



Detail

Complaint Number: 790

Immigration Judge: (b)(6)

Complaint Received Date: 08/27/13

Current ACIJ
Nadkarni, Deepali
Past ACIS:

Base City
(b) (6)

Status
CLOSED

Final Action
Written counseling

Final Action Date
09/03/13

| A-Numbers(s) | Complaint Nature(s) | Complaint Source(s) |
|--------------|---------------------|---------------------|
| (b)(6) | Due process | BIA |
| | | |

Complaint Narrative: Improper denial of motion to change venue

| Complaint History | |
|-------------------|------------------------|
| 09/03/13 | Written counseling |
| 09/09/13 | Database entry created |

Sep 11, 2013

1 of 1

Immigration Judge Complaint Intake Form

HQ Use Only:
complaint #: _____
source: first / subsequent

Date Received at OCIJ: 8.27.13

| complaint source information | |
|---|--|
| complaint source type | |
| <input type="checkbox"/> anonymous <input type="checkbox"/> respondent's attorney <input type="checkbox"/> third party (e.g., relative, uninterested attorney, courtroom observer, etc.) <input type="checkbox"/> other: _____ | <input checked="" type="checkbox"/> BIA <input type="checkbox"/> respondent <input type="checkbox"/> OIL <input type="checkbox"/> Circuit <input type="checkbox"/> EOIR <input type="checkbox"/> OPR <input type="checkbox"/> DHS <input type="checkbox"/> OIG <input type="checkbox"/> Main Justice <input type="checkbox"/> media |
| complaint receipt method | |
| <input type="checkbox"/> letter <input type="checkbox"/> fax | <input checked="" type="checkbox"/> IJC memo (BIA) <input type="checkbox"/> unknown <input type="checkbox"/> email <input type="checkbox"/> phone (incl. voicemail) <input type="checkbox"/> in-person <input type="checkbox"/> other: _____ |
| date of complaint source (i.e., date on letter, date of appellate body's decision) 8.26.13 | complaint source contact information name: David Neal address: BIA Chairman email: _____ phone: _____ fax: _____ |
| additional complaint source details (i.e., DHS component, media outlet, third party details, A-number) A (b) (6) matter of (b) (6) | |

| complaint details | | |
|--|--|---|
| IJ name | base city | ACIJ |
| 13 (b) (6) | | ACIJ Dee Nadkarni |
| relevant A-number(s) | date of incident | |
| A (b) (6) | IJ's June 24, 2013 decision | |
| allegations | | |
| improper denial of motion to change venue | | |
| nature of complaint | | |
| <input type="checkbox"/> in-court conduct <input type="checkbox"/> incapacity | <input type="checkbox"/> out-of-court conduct <input type="checkbox"/> other: _____ | <input checked="" type="checkbox"/> due process <input type="checkbox"/> bias <input type="checkbox"/> legal <input type="checkbox"/> criminal |

Memorandum



| | |
|--|-------------------------|
| Subject | Date |
| Matter of (b) (6) (BIA August 26, 2013) | August 27, 2013 |
| To | From |
| Brian O'Leary, Chief Immigration Judge MaryBeth Keller, Assistant Chief Immigration Judge | David L. Neal, Chairman |

Attached please find a copy of the Board's decision dated August 26, 2013, and relevant portions of the record in the above-referenced matter.

The Board asked me to bring this case to your attention.

Further, the Board anticipates returning the record of proceedings for this remanded case to the Immigration Court in one week. If you wish to review the record prior to its return to the Immigration Court, please contact Suzette Henderson.

Thank you for your attention to this matter.

Attachments

Falls Church, Virginia 22041

File: A (b) (6)

Date: AUG 26 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

INTERLOCUTORY APPEAL

ON BEHALF OF RESPONDENT: (b) (6) Esquire

ON BEHALF OF DHS: (b)(6) & (b)(7)(C)
Chief Counsel

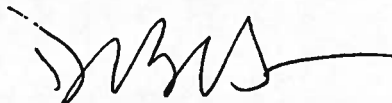
APPLICATION: Change of Venue

The respondent has filed an appeal from the Immigration Judge's June 24, 2013, denial of his motion to change venue. Ordinarily we do not entertain interlocutory appeals to avoid piecemeal review of the myriad of questions which may arise in the course of proceedings. *See, e.g., Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, 20 I&N Dec. 188 (BIA 1990). However, considering the entirety of circumstances presented in this case, which include the fact that the Department of Homeland Security has filed a brief in support of the respondent's interlocutory appeal and his motion, we will consider this appeal. Moreover, considering the record before us and the position of the parties, the appeal is sustained and the following orders will be issued.

