U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SIMBANACH, JUAN CARLOS **A098-300-506**

Date of this notice: 7/16/2010

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:
Grant, Edward R.
Malphrus, Garry D.
Mullane, Hugh G.

File: A098 300 506 - Hartford, CT

Date: JUL 16 2010

In re: JUAN CARLOS SIMBANACH

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Michael J. Wishnie, Esquire

ON BEHALF OF DHS: John Marley
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

APPLICATION: Termination

The respondent has appealed from the decision of the Immigration Judge dated February 4, 2008, denying the respondent's motions to hold a suppression hearing, to suppress evidence, and to terminate the removal proceedings, finding him removable as charged, and granting him voluntary departure with an alternate order of removal to Ecuador. Additionally, the respondent seeks a remand of the proceedings for the consideration of additional evidence. The Department of Homeland Security ("DHS") opposes the appeal as well as a remand of the proceedings. The appeal will be dismissed. The motion to remand will be denied.

We review the findings of fact, including any determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was placed in removal proceedings upon the filing of a Notice to Appear ("NTA"), which was issued on September 20, 2006, with the Immigration Court on October 13, 2006. The respondent objected to admission of the Record of Deportable Alien (Form I-213), and he made a motion to suppress the Form I-213 and to terminate proceedings.

The Immigration Judge denied the respondent's request to hold a suppression hearing. A respondent who raises the claim questioning the legality of the evidence must come forward with proof establishing a prima facie case before the DHS will be called on to assume the burden of justifying the manner in which it obtained evidence. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). If an affidavit is offered, which, if accepted as true, would not form a basis for excluding the evidence, the contested document may be admitted into the record. *Id.* 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. *Id.*

The respondent's affidavit states that on September 19, 2006, while waiting in a park in the hope of being hired for short-term manual labor, he along with several others got into the vehicle of a man offering work. The driver did not question the respondent during the short drive to a parking lot. Upon exiting the vehicle, the group was surrounded by armed law enforcement officers. An officer told the respondent he was arrested and pushed the respondent inside a vehicle. The respondent was driven to the local police department headquarters, where he was questioned and had his fingerprints taken by a local police officer. The immigration officer who examined the respondent was one of those who had arrested him. After being held in a jail cell, he was transported to Hartford, where he was finally allowed to make a telephone call.

The United States Supreme Court has held that a Fourth Amendment violation does not, by itself, require suppression of evidence in the course of a removal proceeding. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). In so holding, the Court pointed out that a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country. *Id.* at 1039. "The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws." *Id.* at 1039. The Court reasoned that the application of the exclusionary rule to immigration proceedings would not likely serve as an effective deterrent to misconduct by immigration officers but would impose unusual and significant social costs by requiring the courts to release illegal immigrants within our borders and "close their eyes to ongoing violations of the law." *Id.* at 1039. Accordingly, the Court stated that evidence gathered in connection with peaceful arrests by immigration officers need not be suppressed in a deportation hearing.

However, a plurality of the Court stated that its conclusions concerning the exclusionary rule's value might change if there developed good reason to believe that Fourth Amendment violations by immigration officers were widespread, and it noted that it was not dealing with "egregious violations" of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. *Id.* at 1050. The Second Circuit has held that the egregiousness of a constitutional violation cannot be gauged solely on the basis of the validity (or invalidity) of the stop, but must also be based on the characteristics and severity of the offending conduct. *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006). "Thus, if an individual is subjected to a seizure for no reason at all, that by itself may constitute an egregious violation, but only if the seizure is sufficiently severe." *Id.* at 235. In determining whether a seizure which lacks any valid basis is "gross or unreasonable," the court will look to such factors as whether the initial illegal stop is particularly lengthy or there is a show or use of force. *Id.* at 236. Second, even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration). *Id.* at 235. The Second Circuit concluded in *Almeida-Amaral* that although the alien had been subjected to a "suspicionless stop" which had infringed his Fourth Amendment rights, it was not sufficiently severe to be deemed "egregious" under the Supreme Court's holding in *Lopez-Mendoza*, and the Board did not err in denying his motion to suppress evidence of his deportability.

