File: [redacted] - Pearsall, TX

Date:

In re: [redacted]

DEC - 6 2010

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Feroli, Esquire

ON BEHALF OF DHS: Justin Adams
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture; remand

The respondent appeals from the order of an Immigration Judge dated June 8, 2010. In that opinion, the Immigration Judge denied the respondent's application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. §§ 1158, 1231(b)(3), as well as his request for protection pursuant to the Convention Against Torture. The Immigration Judge further concluded that the respondent filed a frivolous asylum application. The respondent's request for a waiver of the filing fee associated with the filing of an appeal is granted. *See* 8 C.F.R. §§ 1003.3(a)(1) and 1003.8(c). The appeal will be sustained and the record remanded to the Immigration Court.

Here, the respondent seeks asylum as a member of a particular social group—his own family, who he asserts have been persecuted by the Ethiopian government because of his brother's membership in the Ogaden National Liberation Front ("ONLF"). Immigration Judge John A. Duck, Jr. initially considered the merits of this claim on December 8, 2009. At that time, Immigration Judge Duck found the respondent to be eligible for asylum and withholding of removal under section 241(b)(3) of the Act. *See* I.J. Dec. 8-14 (Dec. 8, 2009).

The Department of Homeland Security ("DHS") subsequently filed a motion to reopen based on what it claims is new evidence. *See* Exh. 14. Due to Immigration Judge Duck's unavailability, a second Immigration Judge was assigned to consider the motion. Immigration Judge John D. Carté granted the DHS's motion, and a final merits hearing was held in this case on February 26, 2010. *See* Exh. 16. Immigration Judge Carté then issued a written opinion June 8, 2010, denying relief upon his determination that the respondent failed to present a credible claim. *See* I.J. Dec. at 13-17 (June 8, 2010). It is within this context that we review the present matter.

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This Board reviews an Immigration Judge's findings of fact, including the determination of credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, such as 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). On appeal, the respondent argues that his proceedings should never have been reopened because, in pertinent part, the DHS failed to comply with the regulations governing motions to reopen.

The respondent also presents multiple arguments pertaining to the reopened proceedings. For instance, the respondent contests Immigration Judge Carté's adverse credibility finding. *See* Respondent's Brief at 37-41. He further argues that the Immigration Judge violated his right to due process of law by denying him an opportunity to cross-examine the confidential informants whose statements were used to discredit him.[1] *See* Respondent's Brief at 18-37. We shall address each of the respondent's arguments in turn. Initially, we shall consider the DHS's motion to reopen.

Like this Board, Immigration Judges are prohibited from reopening an alien's proceedings unless the moving party adequately demonstrates that the evidence sought to be offered "is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.23(b)(3); *see also* 8 C.F.R. 1003.2(c)(1). The respondent does not contest the materiality of the DHS's evidence. *See* Respondent's Brief at 15-16. Instead, he argues that the DHS has failed to adequately establish that this information could not have been discovered or presented during the prior hearing.

The record appears to indicate that the relevant evidence may have been discoverable by the Federal Bureau of Investigation ("FBI") before December 8, 2009. *See* Exh. 14. Nevertheless, on the basis of the material offered with the motion, it would be reasonable for the Immigration Judge to conclude that the DHS did not have any knowledge of the FBI's investigation before the December 8, 2009, hearing. *See id.* As such, there is no error in Immigration Judge Carté's decision to reopen the proceedings. The allegations against the respondent are serious and must be properly evaluated. Nevertheless, as we shall discuss below, we do conclude that the Immigration Judge erred by denying the respondent any opportunity to cross-examine the FBI's confidential informants. *See generally Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990); *see also Olabanji v. INS*, 973 F.2d 1232, 1234-35 (5th Cir. 1992) (addressing the admissibility of hearsay evidence).

The DHS does not argue that the informants' identities must be protected as a matter of national security. *See* DHS's Brief; *see also* Tr. at 112-13. To the contrary, the DHS simply asserts the federal common law informer's privilege, as recognized by the Supreme Court in *Roviaro v. United States*, 353 U.S. 53 (1957), allows the agency to withhold this information. Before we may determine whether the DHS's argument is correct, we must first examine the reason for the privilege's existence. For purposes of this appeal, we will assume without deciding that the privilege

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[1] Concomitantly, the respondent seeks the production of an audio recording that was allegedly made by one of the two informants. *See* Respondent's Brief at 2, 16.

can be invoked even when the government seeks to offer statements directly from the informants to prove a fact in issue.

The informer's privilege is based on the idea that by preserving an informant's anonymity, the public's interest in effective law enforcement is fostered by encouraging citizens to communicate to the government information regarding the commission of crimes. *See id.* at 59; *see generally McCray v. Illinois*, 386 U.S. 300 (1967) (discussing *Roviaro*). The privilege applies in both criminal and civil cases, but it is not absolute. *See Suarez v. United States*, 582 F.2d 1007, 1011 (5th Cir. 1978); *see also, e.g., United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 43 (1st Cir. 1991); *Holman v. Cayce*, 873 F.2d 944, 946-47 (6th Cir. 1989) (discussing the privilege in the civil context). As the Supreme Court stated in *Roviaro*, *supra*, at 62, the privilege's limit is found by balancing "the public interest in protecting the flow of information against the individual's right to prepare his defense." Thus, the applicability of the privilege must be evaluated in each individual case.