ORDER: The Immigration Judge's June 24, 2013, order is vacated.

FURTHER ORDER: Venue in these proceedings is changed to the Immigration Court in

(b) (6)



FOR THE BOARD

Chief Counsel

U.S. Department of Homeland Security

U.S. Immigration and Customs Enforcement

NON-DETAINED

(b)(6) & (b)(7)(C)

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA**

In the Matter of

(b) (6)

File No.: A(b) (6)

In Removal Proceedings

OFFICE OF THE CLERK

2013 AUG -1 P 12: 36

OFFICE

**U.S. DEPARTMENT OF HOMELAND SECURITY'S MEMORANDUM BRIEF IN
SUPPORT OF RESPONDENT'S MOTION FOR INTERLOCUTORY REVIEW AND
CHANGE OF VENUE**

**U.S. DEPARTMENT OF HOMELAND SECURITY'S MEMORANDUM BRIEF IN
SUPPORT OF RESPONDENT'S MOTION FOR INTERLOCUTORY REVIEW AND
CHANGE OF VENUE**

NOW COMES the United States Department of Homeland Security (DHS) and files this DHS Memorandum Brief. For the reasons stated below, DHS respectfully requests that the Board of Immigration Appeals grant Respondent's motion for interlocutory appeal and change venue to the immigration court in (b) (6) for a full and fair hearing on Respondent's application for asylum. At issue is the immigration judge's failure to grant an unopposed motion to change venue, among other reasons because of (b) (6) erroneous belief that (b) (6) can pretermitt Respondent's application for asylum, withholding of removal, and protection.

I. Interlocutory Review is necessary to address important issues related to the administration of the immigration laws and to resolve a recurring problem in the handling of cases by an Immigration Judge.

Although the Board generally declines to entertain interlocutory appeals, it has ruled on the merits of interlocutory appeals where it deemed it necessary to address important issues related to the administration of the immigration laws or to resolve recurring problems in the handling of cases by Immigration Judges. See, e.g., *Matter of Avelisyan*, 25 I&N Dec. 688, 688-89 (BIA 2012); see also *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, 20 I&N Dec. 188 (BIA 1990).

Here, a ruling on the merits of this interlocutory appeal is necessary to resolve two important recurring legal issues: (1) whether an Immigration Judge should defer to the parties and grant a motion to change venue where both parties support such a motion; and (2) whether pretermittting an application for asylum without a hearing is appropriate where both Respondent and the DHS support such a hearing being held. In spite of the BIA having reversed this immigration judge in cases where (b) (6) has pretermitted applications for protection, the immigration judge continues this practice. Further, this immigration judge has on many

occasions refused to grant joint and unopposed motions in a variety of contexts, even ordering aliens removed where DHS does not seek removal.¹ For these reasons, the Respondent's interlocutory appeal has merit.

II. Respondent's Motion for Change of Venue should be granted here because the relevant factors weigh in favor of transfer to (b) (6)

An immigration judge's discretion to change venue in both exclusion and deportation cases is subject to the existence of good cause for such a change. *Matter of Rahman*, 20 I. & N. Dec. 480 (BIA 1992). Good cause is determined by balancing the factors that the Board has found relevant to the venue issue, which include: administrative convenience; expeditious treatment of the case; location of witnesses; and cost of transporting witnesses or evidence to a new location. *Id.*

Here, in addition to DHS's non-opposition to the motion to transfer, all the relevant factors weigh in favor of transfer to (b) (6). Further, there are no issues of administrative convenience that exist concerning the parties, because both Respondent and Respondent's counsel are located in (b) (6) and DHS has counsel in (b) (6) capable of representing its interests. Additionally, because both Respondent and Respondent's counsel are located in (b) (6), the treatment of the case could be held with greater expediency if the case were held there. Similarly, if any witnesses are called during the case, those witnesses will likely be located in (b) (6) because that is where Respondent's relatives reside. The substantial cost of travel between (b) (6) and (b) (6) for Respondent and Respondent's counsel also weighs in favor of venue in (b) (6). As some of the exhibits in Respondent's brief indicate, air travel alone is considerably expensive between (b) (6) and (b) (6).

