

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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:
SHELDON ANDRE BARTON, :
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Petitioner, :
:
-against- : No. 3:01CV881(GLG)
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JOHN ASHCROFT, ATTORNEY :
GENERAL OF THE UNITED STATES, :
ET AL., :
:
Respondents. :
:
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ORDER ON SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Sheldon Andre Barton, has filed a pro se Supplemental Petition for Writ of Habeas Corpus [**Doc. #16**].

BACKGROUND

On October 25, 2001, this Court stayed Petitioner's deportation and held in abeyance his original Petition for Habeas Corpus Relief pending a decision by the Court of Appeals for the Second Circuit in another case. On May 29, 2002, the Second Circuit decided Jankowski-Burczyk v. INS, __ F.3d __, 2002 WL 1066630 (2d. Cir. 2002) (holding that section 212(h) of the Immigration and Nationality Act ("INA") did not violate the equal protection clause). As a result, on June 19, 2002, this Court denied the original Petition for Writ of Habeas Corpus.

In the interim, the Board of Immigration Appeals ("BIA") exercised its discretionary authority to reopen Petitioner's case. On March 8, 2002, the BIA remanded the record to the Immigration Court in order to give Petitioner the opportunity to apply for relief under section 212(c) of the INA, 8 U.S.C. § 1182(c). A hearing before an Immigration Judge to adjudicate Petitioner's request for section 212(c) relief is scheduled for August 6, 2002. (Resp't's Resp. to Supp. Pet. For Writ of Habeas Corpus, 2.)

In his Supplemental Petition for Writ of Habeas Corpus, Petitioner claims that his mandatory detention without bond pursuant to section 236(c) of the INA, 8 U.S.C. § 1226(c), is a denial of his substantive and procedural due process rights under the Fifth Amendment. For the reasons set out below, the Court GRANTS the Petition and directs that a bond hearing be held forthwith.

DISCUSSION

I. Subject Matter Jurisdiction

Respondent argues, and Petitioner concedes, that because of the pending waiver hearing, there is no longer a final order of removal in this case. According to Respondent, we lack subject matter jurisdiction over the Supplemental Petition for two reasons: (1) the Petition is not ripe for judicial review because there is no final agency action; and (2) Petitioner has not

exhausted all administrative remedies.¹ We disagree. Petitioner is not asking this Court to review his removal order, nor is he asking us to consider the merits of his request for a section 212(c) hearing. Instead, he presents a constitutional challenge to the mandatory detention provision of section 236(c) of the INA, 8 U.S.C. § 1226(c), claiming that the statute, as applied to him, violates his substantive and procedural due process rights under the Fifth Amendment. Petitioner cannot raise such a claim with respect to section 236(c) to the IJ or the BIA because they do not have the authority to adjudicate constitutional challenges to the INA. See Arango-Aradondo v. INS, 13 F.3d 610, 614 (2d Cir. 1994); Matter of C-, 20 I. & N. Dec. 529, 532 (BIA 1992); Matter of Anselmo, 20 I. & N. Dec. 25, 30 (BIA 1989). In fact, the BIA has stated that it lacks authority to determine the constitutionality of the mandatory detention provisions of section 236(c). In re Joseph, Int. Dec. 3387 at 6 (BIA 1999) (noting that "it is not within the purview of this Board to pass upon the constitutionality of the mandatory detention provision in section 236(c)(1).")

It would be futile to require Petitioner to exhaust his

¹ Ripeness and exhaustion are technically different, albeit somewhat overlapping, grounds for dismissal. Ripeness focuses on the "types of functions that courts should perform," while exhaustion refers to "how far a party must pursue administrative remedies before going to court." Seafarers Int'l Union of North America v. United States Coast Guard, 736 F.2d 19, 26 n.11 (2d Cir. 1984).

administrative remedies under circumstances such as these where he raises constitutional claims that could not be resolved through the administrative process. See Howell v. INS, 72 F.3d 288, 291 (2d Cir. 1995); Maria v. McElroy, 68 F. Supp. 2d 206, 216 (E.D.N.Y. 1999); see also Welch v. Reno, 101 F. Supp. 2d 347, 351 (D. Md. 2000) (holding that exhaustion is not required if a habeas petitioner challenges his continued detention); Galvez v. Lewis, 56 F. Supp. 2d 637, 644 (E.D. Va. 1999).

II. Due Process Claims

Having rejected Respondent's argument that this Court lacks subject matter jurisdiction over the Supplemental Petition, we now turn to the merits of Petitioner's constitutional claim. The issue before this Court is whether Petitioner's mandatory detention without a hearing is a denial of his substantive and procedural due process rights under the Fifth Amendment.

