

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40809
Summary Calendar

KEBBA SIDIBEH,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Review of an Order of the
Board of Immigration of Appeals
(A29 306 985)

(April 25, 1995)

Before Judges KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Kebba Sidibeh petitions this court to review an order of deportation entered by the Board of Immigration Appeals (the "Board"). For the reasons described below, we affirm the Board's judgment.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Kebba Sidibeh ("Sidibeh"), born in Bansang, Gambia, in 1963, entered the United States in 1981 on a student visa. He attended school at North Dallas High School beginning in March 1981 and graduated in May 1982. Because of financial difficulties, Sidibeh did not attend college in the fall of 1982. He did, however, complete the spring semester in 1983 at El Centro College in Dallas. After that time, further financial problems prohibited his return to college. He allowed his student visa to expire, and it was never renewed.

Sidibeh, however, remained in the United States continuously until he was arrested in April 1992 for possession of cocaine. He pled guilty to the charge, and received a deferred adjudication under Texas law. In accordance with the deferred adjudication, he was placed on probation.

On December 9, 1992, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against Sidibeh because he failed to comply with the conditions of the nonimmigrant status, i.e., he failed to attend school and renew his student visa, under which he came to the United States. See 8 U.S.C. § 1251(a)(1)(C)(i). Because he admitted to the immigration judge in his February 16, 1993, hearing that he had failed to comply with the requirements of his visa, the judge found that Sidibeh was subject to deportation.

When Sidibeh indicated that he was afraid to return to Gambia, the immigration judge directed that he be given applications for asylum and withholding of deportation. 8 U.S.C. §§ 1158(a), 1253(h). Later during this exchange with the judge, Sidibeh acknowledged that he had pled guilty in Texas state court to the crime of possession of cocaine and had received a deferred adjudication. Based on this information, the judge determined that Sidibeh was not eligible to apply for suspension of deportation, 8 U.S.C. § 1254, or for voluntary departure, 8 U.S.C. § 1254(e)(1), because he admitted having committed a crime involving the possession of a controlled substance, which established that Sidibeh was not a person of good moral character. Sidibeh was, nevertheless, allowed to apply for asylum and withholding of deportation.

In a subsequent hearing, Sidibeh gave reasons why he should not be deported. Although his relatives are members of the majority tribe, which controls the government through the majority political party, they are, nevertheless, fairly prominent in the opposition movement. Sidibeh contends that the majority party is corrupt and that the elections would never change the government. In 1975, he joined an underground revolutionary party. This party, however, never participated in elections.

He described some of the events that led him to believe that he would be persecuted if he returned to Gambia. At a fairly young age, Sidibeh became involved in this underground revolutionary

party, helping to raise funds, holding political meetings in small villages, and distributing pamphlets. Additionally, he participated in protests against poor conditions at schools. Despite his young age, he helped to plan the July 1981 attempted coup.¹ Some of his family members were arrested and served time in prison because of their involvement in the coup and because they refused to reveal where Sidibeh could be located. Moreover, in February 1993, Sidibeh's cousin advised him in a letter that if he returned to Gambia he would be forced to stand trial for his involvement in planning the coup. His cousin stated that although the government has granted amnesty to civilians for politically motivated crimes committed during the attempted coup, this amnesty does not extend to active members of the attempted coup.² Sidibeh stated that he was afraid to return to the country because he would have to stand trial and probably spend the rest of his life in jail. He also expressed fear that he might be killed, tortured or harassed. He does not want to return because he has political opinions different from the government, opinions which he is not free to express.

¹At the time of the attempted coup, however, Sidibeh was in the United States.

²The Department of State reported that in 1992 the president of Gambia granted amnesty to all those accused of participating in the July 1981 attempted coup. The leader of the coup, however, was not included in this amnesty. Instead, the government obtained a warrant for his arrest on several counts of treason. SENATE COMM. ON FOREIGN RELATIONS, HOUSE COMM. ON FOREIGN AFFAIRS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, 103d Cong., 1st Sess. 98-99 (1993).

In addressing Sidibeh's claims for asylum and withholding of deportation, the immigration judge first addressed Sidibeh's claim of past persecution by reviewing his evidence relating to the harassment of his family. The judge found that his family's harassment did not support his claim of past persecution, especially since he had admitted that he personally had not experienced problems because of his opposition party membership. The immigration judge, furthermore, looked at Sidibeh's confrontations with the police and the opposition party, and found that his conflicts with police were not related to his party affiliation, and his encounters with the opposition party did not rise to the level of persecution. The judge, additionally, found that any arrest that might occur when Sidibeh returned would be because of his participation in "treasonous and criminal acts," ---not based on his race, religion, nationality, or membership in a particular social group or political opinion. Consequently, he determined that Sidibeh was not eligible for asylum and withholding of deportation. See 8 U.S.C. §§ 1158(a), 1253(h).

