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United States Court of Appeals
Tenth Circuit

June 21, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SARAH FARNUM,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 22-9526

Petition for Review of an Order from the Board of Immigration Appeals

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Aaron C. Hall, Joseph & Hall, P.C., Aurora, Colorado, for Petitioner.

Jessica A. Dawgert, Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C. (Bryan Boynton, Principal Deputy Assistant Attorney General, Civil Division, and Melissa Neiman-Kelting, Assistant Director, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., with her on the brief), for Respondent.

Before **TYMKOVICH**, **MATHESON**, and **EID**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Sarah Farnum filed a frivolous asylum application. An immigration judge determined the application rendered her permanently ineligible for immigration benefits under the Immigration and Nationality Act. Ms. Farnum does not challenge

the frivolousness finding made by the immigration judge. Nor does she challenge that she had proper notice of the consequences of filing a false application. She instead challenges the timing of when the frivolous-asylum bar is effective. In her view, the frivolous-application bar outlined in 8 U.S.C. § 1158(d)(6) cannot be invoked in the same proceeding as a frivolousness finding was made, thus allowing an immigration court to consider other potential claims that might support a finding that the Attorney General should withhold her deportation.

We disagree. Once an immigration judge or the Board of Immigration Appeals makes the required frivolousness finding, the statutory bar is effective. We therefore deny Ms. Farnum's petition.

I. Background

Ms. Farnum, a citizen of Zambia, entered the United States in 2001 and filed an asylum application using a false identity and false asylum claim. In the application, Ms. Farnum provided the name "Olga Kafantandale" and stated that she was a member of the Tutsi ethnic group from the Democratic Republic of the Congo. An asylum officer referred her application to an immigration court. At the conclusion of Ms. Farnum's hearing, which included her testifying to the false contents of her application, the immigration judge found her not credible. Ms. Farnum appealed this decision to the Board of Immigration Appeals. The Board remanded for further evaluation of the documents submitted by Ms. Farnum. When Ms. Farnum did not appear at the subsequent remand proceeding, the immigration judge ordered her removed in absentia.

But Ms. Farnum remained unlawfully in the United States and married a United States citizen. In 2009, Ms. Farnum, this time using her real name, adjusted her immigration status to legal permanent resident. Several years later, in 2013, she filed for naturalization. At that time, however, the United States Citizenship and Immigration Services discovered her previous asylum application. Thus, in 2014, the Department of Homeland Security charged Ms. Farnum as removable for having been inadmissible at the time of adjustment of status due to a material misrepresentation for an immigration benefit under 8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1182(a)(6)(C)(i).[1] Ms. Farnum conceded this charge of removability and informed the court that she would be seeking relief from removal through a waiver under 8 U.S.C. § 1227(a)(1)(H) (allowing the Attorney General the discretion to waive removal of an alien who is the spouse of a United States citizen or an alien lawfully admitted to the United States for permanent residence) or, in the alternative, readjustment of status through her United States citizen spouse under 8 U.S.C. § 1182(i).

The immigration judge analyzed the Department's removability determination. He concluded that Ms. Farnum received adequate notice of the consequences of filing a frivolous asylum application. As a consequence and in light of her misrepresentations in a prior immigration proceeding, he made "a specific finding

[1] It also charged her as removable for seeking admission within ten years of the date of departure following a removal order without prior consent to reapply for admission pursuant to 8 U.S.C. § 1182(a)(9)(A)(iii). The Department later withdrew this charge.

that respondent filed a frivolous application for asylum." App. 000044. Based on this finding, he concluded that Ms. Farnum "is subject to the frivolous application bar under section 208(d)(6), and she is therefore permanently ineligible for any benefits under the Act." App. 000045.