The Immigration Judge correctly noted in his decision that while the booking records suggest that the local police arrested the respondent, the Form I-213 indicates that Immigration and Customs Enforcement (ICE) officers arrested the respondent, with the police incident report suggesting that the local police provided minimal assistance to ICE. The Immigration Judge found that regardless of who was primarily responsible for effectuating the respondent's arrest, the local police or ICE officers, the respondent's affidavit, if accepted as true, does not establish a prima facie basis for excluding the Form I-213. We agree with the Immigration Judge's conclusion. The exclusionary rule does not apply regardless of who arrested the respondent because of the civil nature of removal proceedings. The Second Circuit has recognized that many of the protections afforded defendants in criminal proceedings are not necessarily constitutionally required in immigration proceedings, which are civil proceedings to determine eligibility to remain in this country and not to punish an unlawful entry. *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 130 (2d Cir. 2008) (citations omitted).

Even assuming for the sake of argument that the respondent's arrest was in violation of his Fourth Amendment rights under Second Circuit case law, he has not alleged facts that would indicate it was an "egregious" violation or that the arrest was based upon race or some other "grossly improper consideration." *Almeida-Amaral v. Gonzales, supra*, at 235. In *Melnitsenko v. Mukasey*, 517 F.3d 42, 48 (2d Cir. 2008), the Second Circuit noted that the petitioner in *Lopez-Mendoza* had been arrested in violation of his Fourth Amendment rights, had been briefly detained, taken to the county jail, and questioned - all without being warned of his right to remain silent. In fact, the petitioner had been detained by immigration officers while entering the processing plant at which he worked because, upon seeing an immigration officer, he had averted his head, turned around, and walked away, and not because anyone else had been questioned about his status. *INS v. Lopez-Mendoza, supra*, at 1037. Nevertheless, the Supreme Court found that this conduct was not an "egregious violation[] of Fourth Amendment or other liberties" such that evidence derived from such arrest should be suppressed at an immigration hearing.

In *Melnitsenko*, the Second Circuit held that even if a border checkpoint approximately 107 miles from the Canadian border was illegal, the actions of four or five uniformed immigration officers in stopping the petitioner at the checkpoint, escorting her to a trailer, and interrogating, fingerprinting, and photographing her for 3 hours without any evidence of any *Miranda* or other warnings being given, falls short of the type of Fourth Amendment violation that could be considered "egregious" under *Lopez-Mendoza*. The conduct surrounding the arrest of the respondent appears less egregious than either that in *Lopez-Mendoza* or *Melnitsenko*.

The respondent does not claim that he was subjected to physical abuse, threats, promises, denial of food or drink, or long hours of interrogation which prompted his admissions. In fact, the respondent's affidavit provides few details about his questioning by an immigration officer and omits such critical information as when and where the interrogation took place, the length of the interrogation, and the circumstances under which the respondent provided the information recorded on the Form I-213. It is the respondent's burden to establish a prima facie case before the DHS will be called on to assume the burden of justifying the manner in which it obtained the evidence, and statements in a motion for suppression must be specific and detailed, rather than general and conclusory. *Matter of Barcenas, supra*, at 611; *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). The respondent's omission of significant details in his affidavit contributes to his failure to make out a prima facie case which would warrant a suppression hearing. Absent any evidence establishing

a prima facie case that the officers who arrested and interviewed the respondent engaged in egregious conduct, the respondent has failed to establish that his statements were made involuntarily.

