

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AHMET FERRAJ,	:
Petitioner,	:
	:
-vs-	: Civ. No. 3:02cv909 (PCD)
	:
JOHN ASHCROFT, Attorney General of	:
the United States,	:
Respondent.	:

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241. For the reasons set forth herein, the petition is dismissed for lack of jurisdiction.

I. BACKGROUND

Petitioner is a citizen of Albania and a lawful permanent resident of the United States. The notice of removal proceedings alleged a violation of § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1227(a)(2)(A)(iii), based on petitioner’s conviction for violation of CONN. GEN. STAT. § 53a-172, failure to appear. The Immigration Judge, relying on this Court’s decision in *Barnaby v. Reno*, 142 F. Supp. 2d 277 (D. Conn. 2001), granted petitioner’s motion to terminate the proceedings. Respondent appealed the ruling, which is pending before the Board of Immigration Appeals (“BIA”). Petitioner remains in the custody of the Immigration and Naturalization Service (“INS”) awaiting resolution of the appeal and filed the present petition contesting the propriety of his continued detention pending resolution of the appeal.

II. DISCUSSION

Petitioner argues that he need not be detained awaiting the outcome of the appeal as this Court's decision in *Barnaby* renders the appeal by the INS frivolous. Respondent answers that the petition must be dismissed as petitioner has not exhausted administrative remedies prior to filing his petition.

In general, an alien is required to exhaust all claims before seeking judicial review of a final order of removal. *See* 8 U.S.C. § 1252(d)(1) (“[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right”). A failure to exhaust available administrative remedies deprives a court of jurisdiction to hear the merits of the petition. *See Theodoropoulos v. INS*, 313 F.3d 732, 742 (2d Cir. 2002). There is no dispute as to petitioner's failure to exhaust administrative remedies in light of the appeal pending before the BIA. As the issue on appeal is a matter of statutory interpretation rather than a constitutional question, *see Rabiou v. INS*, 41 F.3d 879, 882 (2d Cir. 1994), it cannot be said that the BIA is not empowered to address the issue before it thus inviting review by this Court on futility grounds.

Such does not resolve the question. Judicial intervention prior to the conclusion of administrative proceedings may be appropriate under limited circumstances. *See Doherty v. Meese*, 808 F.2d 938, 942 (2d Cir. 1986).¹ Such intervention is appropriate “on a clear and convincing showing that the decision against [petitioner] was without a reasonable foundation . . . [and] if there is

¹ *Doherty* involves two separate bases on which a court may intervene prior to a final judgment. The first basis discussed was afforded by statute, specifically 8 U.S.C. § 1252(a), (c) (1982), providing for intervention prior to final order of removal when “the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.” (Internal quotation marks omitted). *See Doherty*, 808 F.2d at 942. Section 1252 has since been amended to remove this statutory basis. The other basis, relevant to the discussion herein, involves the “power of judicial review theretofore existing.” *Id.* (internal quotation marks omitted).

[no] basis in fact for the agency’s decision.” *Id.* (internal quotation marks omitted).² Thus, in the context of a habeas petition contesting detention pending the resolution of an appeal by the INS, this Court must decide “whether there is any reasonable foundation at all for the Attorney General’s action.” *Id.*

There is some question as to whether the above standard applies at all to the facts of the present case. In *Doherty*, the analysis centered on a decision of the Attorney General designating the country to which the petitioner would be deported with substantial emphasis placed on the discretionary nature of the decision. *See id.* In the present case, petitioner is subject to the mandatory detention imposed by the Illegal Immigration Reform and Immigrant Responsibility Act § 236(c), 8 U.S.C. § 1226(c),³ a matter not left to the discretion of the Attorney General. *See Mapp v. Reno*, 241 F.3d 221, 228 n.10 (2d Cir. 2001) (raising issue but not deciding whether detention pursuant to 236(c) would alter decision permitting intervention prior to a final order of removal). The absence of discretion as to pre-removal detention would appear to place the present case beyond the reach of the limited basis for intervention provided in *Doherty*.

Even if it were appropriate to review petitioner’s continued detention under the standard set forth in *Doherty*, petitioner cannot establish that the INS lacks a reasonable foundation for its appeal

² There is little to indicate that the standard set forth in *Doherty* would not apply today. Although *Doherty* utilized the phrase “judicial review,” which has since been interpreted to mean “full, nonhabeas review,” *INS v. St. Cyr*, 533 U.S. 289, 312, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), the “judicial review” expressed in *Doherty* applied to a district court’s denial of a petition for writ of habeas corpus. In light of the continued vitality of habeas corpus jurisdiction, *see id.* at 311-12, it is not apparent that subsequent amendments have modified or eliminated the possibility of such intervention.

³ There are certain exceptions to § 1226(c)’s mandatory detention provision pertaining to cooperation in criminal investigations or witness protection, neither of which is here implicated.

and thus that his continued detention is improper. *See Doherty*, 808 F.2d at 942. Although the issue on appeal in the present case appears to be precisely that decided in *Barnaby*, the BIA is bound only by the decisions of the Court of Appeals in whose jurisdiction the particular issue arises. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390, 392 (BIA 2002). As *Barnaby* was not reviewed by the Second Circuit, it cannot be said that the BIA could not disagree with the statutory interpretation therein. As such, it cannot be said that the appeal to the BIA is frivolous.

III. CONCLUSION

The petition for writ of habeas corpus (Doc. 1) is **dismissed** for lack of jurisdiction. Petitioner is granted leave to refile his petition should the matter not be resolved by the decision of the BIA. The motion to amend the petition (Doc. No. 4) is **denied as moot** as the amendment does not cure the jurisdictional defect. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, February ____, 2003.

Peter C. Dorsey
United States District Judge