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), in whose jurisdiction the instant matter arises, has distilled *Roviaro*'s balancing test into three separate categories of cases. *See Suarez v. United States*, *supra*; *see generally United States v. De Los Santos*, 810 F.2d 1326, 1331-32 (5th Cir. 1987); *United States v. Diaz*, 655 F.2d 580, 586-89 (5th Cir. 1981) (discussing the balancing test). According to the Fifth Circuit,

> At one extreme are those cases such as *Roviaro* itself, in which the informant played an active and crucial role in the events underlying a defendant's or litigant's potential criminal or civil liability. In these cases, disclosure and production of the informant is in all likelihood required to ensure a fair trial. . . . At another extreme are those cases in which the informant was not an active participant, but rather a mere tipster. In those cases, disclosure of the informant's identity is not required by *Roviaro*. . . . A third group of cases falls in between these two extremes. In these cases, there is a distinct possibility that the defendant might benefit from disclosure, but the Government claims a compelling need to protect its informant. . . . In cases such as these, disclosure is not necessarily required, but we have approved and in two cases have actually required an In camera proceeding to determine and balance against each other the importance of the informant's testimony to the defendant's case and the strength of the Government's interest in maintaining the informant's anonymity.

Suarez, 582 F.2d at 1011 (emphasis added). As these proceedings are civil rather than criminal in nature, the question we must answer is whether the respondent's ability to cross-examine the informants is essential or vital to a fair determination of his asylum claim. *See generally United States v. One 1986 Chevrolet Van*, 927 F.2d 39 (1st Cir. 1991); *Holman v. Cayce*, 873 F.2d 944 (6th Cir. 1989) (discussing the privilege in the civil context).

As discussed, Immigration Judge Duck credited the testimony of the respondent and his supporting witness. *See* I.J. Dec. (Dec. 8, 2009). And the only adverse evidence in the record is the

information provided by the FBI's confidential informants.[2] The respondent argues that their accusations are false. *See, e.g.,* Tr. at 152-53 (stating that the respondent's attorney has been told by multiple Somalis that they have been promised release in exchange for information regarding other detainees); *see generally* Tr. at 123, 143-44, 146-47, 154-55 (declining to discuss what the informants were given in exchange for their testimony). Unless we can determine the veracity of the informants' statements, we cannot assess whether the Immigration Judge committed clear error when he discredited the respondent's testimony. *See generally Franks v. Delaware*, 438 U.S. 154 (1978) (permitting "veracity hearings" in cases where the defendant makes a substantial preliminary showing that an affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement); *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989) (discussing the importance of cross-examination when assessing credibility). As such, the respondent must be provided a chance to cross-examine these men if we hope to guarantee his ability to fairly present his claim.

Accordingly, we shall remand the matter to the Immigration Court for additional proceedings. Given the nature of the respondent's concerns, we cannot be certain that the fairness of these proceedings has not been compromised. Consequently, a *new* Immigration Judge should evaluate the matter on remand. We believe that by taking this action we can ensure that the dictates of due process have been met here.

In the remanded proceedings, the respondent shall be given an opportunity to question the informants. He should also have an opportunity to contest the validity of the FBI's audio recording. And both parties should be permitted to present further evidence relevant to the respondent's claim. While the respondent must be given a fair chance to question the FBI's infomers, the Immigration Judge may still take whatever precautions he or she deems necessary and prudent to safeguard their identities, including, but not limited to, the issuance of a protective order or questioning them *in camera*.[3] *See* 8 C.F.R. §§ 1003.27, 1003.46, 1240.33(c)(4); *see generally* 8 C.F.R. § 1240.9 (providing that the hearing shall be recorded verbatim except for statements made off the record with the permission of the Immigration Judge). The Immigration Judge should then make all necessary

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[2] According to FBI Agent Mark Wagoner, the respondent told both informants that he was once a fighter for the ONLF and then later for Al-Ittihad al-Islami ("AIAI"). *See* Tr. at 126-28, 131-33, 147; *see also* Exh. 14. Significantly, AIAI has been placed on the United States' Terrorist Exclusion List. *See* Exh. 21; Exh. 14C.

[3] A limited disclosure of identity and information might address the FBI's interest in maintaining the informants' anonymity while at the same time insuring the respondent's interest in developing the testimony of witnesses who possess facts that could control the outcome of his case.

findings of fact, including an assessment of all testimonial and documentary evidence of record.[4] Based on these considerations, the following orders will be entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

[4] The DHS has never questioned the facts provided by the respondent's witness, Mr. [redacted]. *See, e.g.,* Tr. at 50-53 (corroborating the respondent's claim); *see generally* sections 208(b)(1)(B)(iii) and 241(b)(3)(C) of the Act; *Matter of J-Y-C-*, 24 I&N Dec. 260, 265 (BIA 2007). Upon remand, the Immigration Judge should address the weight that this testimony is to be accorded.