Ms. Farnum appealed the immigration judge's decision to the Board of Immigration Appeals, arguing that the immigration judge erred in making the frivolousness finding and invoking the statutory frivolous bar in the same proceeding. The Board dismissed, explaining that the immigration judge "properly applied the frivolous asylum bar to the respondent's application and waiver, even though the Immigration Judge's decision does not constitute a 'final order' while the respondent's appeal is pending." App. 000005. It added that "[e]ven if the Immigration Judge was not permitted to reach a frivolous asylum finding in the instant case, the respondent would still be barred from relief as a result of our decision." *Id.*

II. Analysis

Ms. Farnum raises one timing issue: whether it is an error to invoke the statutory frivolous bar in the same proceeding as the required frivolousness finding is made. We review this question de novo. *Ferry v. Gonzales*, 457 F.3d 1117, 1126 (10th Cir. 2006).

The frivolous-application bar provides that any alien who knowingly submits a frivolous asylum application and receives appropriate notice "shall be permanently ineligible for any benefits under this [Act], effective as of the date of a final

determination on such application." 8 U.S.C. § 1158(d)(6). An application is frivolous if "[a]ny of the material elements in the asylum application is deliberately fabricated, and the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." 8 C.F.R. § 1208.20(a)(1). The accompanying regulation also provides that the bar will only apply if the alien received the proper notice required under the Act and "a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application." *Id.* An order of deportation becomes final upon the earlier of (1) a determination by the Board affirming such an order, or (2) the expiration of the period in which the alien is permitted to seek review of such order by the Board. 8 U.S.C. § 1101(a)(47).

We conclude that the immigration judge and Board did not err in invoking the bar in the same proceeding as the frivolousness finding. Once an immigration judge or the Board makes this finding, the bar becomes effective.

First, our caselaw and persuasive opinions from the Board suggest that the statutory bar is effective once either an immigration judge or the Board makes the required frivolous determination. In *Jie Liu v. Holder*, for example, we denied a petition for review where an immigration judge applied the frivolous-application bar in the same proceeding in which he made the frivolousness finding. 586 F. App'x 455, 456 (10th Cir. 2014). And in *Ribas v. Mukasey*, we denied an alien's petition for review where the Board concluded that a previous frivolousness determination

had become final prior to the filing of a motion to reopen. 545 F.3d 922, 927 (10th Cir. 2008). The immigration judge in the original order determined that the alien had filed a frivolous asylum application and "should be forever barred from the receipt of any United States immigration benefit." *Id.* at 926.

The Board's guidance also supports our conclusion. In *Matter of X-M-C-*, the Board concluded a determination that an alien had filed a frivolous application for asylum can be made in the absence of a final decision on the merits of the asylum claim. 25 I&N Dec. 322, 322 (BIA 2010). There, the applicant in an adjustment application hearing admitted to previously filing a false asylum application. In the same proceeding, the immigration judge denied the alien's application based on the frivolous-application bar. The Board explained that "after a determination has been made that an asylum application is frivolous, a separate evaluation of the merits of the application is not necessary." *Id.* at 324. "Once the framework and safeguards delineated in *Matter of Y-L-* are followed, that is the end of the inquiry, *and the consequences of filing a frivolous application apply*." *Id.* at 325 (emphasis added). It concluded that "in the context of section 208(d)(6), the phrase 'final determination on such application' includes a final order determining that an asylum application is frivolous." *Id.* *Matter of Y-L-*, the case cited by *Matter of X-M-C-*, outlined four procedural safeguards—notice, a specific finding of an alien's knowledge, sufficient evidence in the record of an alien's deliberate fabrication, and evidence of sufficient opportunity for an alien to address discrepancies. 24 I&N Dec. 151, 155 (BIA 2007). The requirement of a prior final removal order is absent from this list. Like the

commentary in *Matter of X-M-C-*, the Board remarked that a frivolousness finding "is a preemptive determination which, *once made, forever bars an alien from any benefit under the Act*." *Id.* at 157 (emphasis added). That is the case here.

