

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
800 DOLOROSA STREET-SUITE 300  
SAN ANTONIO, TX 78207

JOSEPH DE MOTT AND ASSOCIATES  
ARMENDARIZ, DAVID A. ESQ  
800 DOLOROSA, SUITE 100  
SAN ANTONIO, TX 78207

IN THE MATTER OF  
HE ~~REDACTED~~, ISRAEL

FILE A ~~REDACTED~~

DATE: Jun 10, 2010

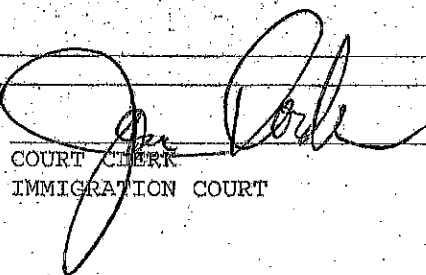
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~~ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:~~ BOARD OF IMMIGRATION APPEALS  
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P.O. BOX 8530  
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ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(d)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT  
800 DOLOROSA STREET-SUITE 300  
SAN ANTONIO, TX 78207

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UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
800 DOLOROSA, SUITE 300  
SAN ANTONIO, TX 78207

IN THE MATTERS OF )

HE [REDACTED], Israel )

Case Number: A8 [REDACTED]

RESPONDENT )

IN REMOVAL PROCEEDINGS )

**CHARGE:** Section 212(a)(6)(A)(i) of the Immigration and Nationality Act –  
Alien present in the United States without being admitted or  
paroled.

**APPLICATION:** Motion to Suppress Evidence and Terminate Proceedings

**ON BEHALF OF THE RESPONDENT**

David Armendáriz, Esq.  
800 Dolorosa, Suite 100  
San Antonio, TX 78207

**ON BEHALF OF THE GOVERNMENT**

Assistant Chief Counsel  
P.O. Box 1939  
San Antonio, TX 78297

**WRITTEN DECISION OF THE IMMIGRATION JUDGE**

**I. Procedural History**

Removal proceedings were initiated against the respondent by the filing of the Notice to Appear (NTA), dated May 15, 2009, charging him with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act). Exhibit I.

At the master hearing on June 12, 2009, the respondent acknowledged receipt of his NTA and denied the allegations and charge of removability contained therein. Guatemala was designated as the county of removal. See Section 241(b)(2) of the Act.

On June 12, 2009, the respondent filed a motion to suppress and terminate proceedings. The Department of Homeland Security (DHS) filed evidence in opposition to the motion on June 12, 2009. An individual hearing was held on June 25, 2009.

## **II. Evidence**

### **A. Testimony**

The respondent testified that he was stopped and arrested on a Friday, May 15, 2009. He stated that he was traveling to Seguin on Highway 10, approximately 20 miles outside San Antonio, Texas. The respondent testified that he was the passenger in the vehicle, and a man named Cesar Hernandez was the driver. The highway had two lanes on either side and light traffic. The respondent testified that the car was a new, black Dodge pickup truck with four doors and a double cab. He stated that nothing was in the back of the truck and nothing was in the back of the cab.

The respondent testified that he saw three Border Patrol (BP) vehicles parked on the side of the road, two small vehicles and one mid-sized vehicle. The respondent recalled that the three vehicles began following he and Mr. Hernandez for approximately eight minutes until the BP vehicles turned on their lights. The respondent testified that he and Mr. Hernandez were traveling 65 miles per hour, the speed limit.

The respondent testified that he is Hispanic in appearance and described his Hispanic features.

The respondent testified that after the BP turned on their lights, he and Mr. Hernandez pulled over to the side of the road. The BP vehicles also pulled over. The respondent stated that two agents in the front vehicle came close to his truck, one on each side, and began questioning the respondent and Mr. Hernandez in English. The respondent recalled that the officers were uniformed and wearing guns. He stated that because he could not understand English, one of the officers asked him in Spanish whether or not he was an American citizen. The respondent answered that he was not. The respondent recalled that he was then placed in one of the smaller BP vehicles while Mr. Hernandez drove away.