The judge next turned to Sidibeh's request for the suspension of deportation and voluntary departure. Because Sidibeh had entered a guilty plea to possession of a controlled substance, and, in essence, admitted to committing this crime, the judge determined that Sidibeh could not meet the good moral character requirements for this relief and denied Sidibeh's request for suspension of

deportation and voluntary departure. See 8 U.S.C. §§ 1254, 1254(e)(1).

Sidibeh appealed to the Board. The Board adopted the immigration judge's decision on the issues of denial of asylum and withholding of deportation, concluding that Sidibeh failed to establish a well-founded fear of persecution. Regarding his applications for suspension of deportation and voluntary departure, the Board found that his guilty plea was an admission of a crime, making him ineligible for relief.

Sidibeh now appeals.

II

Sidibeh raises two points of error. First, he argues that the Board abused its discretion in determining the questions of asylum and withholding of deportation. He argues that his testimony and documentary evidence clearly established a well-founded fear of future persecution on account of political opinion and membership in a social group. Second, he contends that the Board erred as a matter of law by basing his ineligibility for suspension of deportation and voluntary departure on his guilty plea in state court, which did not constitute a conviction, but was treated only as a deferred adjudication.

III

In reviewing an order of deportation, we will uphold findings of fact as conclusive if they are "supported by reasonable, substantial, and probative evidence on the record considered as a

whole." 8 U.S.C. § 1105a(a)(4). To reverse the Board's factual determinations, the evidence must not only support a contrary conclusion, it must compel it. INS v. Elias-Zacarias, 112 S.Ct. 812, 815 & n.1. (1992). Put another way, the Board's decision that an applicant is not eligible for asylum must be upheld unless the applicant shows that the evidence "was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." Id. at 817. "Similarly, we must uphold the Attorney General's ultimate decision whether to grant or deny asylum unless the refugee shows that the action was arbitrary, capricious, or an abuse of discretion." Castillo-Rodriguez v. INS, 929 F.2d 181, 184 (5th Cir. 1991)

A

Turning to Sidibeh's first claim of error, we initially observe that an application for asylum filed by a person who also is involved in deportation proceedings "shall be deemed to constitute at the same time an application for withholding of deportation." 8 C.F.R. § 208.3 (1991); see Castillo-Rodriguez, 929 F.2d at 185. Although the standards for determining asylum and withholding of deportation are closely related, the language "used to describe the two standards conveys very different meanings." INS v. Cardoza Fonseca, 480 U.S. 421, 430, 107 S.Ct. 1207, 1212 (1987). The showing required to establish eligibility for withholding of deportation has been characterized as more stringent than that required to demonstrate eligibility for asylum. Id. at

449-50, 107 S.Ct. at 1222. Under either standard, nevertheless, the alien bears the burden of proof in these proceedings. Zamora-Morel v. INS, 905 F.2d 833, 837 (5th Cir. 1990).

In asylum proceedings, the Attorney General is authorized, in an exercise of discretion, to grant asylum to "refugees." See 8 U.S.C. § 1158(a). The statute defines "refugee" as a person who is unable or unwilling to return home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(emphasis added). "To prove the existence of a well-founded fear of persecution the alien must demonstrate that a reasonable person in the same circumstances would fear persecution" based on race, religion, nationality, membership in a particular social group, or political opinion, if deported. Castillo-Rodriguez v. INS, 929 F.2d 181, 184 (5th Cir. 1991). This reference to fear, however, "makes the eligibility determination turn to some extent on the subjective mental state of the alien." Cardoza Fonseca, 480 U.S. at 430-31, 107 S.Ct. at 1212. By demonstrating a well-founded fear of persecution, the alien establishes eligibility for asylum, the grant of which is ultimately within the discretion of the Attorney General. Castillo-Rodriguez, 929 F.2d at 184.

