Immigration and Nationality Act), and the Immigration Judge on remand should consider the arguments in the respondent's appellate brief with regard to the taking of depositions, and the issuance of a subpoena for the production of documents. As the record will be remanded for a hearing concerning the suppression of evidence, we decline to reach the respondent's alternative bases for challenging the decisions of the Immigration Court at this juncture.[4] *See generally Matter of S-H-*, *supra*, at 465. Given that a suppression hearing will be held, the parties may further develop the record on remand with respect to the issues otherwise raised concerning the admissibility of the evidence presented in this matter.

Accordingly, the following order will be entered.

[4] Insofar as the respondent challenges the denial of his motion for administrative closure, we conclude that the denial was not in error (Respondent's Brief at 31-33). The record reflects that the respondent sought administrative closure on the basis of "prosecutorial discretion" (Exh. 22). However, the DHS declined to exercise prosecutorial discretion in the respondent's favor (Exh. 23). As only the DHS has authority to exercise prosecutorial discretion, the respondent does not have a basis to pursue administrative closure. *See Matter of Avetsiyan*, 25 I&N Dec. 688 (BIA 2012) was unavailing.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

File: A088-745-137 April 17, 2012

In the Matter of

JOSE ESPANA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Violation of Section 212(a)(6)(A)(i) of the Immigration and Nationality Act.

APPLICATIONS: Application for voluntary departure.

ON BEHALF OF RESPONDENT: JONATHAN SCOTT GREENE

ON BEHALF OF DHS: CARRIE E. JOHNSTON

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a citizen and national of Honduras who was placed in removal proceedings when a Notice to Appear dated June 30, 2008 was filed with the Immigration Court alleging that the respondent entered the United States without inspection, therefore violating Section 212(a)(6)(A)(i) of the Immigration and Nationality Act.

The respondent appeared at master calendar and denied

the charge and denied all allegations. Subsequently, respondent through counsel filed a motion to terminate. Court denied the motion to terminate and subsequent motion to reconsider the motion to terminate which was denied. The Court found that based on the evidence submitted by the Government that the respondent is removable by clear and convincing evidence.

The respondent subsequently sought to obtain relief through prosecutorial discretion, and at the hearing today through counsel represented that he wishes to apply for voluntary departure, but wishes to reserve the possibility of appeal on the application for voluntary departure. Accordingly, after considering the exhibits which total in number 14, and determining that the respondent is eligible for voluntary departure with no objection from the Government, the Court will enter an order of voluntary departure for a period of 60 days, which would be until June 18, 2012 upon a posting of a $500 departure bond to be posted within five days of the hearing today. The failure of the respondent to post the departure bond within five days or to depart before the expiration of June 18, 2012 will result in an automatic order of removal of the respondent to Honduras.

The Court, having considered the motion for prosecutorial discretion, denies the motion for prosecutorial discretion, inasmuch as the Court's view is that the ultimate outcome of the matter if re-calendared after it being

administratively closed upon prosecutorial discretion, would place us back in the same shoes as we are today, that is, the respondent would be seeking voluntary departure.

ORDER

IT IS HEREBY ORDERED that the application for post-hearing voluntary departure be granted for a period of 60 days until June 18, 2012, and that a bond of $500 be posted within five days of the hearing today, with the failure to post the bond within five days of today resulting in an order of removal to Honduras, or if the respondent fails to depart by the expiration of June 18, 2012, then an automatic order of removal will go into effect. Any notice of appeal must be filed on or before May 17, 2012.

DAVID W. CROSLAND
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE DAVID W. CROSLAND, in the matter of:

JOSE ESPANA

A088-745-137

BALTIMORE, MARYLAND

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Jonathan Charlton

JONATHAN CHARLTON (Transcriber)

DEPOSITION SERVICES, Inc.

JUNE 22, 2012

(Completion Date)