

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 27 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HERMAN KUSNADI,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 07-71955

Agency No. A079-572-257

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted May 12, 2011
San Francisco, California

Before: GOODWIN and PAEZ, Circuit Judges, and O'GRADY, District Judge.**

Petitioner Herman Kusnadi seeks review of an order of the Board of Immigration Appeals (BIA) dismissing an appeal from an order of the Immigration Judge (IJ) that held—among other things not relevant to this appeal—that Kusnadi filed a frivolous asylum application. We conclude that Kusnadi was not afforded

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Liam O'Grady, District Judge for the U.S. District Court for Eastern Virginia, Alexandria, sitting by designation.

sufficient notice and adequate opportunity to explain the grounds invoked for the frivolousness determination. We therefore grant the petition for review and remand to the BIA for further proceedings.

We have jurisdiction under 8 U.S.C. § 1252. Because Kusnadi's brief to the BIA clearly argues that the IJ erred in finding that he filed a frivolous application for asylum, we hold that Kusnadi has properly exhausted his claim. *See Zhang v. INS*, 388 F.3d 713, 721 (9th Cir. 2004). Where, as here, the BIA "conducts its own review of the evidence and law rather than adopting the IJ's decision," our review "is limited to the BIA's decision except to the extent that the IJ's opinion is expressly adopted." *Liu v. Holder*, 632 F.3d 1150, 1155 (9th Cir. 2011). We review de novo the BIA's determination of whether the IJ complied with the "procedural requirements for a frivolousness finding." *Id.*

The BIA decided Kusnadi's appeal two days before publishing *In re Y-L-*, 24 I. & N. Dec. 151 (B.I.A. 2007), a case that provided generous guidance on the procedures that immigration judges should follow in determining whether an asylum application is frivolous. In this case, the requirements of *Y-L-* were not met. In particular, the record demonstrates that Kusnadi was not given sufficient notice and opportunity to explain the grounds invoked for the frivolousness determination. *See* 8 C.F.R. § 1208.2; *Y-L-*, 24 I. & N. Dec. at 241–43; *cf. Liu*, 632 F.3d at 1158 (granting a Petition for Review where this requirement was not met).

Because of this deficiency, the IJ did not have the opportunity to “separately address [Kusnadi’s] explanations in the context of how they may have a bearing on the materiality and deliberateness requirements unique to [the frivolousness] determination,” as she was required to do. *Matter of B-Y-*, 25 I. & N. 236, 240 (B.I.A. 2010). We therefore grant Kusnadi’s petition and remand to the BIA for further proceedings consistent with *Y-L-*.

GRANTED and REMANDED.