¹ The Department of Homeland Security would be happy to submit a list of these cases, if the BIA would want such a list.

The substantial deference that should be given to an agreed course of action by the parties, as well as the significant role of the parties in removal proceedings, was directly addressed by the Board in *Matter of Yewondwosen*, 21 I&N Dec. 1025 (BIA 1997). In *Yewondwosen*, the Board held that, despite failing to comply with governing regulatory requirements, the respondent's motion to reopen/remand, which was affirmatively joined by DHS, may be granted in the interests of fairness and administrative economy. *Id.* at 1025. When reaching this decision the Board emphasized the importance of the parties and their agreement on the issue, stating:

[W]e consider the Service's position in this case to be significant. Rather than oppose the motion . . . the Service joined [the respondent's] motion to remand for further proceedings. We believe the parties have an important role to play in these administrative proceedings, and that their agreement on an issue or proper course of action should, in most instances, be determinative.

Matter of Yewondwosen, 21 I&N Dec. 1025, 1026 (BIA 1997). *Yewondwosen's* recognition of the parties significant role in immigration proceedings and that "their agreement on an issue or proper course of action should, in most instances, be determinative," is an acknowledgment that when *opposing* parties reach an agreement in *adversarial* proceedings, their agreement is likely in the best interests of the parties and the best interests of justice.

In this case, DHS does not oppose Respondent's motion to change venue and agrees with Respondent that Respondent should have a full hearing on the merits of his asylum claim. Under *Yewondwosen*, an IJ should show considerable deference to a request to change venue that is unopposed by DHS. Not only did the immigration judge fail to show any deference to the parties, but (b) (6) also failed to articulate any good reasons why venue in this case should not be changed. For these reasons, the BIA should change venue to (b) (6) to allow Respondent a full and fair hearing on his application for asylum.

III. The Department of Justice and DHS both have a responsibility to ensure that an alien is afforded a full and fair opportunity to present the merits of a Credible Fear determination.

The United States has obligations under treaty and law to extend protection to those entitled to asylum and withholding of removal within the United States. *See generally Matter of S-M-J*, 21 I&N Dec. 722, 723 (BIA 1997). Ensuring that these obligations are met is a responsibility shared by both DHS and the Department of Justice ("DOJ"). Specifically, DHS and DOJ share in the responsibility to ensure that protection is granted where appropriate and that the record be adequately developed. *See id.* The pretermission of an application based on a premature conclusion that the applicant cannot articulate a legally cognizable basis for asylum fails to comport with the important responsibilities vested in DOJ and DHS.

Here, at an earlier hearing, inquiry was made into the basis of the Respondent's application for asylum. The IJ denied Respondent's motion to change venue, despite DHS's non-opposition, stating that it was necessary to determine if the application for asylum should be pretermitted. DHS contends, along with Respondent, that the possible pretermission of Respondent's application for asylum is inappropriate here, because Respondent is entitled to a full hearing on the merits of his application for asylum.

IV. Pretermission of a Respondent's application for asylum is inappropriate, and a full hearing is necessary to review the merits of Respondent's application

Each alien seeking asylum or protection should be afforded where appropriate "a full and fair opportunity to present the merits of his asylum application." *See Matter of Exame*, 18 I&N Dec. 303, 305 (BIA 1982) (remanding the case where the immigration judge denied admission of background evidence precluding applicant from making a full and fair presentation of his persecution claim). Given the contextual nature of asylum claims, a full hearing is necessary to develop the record and assess a claim of persecution. Pretermission of such a claim prior to a

full hearing would be an abuse of discretion, would impact on the process due an alien in his removal proceeding, and is not justified by law or regulation.

