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United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of May, two thousand nineteen.

Present:

Dennis Jacobs,
Debra Ann Livingston,
Richard J. Sullivan,
Circuit Judges.

Ahmadou Sankara,

Petitioner,

v.

17-2257(L)
19-742(Con)
NAC

William P. Barr, United States Attorney General,

Respondent.

Petitioner, pro se, petitions for review of August 2017 and March 2019 decisions of the Board of Immigration Appeals ("BIA") denying his motions to reconsider prior BIA decisions and reopen his removal proceedings. Petitioner moves for in forma pauperis ("IFP") status, a stay of removal, appointment of counsel, and other miscellaneous relief. Respondent moves to consolidate the petitions.

Upon due consideration, it is hereby ORDERED that Respondent's motion to consolidate is GRANTED and the cases are consolidated with 17-2257 as the lead case. It is further ORDERED that Petitioner's IFP motion is DENIED and both petitions are DISMISSED because they present no arguable issues. *See* 28 U.S.C. § 1915(e)(2)(B); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Pillay v. INS*, 45 F.3d 14, 17 (2d Cir. 1995). Petitioner's remaining motions are DENIED as moot.

Because the petitions are timely only as to the August 2017 and March 2019 decisions, "we are precluded from passing on the merits of the underlying [removal] proceedings." *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 90 (2d Cir. 2001). Our review is limited to the BIA's denial

of reconsideration and reopening, which we review for abuse of discretion. *See Ali v. Gonzales*, 448 F.3d 515, 517 (2d Cir. 2006); *Jin Ming Liu v. Gonzales*, 439 F.3d 109, 111 (2d Cir. 2006). The BIA did not abuse its discretion. Petitioner's requests for reconsideration were untimely filed more than 30 days after any prior decision, the regulations bar motions to reconsider the denial of prior motions to reconsider, and the motions reiterated prior arguments and did not identify any errors in prior decisions. *See* 8 U.S.C. § 1229a(c)(6)(B) (30-day deadline for filing motion to reconsider); *id.* § 1229a(c)(6)(C) (requiring motion to "specify the errors of law or fact in the previous order"); 8 C.F.R. § 1003.2(b)(1), (2) (same); *see also Jin Ming Liu*, 439 F.3d at 111 ("The BIA does not abuse its discretion by denying a motion to reconsider where the motion repeats arguments that the BIA has previously rejected.").

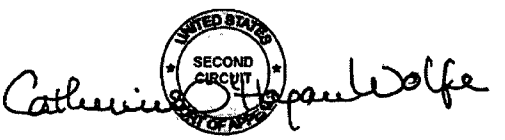
Petitioner's motion to reopen was time and number barred because it was filed more than 90 days after the 2013 removal order and was not Petitioner's first motion to reopen. *See* 8 U.S.C. § 1229a(c)(7)(A), (C)(i) (allowing one motion to reopen filed within 90 days of removal order). Petitioner did not state a coherent ineffective assistance claim and made no effort to comply with the procedural requirements for such a claim, such as notifying prior counsel or filing a disciplinary complaint. *See Jian Yun Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 47 (2d Cir. 2005) (holding that ineffective assistance claim is forfeited absent substantial compliance with procedural requirements). We lack jurisdiction to review the BIA's "entirely discretionary" decision not to reopen or reconsider sua sponte. *Ali*, 448 F.3d at 518.

Insofar as Petitioner asserts that he is eligible for withholding of removal or relief under the Convention Against Torture, he did not submit any new evidence to support that claim and we may not revisit the agency's original determination that he did not establish a likelihood of persecution or torture. *See Ke Zhen Zhao*, 265 F.3d at 90.

To the extent Petitioner challenges his immigration detention, the agency's custody determination is not reviewable in this Court through a petition for review. *See* 8 C.F.R. § 1003.19(d) ("Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond . . . shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding."). Petitioner can raise any challenge to his detention in his pending 28 U.S.C. § 2241 habeas petition. W.D.N.Y. No. 19-cv-174; *Demore v. Kim*, 538 U.S. 510, 516-17 (2003).

Finally, Petitioner's pending U visa application does not affect these petitions for review. The U.S. Citizenship & Immigration Services "has sole jurisdiction over all petitions for U nonimmigrant status," including petitions filed by aliens in removal proceedings or with final orders of removal. 8 C.F.R. § 214.14(c)(1). A pending U visa application does not affect the agency's ability to execute a final order of removal, although Petitioner may apply for a stay of removal from Immigration & Customs Enforcement. *Id.* § 214.14(c)(1)(ii). If Petitioner is removed, he may continue to pursue his U visa application from abroad. *Id.* § 214.14(c)(5)(i)(B).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of March, two thousand and nineteen,

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Ahmadou Sankara,

Petitioner,

v.

William P. Barr, United States Attorney General,

Respondent.

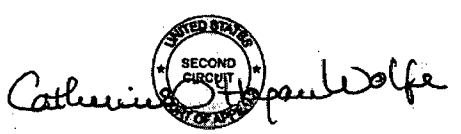
ORDER
Docket Number: 19-742

A petition for review was filed on March 26, 2019. The filing fee of $500.00 was due to be paid to the Court by March 26, 2019. The case is deemed in default.