The respondent testified that while he was in the BP vehicle, another pickup was stopped. He stated that the pickup was an old red truck with nothing in it except three persons who appeared to be Hispanic. The respondent testified that the two officers of the vehicle which he was in spoke with the persons in the red truck, then arrested them, and put in another BP vehicle. The respondent was taken to San Antonio for processing.

### **B. Documentary Evidence**

- Exhibit 1 Notice to Appear (dated May 15, 2009)
- Exhibit 2 Entry of Appearance, David Armendáriz
- Exhibit 3 Respondent's Motion to Suppress (dated June 12, 2009)
- Exhibit 4 Respondent's Supplemental Documentation for Motion to Suppress
- Exhibit 5 Record of Deportable Alien, Form I-213 (dated May 15, 2009)
- Exhibit 6 Map of San Antonio Metropolitan Area, Google Maps
- Exhibit 7 Demographic and Housing Estimates, 2006-07, U.S. Census Bureau

- Exhibit 8 Map of San Antonio Metropolitan Area, Texas Dept. of Transportation
- Exhibit 9 San Antonio, Wikipedia
- Exhibit 10 New Car Dealers in San Antonio, TX, Online Yellow Pages
- Exhibit 11 Notice of Rights and Request for Disposition
- Exhibit 12 DHS' Notice of Filing (dated June 12, 2009)

### III. Legal Standards

#### A. Burden of Proof

An alien who seeks to suppress evidence has the burden of proving a *prima facie* case for suppression. *Matter of Wong*, 13 I&N Dec. 820, 22 (BIA 1971); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975). The alien's motion to suppress must be made in writing and state with particularity the grounds therefore. See 8 C.F.R. § 1003.23(a). It also must be supported by specific and detailed affidavits based on personal knowledge, identifying a basis for suppression, and enumerating the articles to be suppressed. *Matter of Wong*, 13 I&N Dec. 820, 821-22 (BIA 1971). If the affidavit is such that the facts alleged, if true, could support a basis for excluding the submitted material, then the alien must support his claims through testimony. See *Barcenas*, 19 I&N Dec. at 611-12.

Once the respondent has established a *prima facie* case, the burden shifts to the DHS to justify the manner in which the evidence was obtained. *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).

#### B. Legal Standard

Generally, evidence will be admissible in removal proceedings if it is probative and its use is fundamentally fair so as not to deprive the alien of due process. *Mendoza-Solis v. INS*, 36 F.3d 12, 14 (5th Cir. 1994); see *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

While the exclusion rule ordinarily does not apply in removal proceedings, an alien may merit suppression of evidence if he can show that there is a policy or widespread abuse or that the evidence was obtained through an egregious violation of the Fourth Amendment or other liberties that transgresses "notions of fundamental fairness and undermines the probative value of the evidence obtained." *Lopez, supra*, at 1050-51. A mere violation of an alien's constitutional rights is insufficient for suppression of evidence, however. See *id.*

"The Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Immigration enforcement officials must have a reasonable suspicion based on specific, articulable facts for a non-detentional questioning of an alien. *Matter of King and Yang*, 16 I&N

Dec. 502 (BIA 1978). Whether the stop was justified depends on a "totality of the circumstances." *U.S. v. Arvizu*, 122 S.Ct. 744, 750-53 (2002). Relevant factors in determining whether reasonable suspicion existed include, but are not limited to, (1) proximity of the area to the border, (2) traffic patterns on the road, (3) an officer's previous experience, (4) recent illegal border crossings in the area, (5) a driver's behavior, such as erratic driving or evasion attempts, (6) aspects of the vehicle, such as fold-down seats for concealing aliens, and (7) characteristics of persons who live in a particular country, such as haircut or dress. *Brignoni-Ponce, supra*, at 885.

Where there is reasonable suspicion to stop someone (e.g. for speeding), an officer's inquiry into an individual's immigration status is not a violation of the Fourth Amendment. *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005). However, race or alienage alone is insufficient to establish reasonable suspicion. *Brignoni-Ponce, supra*, at 885-87; see, e.g., *King and Yang, supra*.