By contrast, a court should withhold deportation only upon a showing that the alien's "life or freedom would be threatened on account of race, religion, nationality, membership in a particular

social group, or political opinion." 8 U.S.C. § 1253(h)(emphasis added).³ An applicant for withholding of deportation must demonstrate a "clear probability of persecution." Cardoza Fonseca, 480 U.S. at 429, 107 S.Ct. at 1212. That is, the alien is required "to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation." Id. Furthermore, if the alien meets this standard, the Attorney General has no choice but to withhold deportation. Id. In other words, the withholding of deportation is mandatory if the refugee meets this standard.

Thus, the distinctions between the provisions for withholding deportation and the granting of asylum become clear. A refugee who establishes "a clear probability of persecution is entitled to mandatory suspension of deportation and eligible for discretionary asylum, while those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum." Cardoza Fonseca, 480 U.S. at 444, 107 S.Ct. at 444 (emphasis in original). Therefore, an alien who cannot establish eligibility for the discretionary grant of asylum is necessarily precluded from establishing entitlement to

³Although the respective statutes speak in terms of a threat to "life or freedom," in 8 U.S.C. § 1253(h), on the one hand, and "persecution," in 8 U.S.C. § 1101(a)(42), on the other, our cases have found no occasion to examine this distinction, but instead have used the term "persecution" interchangeably in discussing each statute. See Cardoza Fonseca, 480 U.S. at 421, 107 S.Ct. at 1207; Adebisi v. INS, 952 F.2d 910 (5th Cir. 1992).

withholding of deportation. Adebisi v. INS, 952 F.2d 910, 914 (5th Cir. 1992).

In Sidibeh's case, the immigration judge found Sidibeh to be a credible witness. The judge determined, however, that Sidibeh did not meet his burden of showing that he was eligible for asylum or withholding of deportation. The Board agreed with this determination. Although Sidibeh presents a lamentable account of his country's political troubles, we agree that he has not met his burden of proof to establish eligibility for asylum. Sidibeh has admittedly engaged in treasonous acts against a democratically elected government. Given the fact that he committed these acts, plus the weakness of his other evidence as duly noted by the immigration judge, substantial evidence supports the Board's conclusion that Sidibeh failed to show that the basis of any fear of persecution is based on his race, religion, nationality, or because of his membership in a particular social group or his political opinion. In short, we do not find the facts of his case to be so compelling so as to cause a reasonable fact finder to find that his particular fear of persecution is protected by the statute. See Elias-Zacarias, 112 S.Ct. at 817. Because Sidibeh has not met the less stringent standard for establishing eligibility for asylum, he necessarily has failed to meet the standard for withholding of deportation. In sum, the Board's decision that Sidibeh is not eligible for asylum or withholding of deportation is supported by substantial evidence.

B

We now turn to Sidibeh's second point of error. Sidibeh argues that the Board erred as a matter of law when it allowed his unadjudicated guilty plea to cocaine possession to preclude consideration of the merits of his applications for suspension of deportation and voluntary departure. We must accord due deference the Board's interpretation of the immigration statute "unless there are compelling indications that its interpretation is incorrect." Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994). Suspension of deportation and voluntary departure require, among other things, a showing of good moral character. See 8 U.S.C. § 1254(a)(1) and (e)(1). Under 8 U.S.C. § 1101(f)(3), no one described in 8 U.S.C. § 1182(a)(2)(A), along with other sections, shall be regarded as having good moral character. The relevant statute states that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute essential elements" of a violation of any law relating to a controlled substance cannot be considered to possess good moral character. 8 U.S.C. § 1182(a)(2)(A)(i)(II) (emphasis added).

The Board recognized that under Texas law, a deferred adjudication does not constitute a conviction for immigration purposes, citing Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir. 1990). Thus, Sidibeh's deferred adjudication on a charge of cocaine possession does not act as a conviction to preclude him from applying for suspension of deportation and voluntary

departure. Nevertheless, he has admitted having committed a crime involving controlled substances. In Nunez-Payan v. INS, 811 F.2d 264 (1987), we made clear that a guilty plea to a narcotics offense can be considered as an admission of the crime by an immigration judge. Here, the Board determined that under Nunez-Payan, Sidibeh's guilty plea to a controlled substance offense, as well as his failure to present evidence to the contrary, worked to preclude a showing of good moral character. Consequently, he was statutorily ineligible to apply for suspension of deportation and voluntary departure. We agree and affirm the Board's denial of suspension of deportation and voluntary departure.

IV

For the foregoing reasons, the decision of the Board denying Sidibeh asylum, withholding of deportation, suspension of deportation, and voluntary departure is

A F F I R M E D.