Additionally, the record in the instant case does not show that the respondent was subjected to a seizure "for no reason at all" or that his seizure was based upon his race or some other grossly improper consideration. *Almeida-Amaral v. Gonzales, supra*, at 235. As pointed out by the Immigration Judge, the respondent voluntarily approached and entered a vehicle operated by an undercover officer for the purpose of providing short-term day labor. The respondent submitted an article indicating that the particular area in which he solicited work is populated on a daily basis by large numbers of day laborers seeking work and that Spanish-speaking police had been instructing laborers to stay at the park, and not along Main Street, due to complaints concerning public safety when the laborers loitered and ran into the streets to solicit employment (Tabs E and T). After entering the vehicle, the respondent was arrested and interrogated.[1] *See* section 287(a) of the Act, 8 U.S.C. § 1357(a). The Immigration Judge correctly found that because the solicitation of day labor has a strong correlation to undocumented presence in the United States and lack of employment authorization, the arresting agents had a reasonable suspicion based on articulable facts to believe that an immigration violation had occurred at the time of the respondent's seizure or arrest.

Even assuming for the sake of argument that the agents' arrest of the respondent on reasonable suspicion that an immigration violation had occurred was in violation of the Fourth Amendment, or in violation of certain regulatory provisions, the respondent has not shown that the admissions made by him, and documented in the Form I-213, were not reliable regardless of the violation. The Second Circuit has pointed out that in those cases in which it has affirmed the denial of suppression motions on the basis that the evidence was nonetheless reliable, the evidence related to simple, specific, and objective facts, e.g., whether a person is a foreign citizen or has a passport and valid visa. *Singh v. Mukasey*, 553 F.3d 207, 216 (2d Cir. 2009), *citing, inter alia, Melnitsenko v. Mukasey, supra*; *Almeida-Amaral v. Gonzales, supra*. The Second Circuit stated that "[t]hese facts are not altered by coercive interrogation - a person either is or is not a citizen of a particular country and either does or does not have a visa." *Singh v. Mukasey, supra*, at 216.[2]

The instant case involves evidence relating to such "simple, specific, and objective facts" as whether the respondent was born in a foreign country and is present in the United States without having been admitted or paroled, i.e., facts which the Second Circuit has found are "not altered by coercive interrogation." *Singh v. Mukasey, supra*, at 216. Additionally, the respondent does not

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[1] Although the respondent indicates that he was not questioned while in the vehicle, he does not state when he first discussed his place of birth or his undocumented status with immigration officers or local police officers.

[2] In the *Singh* case, which the Second Circuit characterized as *extraordinary*, the court found that the reliability of a statement supporting the removability of a lawful permanent resident charged with alien smuggling was undermined by the immigration officers' conduct during a coercive interrogation, pointing out that the issue involved "is more nuanced and susceptible to corruption during the course of an improper interview" than the issue of a petitioner's citizenship or possession of a visa. *Singh v. Mukasey, supra*, at 216.

allege that any of the information reported in the Form I-213 is false or inaccurate. Accordingly, the Immigration Judge did not err in finding the Form I-213 to be reliable evidence.

With regard to the regulatory violations alleged by the respondent, the Second Circuit has held that pre-hearing regulatory violations are not grounds for termination if there is no showing that the violations reveal prejudice that affected the outcome of the proceedings, conscience-shocking conduct, or a deprivation of fundamental rights. *Rajah v. Mukasey*, 544 F.3d 427, 446-48 (2d Cir. 2008). In so holding, the Second Circuit stated that "there are no societal benefits from entitling deportable aliens to extend their time in the United States because of harmless technical violations of regulations in the pre-hearing phase," and "[f]orcing the system to litigate every regulatory dispute, no matter how harmless or technical, as a routine part of deportation proceedings would impose a burden of far greater magnitude than any benefit to be gained." *Id.* at 447-48. The respondent has not made a prima facie showing that any claimed regulatory violations in this case reveal prejudice which affected the outcome of the proceedings, conscience-shocking conduct, or a deprivation of fundamental rights.