As a practical matter, accepting the interpretation Ms. Farnum invites us to adopt leaves us in the same place: the statutory frivolous bar permanently prevents her from receiving any immigration benefits under the Immigration and Nationality Act. Here, the immigration judge made the required frivolousness finding. Ms. Farnum did not contest that determination, conceding it on appeal. The Board affirmed the immigration judge's order, making it final. *See* 8 U.S.C. § 1101(a)(47). Thus, there is a final order by "the Board of Immigration Appeals specifically find[ing] that the alien knowingly filed a frivolous asylum application." 8 C.F.R. § 1208.20(a).[2]

Finally, even if the immigration judge erred in invoking the statutory bar in the same proceeding as making the frivolousness finding, it is harmless error. The Board addressed the merits of Ms. Farnum's claim: "Even if the Immigration Judge was not permitted to reach a frivolous asylum finding in the instant case, the respondent would still be barred from relief as a result of our decision. . . . Upon our de novo review, we conclude that this finding renders the respondent barred from a grant of adjustment of status and a waiver of inadmissibility." App. 000005–6.

[2] Ms. Farnum suggests we could vacate the Board's order affirming the immigration judge but she points to no authority that would allow us to do so. And as we discuss, the immigration judge would have no recourse but to find her ineligible for any immigration benefits.

In resisting this conclusion, Ms. Farnum makes several arguments based on the language of § 1158(d)(6) and § 1208.20(a). We are unpersuaded.

Ms. Farnum is correct that § 1208.20(a), which interprets § 1158(d)(6), provides that an applicant is only subject to the bar if there is "a final order by an immigration judge or the Board of Immigration Appeals specifically find[ing] that the alien knowingly filed a frivolous asylum application." Ms. Farnum's proposed interpretation, however, would lead to an irrational result: An immigration judge makes the required frivolousness finding, a final order is entered, and the bar can only be enforced in some future (hypothetical) immigration proceeding. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach."). And, as discussed above, there *is* a final order containing a frivolousness finding and the Board *did* reach the merits. Nothing requires the immigration judge to consider other claims that are barred as a result of the frivolousness finding.

Next, Ms. Farnum argues that her view is consistent with Supreme Court precedent. In her view, our interpretation promotes practical efficiency over regulatory guidance. True, the Supreme Court has rejected weighing practical considerations over the text of a statute or regulation. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2118 (2018) ("These practical considerations are meritless and do not justify departing from the statute's clear text."). But the Supreme Court's precedent in *Pereira*, 138 S. Ct. at 2118, and *Niz-Chavez v. Garland*, 141 S. Ct. 1471 (2021),

are materially distinguishable from this case. Those cases present instances where the government ignored statutory text in light of administrative burdens. In *Pereira*, the government presumed that providing aliens with a specific time, date, and place for their removal was too burdensome. 138 S. Ct. at 2110. And in *Niz-Chavez*, the government complained of the difficulty of sending one document required statutorily for an alien's removal hearing. 141 S. Ct. at 1485–86. This case, in contrast, presents a situation where an immigration judge, despite making the *statutorily* required determination of frivolousness, would still be required to conduct additional proceedings at odds with the statutory scheme barring immigration benefits. Neither case is applicable here.

Lastly, Ms. Farnum contends that the agency's subsequent removal of language referring to a "final order" from revised regulations addressing the frivolous application-bar shows the agency intended it to be a requirement in her case. *See* Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 80274, 80279 (Dec. 11, 2020) (revised § 208.20) (stating that for applications filed on or after January 11, 2021, adjudicators are only required to make a frivolousness finding and if the alien has been provided with notice, he need not be given opportunity to address discrepancies). This argument overlooks the statutory language—"final determination on such application"—that the Board has explained "*includes* a final order determining that an asylum application is frivolous." *X-M-C-*, 25 I&N at 325 (emphasis added). A final order is not the only way to make a final determination.

III. Conclusion

We deny Ms. Farnum's petition.