MATTER OF SMITH

In Bond Breach Proceedings

A-20067020

Decided by Regional Commissioner March 17, 1977

(1) This proceeding involves the breach of a bond posted in Buffalo, New York, March 24, 1976. Under the terms of the bond the obligor agreed to cause the alien to be produced to an immigration officer upon each and every request of the Service. On August 20, 1976, the alien was ordered to appear before an immigration judge at Buffalo, New York, on September 7, 1976, at 10 a.m., in conjunction with his deportation hearing. Simultaneously, a notification was mailed to the obligor to produce the alien at the aforementioned said time and place. The alien failed to appear as ordered and the District Director declared the bond breached as of September 7, 1976.

(2) Mailing of a notice requesting surrender of the alien to the address of record of the obligor via certified mail, return receipt requested, and the furnishing of the notice of the deportation hearing to the respondent, with a copy to his counsel on the same date, fulfilled the requirements of 8 C.F.R. 242.1(b) and 103.5a(2) respecting service of notice, and therefore, obligor was given proper notice to surrender the alien under the regulations.

(3) Request by the District Director to the Department of State for a more definitive response concerning respondent's asylum claim cannot be construed as an attempt by the District Director to sway the Department of State from issuing a favorable recommendation respecting respondent's request for asylum.

(4) It was not improper for the immigration judge to refuse the request for a change of venue of the deportation proceedings where he determined that the evidence presented to him at the Buffalo hearing would be consequential to any application by respondent for section 245 relief in the course of the hearing. See 8 C.F.R. 242.8(a). Moreover, the Service indicated it would not oppose respondent's request to transfer the file to Newark for the taking of respondent's testimony and depositions of his witnesses living in the Newark and New York area. Under the circumstances the immigration judge's denial of the request for a change of venue was proper, and the District Director's request to produce the alien at Buffalo was not contrary to the law or regulations.

(5) Delivery bonds are violated if the obligor fails to cause the alien to be produced to the immigration officer upon each and every request until deportation proceedings are finally terminated or the alien is actually accepted by the immigration officer for detention and deportation. On September 7, 1976, the obligor failed to produce the alien in accordance with the terms of the bond which constituted a breach of the bond, and the appeal will be dismissed.

IN BEHALF OF OBLIGOR: Omar Z. Ghobashy, Esquire
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This matter is before the Regional Commissioner on appeal from the

decision of the District Director who concluded that there was a substantial breach in the conditions of the bond when the alien failed to surrender to the Service as directed.

The bond in this proceeding was posted on March 24, 1976. Under the terms of the bond the obligor agreed to cause the alien to be produced to an immigration officer upon each and every request of the Service. On August 20, 1976, the alien was ordered to appear before an immigration judge at Buffalo, New York, on September 7, 1976, at 10 a.m., in conjunction with his deportation hearing. Simultaneously, a notification was mailed to the obligor to produce the alien at the aforementioned said time and place. The alien failed to appear as ordered and the District Director declared the bond breached as of September 7, 1976.

On appeal and in oral argument, counsel for obligor urges that the obligor did not receive the communication dated August 20, 1976, and, therefore, had no notice of the alleged demand for surrender. Counsel sets forth extensive argument by brief urging that the decision of the District Director is contrary to law and regulation.

We will speak first to the gravamen of counsel's complaint that the obligor failed to receive a demand for the alien's surrender. On this point we find the affidavit by the obligor averring nonreceipt of Service demand for surrender fails to excuse her from the conditions of the bond. The written notice was sent by certified mail to the obligor at her address of record on August 20, 1976. On this same date a notice scheduling the deportation hearing at Buffalo on September 7, 1976, was also furnished the alien, her husband, with a copy to the attorney of record. Such notices comply with pertinent regulation 8 C.F.R. 242.1(b). The mailing of the notice by certified or registered mail, return receipt requested, addressed to the obligor at her last known address also complies with the requirements of personal service within the purview of 8 C.F.R. 103.5a(2).

We will now address counsel's argument that the deportation hearing was improperly scheduled at Buffalo and, therefore, the demand on the obligor to present the alien was not justified nor proper. We have reviewed the record and enumerate the following sequence of events as reflected by the record at hand.

The alien was arrested and Ordered to Show Cause issued by the District Director at Buffalo on January 29, 1976. The alien's address at that time was in care of Erie County Jail, Buffalo, New York. The deportation proceeding was instituted against the alien on February 5, 1976, at Buffalo, New York. Such proceedings have been continued until the present date with intermittent adjournments.