Instructions for moving for *in forma pauperis* status are provided in the Court's instructions entitled "*How to Appeal an Agency Case in the United States Court of Appeals for the Second Circuit*". The manual and the forms required to file the motion are enclosed with this order. They are also available on the Court's website www.ca2.uscourts.gov.

IT IS HEREBY ORDERED that the petition for review is dismissed effective April 17, 2019 unless by that date petitioner either pays the fee in full, or moves for *in forma pauperis* status in this court.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BEFORE THE IMMIGRATION COURT
NEW YORK, NEW YORK

In the Matter of

Ahmadou Sankara — Respondent

DETAINED
A97-528-851
In Removal Proceedings

On behalf of Respondent:
Pro Se

On behalf of DHS:
Dara Faith Reid
Asst. District Counsel

ORDER OF THE IMMIGRATION JUDGE

Respondent is detained. An *in absentia* order of removal was entered against him on May 13, 2008. By motion dated February 26, 2009, he moved to reopen and rescind due to exceptional circumstances, requesting also a stay of removal. His motion to rescind automatically stays removal pending decision by the IJ. 8 CFR 1003.23(b)(4)(ii). INA Sec. 240(b)(5)(C). The government opposes the motion.

The government correctly notes he did not make his application within the 180-day period allowed him if exceptional circumstances prevented his appearance, which is what he claims: he was dealing with "some mental health issues that were causing me to be unable to function," according to his motion. It also notes that he does not meet the exceptions for making his motion more than 180 days after the order, because he has not shown or alleged a change in circumstances. On the other hand, the government is incorrect that he has "failed to submit an application [redacted]." He did so before the *in absentia* order and it is still in the file and is still the application he wishes to pursue. Also, while the suggestion of ineffective assistance of counsel following his missed hearing is not substantiated, his attorney's own failure to appear at the missed hearing itself is *prima facie* without excuse.

On this record the court was initially prepared to deny the motion. The statement about mental health issues is too general to allow the court to reopen on that claim, and the lack of documentation is important. But four things combined to lead the court to give the benefit of the doubt to respondent. First, *if* there are genuine mental health issues, it is of course plausible that they may render a person unable to function, and if severe they may render him unable to function not just on the day of his hearing but for more than 180 days thereafter. We see many cases where people have suffered trauma in their country precisely because of the persecution that they must prove in court but cannot emotionally face – raising the irony that their very inability to address their case is a direct result of the case being so strong. Second, his [redacted]

application gives a credible basis for inferring trauma: he is a member of a minority ethnic group in a country, Ivory Coast, where objective evidence shows a pattern of severe persecution and war, and where, according to his application, that both his mother and father were killed by security forces. Third, he has presented documentary evidence showing concrete steps he has taken, with the help of a law school clinic, to obtain specific medical evidence from Harlem Hospital, which may be the very evidence required here. Fourth, he is detained and unrepresented in this proceeding, and is not at complete liberty to act on his own behalf and produce everything the court may require.

Weighing these factors I recognize that his [redacted] claim is not proved but only alleged. I recognize also that his general statement about "mental health issues" leaves lots of room for something far less serious than the effects of trauma. But against these considerations I weigh the proof of steps he took recently (the medical release is dated January 23, 2009), and the likelihood that the law school immigration clinic helping him get medical records has seen a non-frivolous reason for trying to obtain them. In addition, the risk of harm to him if the court wrongly decides not to reopen is potentially extremely great (persecution or severe exacerbation of whatever psychological problems he may have), while the risk of harm to the government of a wrong decision reopening the case is not as great and is subject to tight monitoring by the IJ in a reopened case, while deportation would be final.

Mental health problems, if real, raise concerns (all the stronger when a person is not represented) that call into question whether the person's statements can be taken at face value, which in turn greatly affects how a judge weighs evidence, assesses credibility, and applies the law to facts. On the other hand, if false or feigned, claims of such problems also provide a respondent an easy excuse for not being able to state a coherent claim. Here, the fabric of evidence plausibly shows that respondent's claims may be genuine. The relative risks involved, the lack of sufficient information to rule definitively about those risks, and the efforts to obtain such information through a respected channel, lead the court to exercise discretion in favor of reopening in these circumstances on the court's own motion. On reopening the court will require immediate steps to settle issue of respondent's mental and emotional state.

ORDER

IT IS ORDERED that this removal proceeding is reopened on the court's own motion.

William Van Wyke
Immigration Judge
March 23, 2009

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of May, two thousand and nineteen,

Present: Dennis Jacobs,
Debra Ann Livingston,
Richard J. Sullivan,

Circuit Judges.

Ahmadou Sankara,

Petitioner,

v.

William P. Barr, United States Attorney General,

Respondent.

ORDER
Docket No. 17-2257(L)
19-742(Con)
NAC

Petitioner, Ahmadou Sankara filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court