Updated June 8, 2016 by Alex Schank

Motion to Suppress

A motion to suppress is used to challenge admissibility of evidence and may be granted when it is supported by a specific and detailed statement based on personal knowledge that establishes a prima facie case for suppression. Matter of Barcenas, 19 I&N Dec. 609, 611 (BIA 1988). To set forth a prima facie case, the applicant bears the burden to assert a basis for suppression and must enumerate the articles to be suppressed. 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). If a prima facie case is established, the burden then shifts to DHS to justify the manner in which it obtained the evidence at issue. Matter of Burgos, 15 I&N Dec. 278, 279 (BIA 1975).

Fifth Amendment Right to Due Process

A violation of due process under the Fifth Amendment can provide the basis for suppression of evidence. It is well-settled that the Fifth Amendment entitles aliens within the United States to due process of law. U.S. CONST. amend. V (guaranteeing due process of law to all persons); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (recognizing that "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Plyler v. Doe, 457 U.S. 202, 210 (1982) (stating that "even aliens whose presence in this country is unlawful have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."). However, "a deportation hearing is a civil matter, and the heightened procedural protections of a criminal trial 'are not necessarily constitutionally required.'" Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996) (quoting Dor v. District Director, INS, 891 F.2d 997, 1003 (2d Cir. 1989)). Evidence is admissible provided that it does not violate the alien's right to due process of law under the Fifth Amendment. Zhen Nan Lin v. U.S. Dep't of Justice, 459 F.3d 255, 268 (2d Cir. 2006). To satisfy due process, evidence in an immigration proceeding must be relevant, probative, and fundamentally fair. Lin, 459 F.3d at 268; Felzcerek, 75 F.3d at 115-16; Barcenas, 19 I&N Dec. at 611. For example, public records are routinely admitted into evidence because of their inherent reliability and probative worth. Felzcerek, 75 F.3d at 116 (admitting a Form I-213, Record of Deportable Alien, over the respondent's objection, concluding that such public record contains "guarantees of reliability and trustworthiness").

The use of admissions obtained from an alien involuntarily to establish removability is fundamentally unfair and the requirements of due process require their exclusion from the record. Matter of Garcia, 17 I&N Dec. 319, 321 (BIA 1980). In considering the type of behavior that would rise to the level of a Fifth Amendment violation, the BIA has held that statements must include factual details from which the Court can conclude that there was physical or psychological coercion, intimidation, duress, or improper inducement, such that the respondent's will was overborne. See Ramirez-Sanchez, 17 I&N Dec. at 505-06; Matter of Luis-Rodriguez, 22 I&N Dec. 747, 761 n.5 (BIA 1999). To determine whether the conduct of immigration officers was egregious, the Court should consider the use of physical abuse, the number of hours of interrogation, the denial of food or drink, the use of threats or promises, or the interference with any attempt by the respondent to exercise his rights. Ramirez-Sanchez, 17 I&N Dec. at 506; Garcia, 17 I&N Dec. at 321 (admission of alienage suppressed as involuntary

where alien made admissions only after officers led him to believe that his deportation was inevitable, that he had no rights whatsoever, that he could not communicate with his counsel, and that he could be detained without explanation of why he was in custody).

Fourth Amendment Violation

Generally, the Fourth Amendment exclusionary rule does not apply in removal proceedings. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984). Suppression may be warranted under the Fourth Amendment only when the evidence indicates "either (a) that an egregious violation that was fundamentally unfair has occurred, or (b) that the violation – regardless of its egregiousness or unfairness – undermine[s] the reliability of the evidence in dispute." Rajah v. Mukasey, 544 F.3d 427, 441 (2d Cir. 2008) (quoting Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006)).

The first prong, set forth in Rajah and Almeida-Amaral, implicates the Fifth Amendment in that suppression is only warranted when evidence is obtained pursuant to an egregious Fourth Amendment violation which "trangess[es] the fundamental notions of 'fair play' that animate the Fifth Amendment." Rajah, 544 F.3d at 441; Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980) (egregious Fourth Amendment violation may render evidence inadmissible under the due process clause); Garcia, 17 I&N Dec. at 320 (holding that statements given involuntarily should be suppressed under the due process standard); see, e.g., United States v. Isiofia, 370 F.3d 226, 234-35 (2d Cir. 2004) (suppressing evidence of defendant's identity because he had not given voluntary consent for search of his home, where his passport was seized); Melnitsenko v. Mukasey, 517 F.3d 42, 47-48 (2d Cir. 2008) (finding no Fourth Amendment violation where petitioner was stopped by DHS 107 miles from the Canadian border and interrogated, fingerprinted, and photographed for three hours with no Miranda warnings); Cotzojay v. Holder, 725 F.3d 172, 179 (2d Cir. 2013) (finding that Petitioner had established a prima facie case of non-consensual warrantless entry into his home by ICE officers; and 2) that the ICE officers' alleged conduct amounted to egregious Fourth Amendment violation.).[1]

However, even if discovered unfairly, the alien's identity is never suppressible. Lopez-Mendoza, 468 U.S. at 1039-40**;** Katris v. INS, 562 F.2d 866, 869 (2d Cir.1977); see Zerrei v. Gonzales, 471 F.3d 342, 346 (2d Cir. 2006) (finding admission of copy of alien's passport did not violate alien's due process rights because the alien never objected to its submission and it was treated as authentic by alien's counsel); see also Matter of Cervantes-Torres, 21 I&N Dec. 351, 353 (BIA 1996) (finding that the "identity of an alien is never itself suppressible as a fruit of an unlawful arrest."). However, the Second Circuit, joined the Fourth, Eighth and Tenth Circuits, and held that Lopez-Mendoza merely confirmed the long-standing jurisdictional rule that an unlawful arrest has no bearing on the validity of a subsequent proceeding; it did not create an evidentiary rule insulating specific pieces of identity-related evidence from suppression. See Pretzantzin v. Holder, 736 F.3d 641, 647 (2d Cir. 2013).

[1] The Second Circuit also has found that, under the border search doctrine, "United States Customs officers at an international airport may lawfully and without a warrant examine and photocopy a document that belongs to a traveler entering the United States if the officers have reasonable suspicion on the basis of information supplied from another federal agency that the traveler is engaged in criminal activity unrelated to contraband, customs duties, immigration, or terrorism." U.S. v. Levy, 803 F.3d 120, 121 (2d Cir. 2015).

Accordingly, the BIA erred in concluding that the Government had met its burden of establishing that certain alienage-related evidence had been obtained independent of any constitutional violation. Pretzantzin, 736 F.3d at 652.

Since the identity of the respondent is not suppressible, DHS may always prove alienage by "using evidence gathered independently of" an illegal arrest. Lopez-Mendoza, 468 U.S. at 1043; see also La Franca v. INS, 413 F.2d 686, 689 (2d Cir. 1969) (finding that even if the alien's arrest without a warrant were presumed illegal, DHS, nonetheless, could sustain the charge of deportability based upon independent source evidence); Cervantes-Torres, 21 I&N Dec. at 353 (finding that "once an alien has been placed in deportation proceedings any evidence which is independently obtained may be relied upon, regardless of the alleged illegal arrest.").