#### IV. Findings of Fact and Conclusions of Law

In the present case, the respondent seeks to suppress the admission of the Form I-213 and any other statements or records resulting from his arrest, including his previous immigration records. The respondent first argues that the stop of his vehicle constituted an egregious violation of his Fourth and Fifth Amendment rights because he was stopped solely because of his Hispanic appearance. The Court agrees.

The respondent presents credible testimony and a written affidavit testifying that he was the passenger in a new pickup truck, traveling at the speed limit, with nothing in the cab or the truck bed or other aspects of the pickup which would elicit suspicion. The respondent testified that the only question the Border Patrol officer asked of him was whether or not he was an American Citizen. No other questions were asked as to Mr. Hernandez' driving behavior and there was no evidence of any suspicious activity or driving infractions. The respondent was not traveling within 100 miles of the Texas-Mexico border. See Section 287(a)(3) of the Act (defining the term "reasonable distance" from the border to mean within 100 air miles); see also maps of San Antonio, Exhibits 6 & 8. The Court is left with only the respondent's Hispanic appearance as the cause for the stop.

Further, the respondent provides a previous decision in which a motion to suppress was granted because the same Border Patrol officer who stopped the respondent in the present case had unlawfully stopped another alien for his Hispanic appearance. Exhibit 4, Tab B; see *Lopez-Mendoza*, 468 U.S. at 1050-51 & n.5 (finding that suppression of evidence in removal proceedings is appropriate when there is evidence of widespread abuse of the Fourth Amendment).

The DHS has provided no evidence to refute the respondent's *prima facie* case for suppression. See *Matter of Tang*, 13 I&N Dec. 691. It does not provide a statement from the Border Patrol officer or present any explanation other than the respondent's Hispanic appearance as the reason for the stop.

Given the respondent's testimony and the lack of any evidence of suspicious activity or indications of alienage, the Court cannot conclude that the officers had a "reasonable suspicion" beyond the respondent's Hispanic appearance to stop his vehicle. See, e.g., *U.S. v. Lopez-Veldez*, 178 F.3d 282 (5th Cir. 1999)(reversed district court denial of suppression motion notwithstanding vehicle's proximity to the border, numerous passengers in the vehicle, and the road the vehicle was traveling on could be used to circumvent an immigration checkpoint); *U.S. v. Rodriguez-Rivas*, 151 F.3d 377 (5th Cir. 1998)(reversed district court denial of suppression motion where vehicle was stopped by Border Patrol because it had no front license plate); *U.S. v. Jones*, 149 F.3d 364 (5th Cir. 1998)(reversed district court finding of reasonable cause based on car's 80-mile proximity to the Texas-Mexico border, fresh mud on the vehicle's tires, and a tarp covering something in the back). Rather, the Court is left with only the respondent's Hispanic appearance as the reason for the stop.

To allow roving-patrol stops of all vehicles in San Antonio, Texas carrying Hispanic-looking persons without further evidence of suspicious activity would subject residents to "unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." See *Brignoni-Ponce*, 422 U.S. at 882. Thus, given the totality of the circumstances, the Court finds that the respondent's constitutional rights were egregiously violated when he was stopped merely for his Hispanic appearance. See *Brignoni-Ponce*, 422 U.S. at 885-87.

The Court does not reach the claim of whether or not the respondent was unlawfully arrested, as it has already determined that the stop of the respondent was a violation of his constitutional rights and any evidence that is the fruit of the unlawful stop is suppressible. See *Wong Sun v. U.S.*, 371 U.S. 471, 484 (1963).

Accordingly, the Court grants the respondent's motion to suppress. As the DHS has produced no further evidence of the respondent's removability, the Court terminates the proceedings.

For the above reasons, the following orders shall be entered:

**ORDER**

**IT IS HEREBY ORDERED** that the respondent's Motion to Suppress Evidence and Terminate be **GRANTED**.

**IT IS FURTHER ORDERED** that the respondent's proceedings be **TERMINATED**.

Date: June 8, 2010

  
JOHN D. CARTÉ  
United States Immigration Judge