On February 25, 1976, an application for political asylum, I-589, was filed by the alien at Buffalo, New York. The alien's address at that time was INS Detention, Buffalo, New York. The record reflects that the

District Director, Buffalo, in accordance with 8 C.F.R. 108.2 corresponded with the Department of State concerning the alien's request for political asylum.

On April 23, 1976, the Department of State reported that the question of whether or not the alien can be classified as a refugee depends on the stabilization of conditions existing in Ethiopia. The Department of State recommended that the alien be permitted to remain in the United States and that he be informed that his case would be reviewed in 12 to 18 months to determine whether the situation has changed in Ethiopia, permitting his return and if so, that he will be returned to Ethiopia. The Department recommended that employment be authorized during this period.

On June 9, 1976, the District Director again corresponded with the Department of State regarding the alien's case. The District Director stated that since the Department of State's letter failed to make a clear-cut finding as to whether or not the alien is presently classifiable as a refugee, the District Director requested the case be considered and a more positive advisory opinion be given. As a result of this letter, on July 19, 1976, the Department of State reported that on the record they did not believe that the applicant has made a reasonable case for granting him the political asylum he had requested. Subsequently, the District Director on July 28, 1976, denied the alien's asylum request and informed him that he could renew his claim for political asylum under the provisions of section 243(h) of the Immigration and Nationality Act in deportation proceedings.

On appeal counsel urges that the District Director attempted to obtain an adverse decision contrary to established procedure; that he failed to act upon a favorable grant of political asylum and communicate such favorable decision to respondent or his attorney; that the District Director failed to follow the requirements of 8 C.F.R. 108.2 which provides that a case shall be certified to the Regional Commissioner for final decision if the Department of State has made a favorable statement, but notwithstanding, the District Director has chosen to deny the application.

A careful reading of the Department of State's first recommendation fails to substantiate counsel's claim that the agency had determined the alien had established a case for political asylum. The letter recommended against forcing the alien's departure at that time and recommended further review in 12 to 18 months. It does not support counsel's contention that the District Director denied the asylum request despite a favorable recommendation by State. The District Director's second memorandum to the Department of State concluded as follows: "This office feels that the recommendation is not consistent and requests that the facts in this case be reconsidered and a more positive advisory

opinion be given." We fail to read into this letter, as counsel alleges, an attempt by the District Director to sway the Department of State from issuing a favorable recommendation towards the alien's request for political asylum.

When counsel sought to transfer the case to Newark, New Jersey, the District Director, Buffalo, on August 10, 1976, replied that such request should be directed to the immigration judge. The record contains a letter from Gordon W. Sacks, immigration judge, dated August 19, 1976, denying the applicant's request for a change in venue of the deportation proceedings. Judge Sacks stated, "It is clear from the transcript that evidence presented before me is consequential in any application for adjustment of status under Section 245 of the Immigration and Nationality Act which might be presented on your client's behalf. Therefore, such application may not be considered by a different judge." Judge Sacks concluded, "I, therefore, deny your request for change of venue."

Following this on August 20, 1976, the demand notice for the alien to appear at Buffalo, New York, on September 7, 1976, was sent to the obligor. Notices of the deportation hearing scheduled at Buffalo on September 7, 1976, were also sent to the alien and counsel. The record reflects that the alien failed to appear as directed on September 7, 1976, and the District Director subsequently declared the bond breached on the aforementioned date.

Counsel has set forth the extensive argument that the refusal by the District Director, Buffalo, and Immigration Judge Sacks to transfer the deportation proceedings to Newark, New Jersey, was unreasonable. Counsel argues that the demand for the alien's appearance in Buffalo was in violation of due process, in violation of law, and therefore the deportation hearing was illegally convened. Counsel alleges, for these reasons, the District Director was estopped from declaring the bond breached.

Dicta have supported that the place of the deportation proceeding is a matter of venue rather than jurisdiction. There is no clear mandate in either the statute or the regulations as to where a hearing should be held. Ordinarily, the better procedure would be to hold the hearing in the district of the alien's residence or place of arrest. *La Franca* vs. *INS*, 413 F.2d 686 (2d Cir. 1969). The court held in a case where the respondent who moved from Duluth, Minnesota, to New York was found to not be prejudiced because INS refused to transfer the deportation hearing to New York. It was held that the place where the defendant was living was a proper place to file and hear the deportation proceeding. The court held, "In any event, we cannot say that the immigration authorities' choice of time and place was unreasonable or arbitrary." *U.S.* vs. *Heikkinen*, 240 F.2d 94 (7th Cir. 1957).