The respondent alleges that he was not advised of his right to be represented by an attorney at no expense to the government, 8 C.F.R. § 287.3(c), and that his right to be represented by an attorney or representative during an immigration examination, 8 C.F.R. § 292.5(b), was violated. While we recognize that an alien has the right to legal representation during an examination, the regulations do not require the DHS to inform him of such a right before or during the examination. Rather, the DHS is only required to inform an alien of his right to legal representation after he is placed into formal proceedings under section 238 or 240 of the Act. 8 C.F.R. § 287.3(c); *see, e.g., Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009) (border patrol agent's telephonic interview of alien arrested without warrant without first advising him of his rights did not violate 8 C.F.R. § 287.3(c), because obligation to notify alien of his rights does not attach until alien has been arrested *and* placed in proceedings). In the case, the respondent gave the statements he seeks to suppress prior to the filing of the Notice to Appear with the Immigration Court, and thus, prior to the initiation of formal removal proceedings. Accordingly, his statements were not obtained in violation of 8 C.F.R. § 287.3(c).

Additionally, the respondent has not shown that his right to representation during an immigration examination may have been violated. The respondent does not allege that he informed the examining officer that he wished to have counsel represent him during the examination. *Cf. Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980) (alien's admissions excluded from record where alien was led to believe his return to Mexico was inevitable and that he had no rights whatsoever, the arresting officer physically prevented him from giving his attorney's phone number to his employer, and his numerous requests to call his attorney after he was placed in detention were ignored so that he finally made his admissions after having lost hope of speaking with his attorney).[3]

The respondent asserts that he believes that the immigration officer who interrogated him was also one of the arresting officers. The regulation provides that an individual arrested without a

[3] It is not necessary to consider whether *Matter of Garcia, supra*, effectively has been modified by *INS v. Lopez-Mendoza, supra.*

warrant of arrest "shall be examined . . . by an officer other than the arresting officer," unless "no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay." However, the respondent has not established that he may have been prejudiced by being examined by one of the officers who was involved in making his arrest, which is allowed under certain circumstances in order to avoid delay.

With regard to the respondent's assertions that regulations regarding the making of a warrantless arrest were violated, we have found that even if the respondent's arrest was unlawful, the exclusionary rule does not apply because the conduct surrounding his arrest was not egregious, his arrest was not based on race or another improper consideration and was not made "for no reason at all," and he has not shown that the admissions contained on the Form I-213 are unreliable. Additionally, we agree with the Immigration Judge that a suppression hearing is not warranted to determine whether there were violations of the Attorney General Guidelines on INS Undercover Operations ("AG Guidelines") and ICE Operation Manual. *See, e.g., Krasilych v. Holder*, 583 F.3d 962 (7th Cir. 2009) (Government is not required to prove that undercover investigation targeting fraudulent procurement of immigration benefits complied with AG Guidelines for evidence to be admissible in alien's removal proceedings since AG Guidelines are internal rules with no legal force).

Because the respondent's affidavit, even accepted as true, would not form a basis for excluding the Form I-213 submitted by the DHS, the Immigration Judge correctly denied the respondent's motions for a suppression hearing, for suppression of the Form I-213, and for termination of proceedings. Additionally, the respondent's admissions establish his removability as charged by clear and convincing evidence. Accordingly, the appeal will be dismissed.

The respondent has also filed a motion to remand the proceedings, which is opposed by the DHS. Because we have found that the exclusionary rule does not apply regardless of whether immigration officers or local police were primarily responsible for effectuating the respondent's arrest and regardless of who was in charge of the undercover operation, we find that remand of the proceedings for consideration of additional evidence in that regard is unwarranted. The respondent has not submitted any new evidence which would likely change the result in this case. *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992). Accordingly, the motion to remand will be denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion is denied.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76,927, 937-38 (Dec. 18, 2008) (to be codified at 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1)).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 73 Fed. Reg. at 76938 (to be codified at 8 C.F.R. § 1240.26(i)).

Edward R. Grant

FOR THE BOARD