With the exception of the regulations governing Cancellation of Removal for Certain Nonpermanent Residents, the term "pretermisison" is absent from the Immigration and Nationality Act and the Code of Federal Regulations. It is important to note, that in the context of authorizing pretermisison for statutory ineligibility where non-LPR grants of cancellation are unavailable, pretermisison is specifically disallowed based on discretion, a lack of good moral character, and hardship. See 8 CFR §1240.21(c)(1). This implies that pretermisison should be used only when the respondent is readily and clearly ineligible for relief, such as an alien lacking the necessary ten years of continuous physical presence under INA §240A(b). Pretermisison cannot be used where the issue is more contextual and factually specific, such as when an alien has established the necessary hardship for non-LPR COR. Similarly, a hearing is appropriate in determining whether an alien has demonstrated that he does or does not have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or that he is otherwise entitled to protection under withholding of removal or the Convention Against Torture.

In the context of asylum, the BIA specifically withdrew from the practice of pretermisiting asylum applications, where, at the time, the alien would have been subject to a statutory bar for withholding of removal, but was not technically barred from asylum. *Matter of Gonzalez*, 19 I&N Dec. 682, 685 (BIA 1988). In *Matter of Gonzalez*, the BIA stated that "an immigration judge shall not refuse to conduct a full evidentiary hearing and consider the evidence in its totality simply because an applicant for asylum is ineligible for withholding of deportation under the provisions of, [former] section 243(h)(2) of the Act." *Id.* While the instant case differs on its

facts, Gonzalez supports the proposition that an alien should be entitled to a full hearing on his application for asylum based on his credible fear determination of torture.

In general, it is DHS's position that pretermission is appropriate in those limited situations where the issue of eligibility is readily and simply determinable. For example, an immigration judge could pretermit an asylum application where an alien is convicted of an aggravated felony, a specific bar to asylum under INA §208(b)(2)(B)(i). See (b) (6)

(b) (6)

(b) (6) In such a situation, there is no prejudice to an alien in not permitting him to develop the full factual basis of his claim where his ineligibility is readily determinable.

A fully informed determination of these issues can only be adequately addressed in the context of a full and fair hearing. In fact, 8 C.F.R. § 208.30 states that:

[I]f an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security *shall nonetheless place the alien in proceedings* under section 240 of the Act *for full consideration of the alien's claim*[.]

8 C.F.R. § 208.30(e)(5) (emphasis added). A full and fair hearing is one where Respondent has a full opportunity to show the basis for his claim of asylum or protection. Thus, pretermission of Respondent's asylum claim based is inappropriate.

Conclusion

For the above stated reasons, DHS respectfully requests that the Court grant Respondent's Motion for Change of Venue and remand to the Immigration Court in (b) (6)

(b) (6) for a full and fair hearing on Respondent's application for asylum.

Respectfully submitted,

U.S. DEPARTMENT OF HOMELAND SECURITY

(b)(6) & (b)(7)(C)

Chief Counsel

CERTIFICATE OF SERVICE

I certify that on this date a copy of this U.S. DEPARTMENT OF HOMELAND SECURITY'S MEMORANDUM BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR INTERLOCUTORY REVIEW AND CHANGE OF VENUE was served by regular mail addressed to:

2013 AUG - 11
RECEIVED
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE
36

(b) (6)

Date 7/31/13

(b)(6) & (b)(7)(C)

(Printed Name of person serving)

Nadkarni, Deepali (EOIR)

From: Nadkarni, Deepali (EOIR)
Sent: Tuesday, September 03, 2013 5:00 PM
To: (b) (6) (EOIR)
Subject: IJC Memo - Matter of (b) (6)
Attachments: (b) (6) memo_2013_08_27.pdf; A (b) (6)

Good afternoon, Judge (b) (6). The attached unpublished decision (*Matter of* (b) (6)) has been referred to the Chief Immigration Judge by the Chairman of the Board of Immigration Appeals. Please read the Board panel's August 26, 2013, decision reversing your June 24, 2013, denial of an unopposed motion to change venue. Please also carefully consider the government's brief, which the Board forwarded to the Chief Judge as a source of its concern regarding your handling of the case.

I had previously raised this case to your attention on July 9, 2013 (see attached), as it related to the timely adjudication of the motions to change venue and to continue. We also discussed this matter during your August 22, 2013 performance appraisal, in the context of acting in a fair and impartial manner. I trust the Board's decision will further inform your judgment in future cases.

Dee Nadkarni
Assistant Chief Immigration Judge
703.305.1247