A possible abuse of discretion was implied by the court when a deportation hearing could have been transferred with little or no inconvenience to the Government. The court stated: "While venue is not clearly delineated in statute dealing with deportation of aliens, a hearing for deportation of alien would be appropriate in New Jersey and not in Florida where he was found by the Immigration officer, where New Jersey was the alien's permanent residence, witnesses were available in New Jersey, the alien's opportunity to establish his cooperation with the government in criminal prosecution was there, and likelihood that the alien's lawyer who had detailed knowledge of circumstances could not be present for hearing in New Jersey." *Cholomos* v. *U.S. Department of Justice*, 516 F.2d 310 (3rd Cir. 1975).

In the matter at hand the immigration judge's decision stated that evidence previously presented before him in this case would be consequential in any application for adjustment of status under section 245 which might be presented by the applicant. In his letter the immigration judge specifically denied a change of venue because of prior testimony made before him, germane to the alien's request for permanent resident status which Judge Sacks contemplated would be introduced during subsequent proceedings. In this same vein, the trial attorney on August 19, 1976, stated by memorandum to Judge Sacks that the Service offered no objection to counsel's request to transfer the file to Newark, New Jersey, solely for the purpose of respondent's testimony and depositions of the witnesses who live in the Newark and New York area.

We find the circumstances here distinguishable from *Cholomos, supra*. Here, the Service offered no objection to transferring the record to Newark to permit testimony by the alien and his witnesses. Judge Sacks retained jurisdiction for final determination at Buffalo only for reasons outlined in his denial of the request for change of venue.

It was held in the *Matter of Seren*, Interim Decision 2472, that the authority of the immigration judge under 8 C.F.R. 242.8(a) to take such action as "may be appropriate to the disposition of the case" encompasses the power to rule on a motion to change venue of a deportation proceeding. On this same point, the BIA concluded in the *Matter of K—*, 5 I. & N. Dec. 347, that the power to rule on the challenge by counsel of the qualifications of the hearing officer on the ground of prejudice and bias and for change of venue on the same ground lies solely with the hearing officer, and in the event of a ruling adverse to counsel, the hearing officer may direct the hearing to proceed to a conclusion.

Judge Sacks' action were accordant with the judiciousness of *Matter of Seren*, and *Matter of K—*, *supra*. We also find that the District Director properly deferred to the immigration judge the alien's request to transfer his deportation hearing since the District Director lacked the

power to change or deny a request to change the place of the hearing.

Counsel seeks to adjudge a finding in this case that the District Director's request for the alien to appear at deportation proceedings in Buffalo on September 7, 1976, was illegal and contrary to law and regulation and, therefore, abrogated the obligor's responsibility to produce the alien at said time and place. Counsel follows with the argument that the bond was improperly declared breached by the District Director.

Based on a thorough consideration of the evidence of record, including those representations made on appeal and in oral argument, we find that the obligor has not substantiated that the demand for the alien's appearance before an Immigration officer at Buffalo, New York, on September 7, 1976, in conjunction with his deportation proceeding was illegal or outside of law and regulation. We find that a proper and timely demand was made upon the obligor to produce the alien. The conditions of the bond are specific. The obligor agreed to surrender the alien upon each and every request of the Service.

Delivery bonds are violated if the obligor fails to cause the alien to be produced to the immigration officer upon each and every request until deportation proceedings in his case are finally terminated or until the alien is actually accepted by such immigration officer for detention or deportation. The obligor failed to produce the alien to this Service on September 7, 1976, in accordance with the demand made under the terms of the Immigration bond. The bond is in contract between the United States and the obligor and the surety cannot question his liability under the bond if it is established that the violation occurred. *U.S.* v. *Olson*, 42 F.2d 1070 (1931). The liability on the part of the obligor which has arisen cannot be waived. *U.S.* v. *Rosenfeld*, 109 F.2d 908 (1940).

Counsel's argument, although extensive, does not serve to overcome the substantial violation of the conditions of the bond within the purview of 8 C.F.R. 103.6(e) or relieve the obligor of her responsibility as specified in the bond agreement. Accordingly, the appeal will be dismissed.

IT IS ORDERED that the appeal be and same is hereby dismissed.