In April 2001, an Immigration Judge found Petitioner deportable under the INA based upon his conviction of an aggravated felony and his conviction of two crimes involving moral turpitude. Petitioner has not challenged his classification as an aggravated felon. Section 236(c) provides that the Attorney General "shall take into custody any alien" who is removable for a number of reasons, including an alien determined to be an aggravated felon under 8 U.S.C. § 1227. A person taken into custody pursuant to section 236(c) may be

released on bond but only if he or she is part of a witness protection program and is not a flight risk or a danger to others. See INA § 236(c)(2), 8 U.S.C. § 1226(c)(2). Since Petitioner does not fall within this limited release provision, he is presently being detained without consideration of bond.²

It is undisputed that Congress has plenary power to create substantive immigration law to which the courts generally must defer. See Harisiades v. Shaughnessy, 342 U.S. 580, 589-90 (1952). The Supreme Court has stated, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)). Nevertheless, Congress's power is subject to constitutional limitations. Zadvydas v. Davis, 533 U.S. 678, 695 (2001). In Zadvydas, the Supreme Court distinguished between the deference that must be afforded to *immigration policies* and the more stringent review of the *procedures* used to implement those policies. Id. The issue in the instant case implicates the procedure by which Congress carries out its decisions as to who should be deported and on

² Petitioner has been in the custody of the Immigration and Naturalization Service ("INS") for over thirteen months. He has been held at an INS detention center in Louisiana since at least April 30, 2001, although it is not clear from the record when he was first transferred from the Garden State Youth Correctional Facility in New Jersey to the custody of the INS.

what basis, not the actual criteria for deportation. See INS v. Chadha, 462 U.S. 919, 940-41 (1983) (Congress must choose a constitutionally permissible means of implementing its plenary power over aliens).

The Court of Appeals for the Second Circuit has not yet ruled on the constitutionality of section 236(c). However, other circuit courts have done so. Only the Seventh Circuit has considered the issue directly, and upheld the statute on the ground that a fundamental liberty interest was not implicated. See Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999); see also Richardson v. Reno, 162 F.3d 1338, 1376 n.179 (11th Cir. 1998), vacated on other grounds, 526 U.S. 1142 (1999) (summarily rejecting petitioner's due process challenge, noting that a permanent resident alien returning from a brief trip outside the United States does not have a right to the same treatment as a permanent resident alien who has not left the country, citing Landon v. Plasencia, 459 U.S. 21, 31 (1982)). Parra is easily distinguishable from the instant case. In Parra, the court upheld section 236(c) on the ground that a fundamental liberty interest was not implicated, because the petitioner was not eligible for any discretionary relief and thus not entitled to remain in the United States. Parra, 172 F.3d at 958.

Most recently, however, the Third Circuit considered the constitutionality of section 236(c) and struck it down. Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001) (discussing the Supreme

Court's recognition in Zadvydas v. Davis, 533 U.S. 678 (2001) that immigration detention implicates a fundamental liberty interest). In addition, several district courts in this Circuit have recently found that section 236(c) violates due process. See Bi Zhu Lin v. Ashcroft, 183 F. Supp. 2d 551 (D. Conn. 2002); Cardoso v. Reno, 127 F. Supp. 2d 106 (D. Conn. 2001); Zgombic v. Farquharson, 89 F. Supp. 2d 220 (D. Conn. 2000); Rogowski v. Reno, 94 F. Supp. 2d 177 (D. Conn. 1999); but see Rady v. Ashcroft, 193 F. Supp. 2d 454 (D. Conn. 2002) (a fundamental liberty interest was not involved because petitioner was not a legal permanent resident); Avramenkov v. INS, 99 F. Supp. 2d 210 (D. Conn. 2000) (holding that because petitioner was not eligible for discretionary relief, he had no legal right to remain in the country; consequently, he had no significant liberty interest to be free on bail pending conclusion of the removal proceedings).

CONCLUSION

Having considered the thoughtful reasoning set out in the relevant case law, we conclude that detaining Petitioner without giving him the opportunity to rebut the presumption that he is a danger to society or a flight risk implicates a fundamental liberty interest. The government may not infringe upon an alien's certain "fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores,

507 U.S. 292, 302 (1993) (emphasis in original). Although we are mindful of Congress's plenary policy powers in the area of immigration, we hold that the means chosen by Congress to implement its policy, section 236(c)'s mandatory detention provision without the possibility of an individualized bail determination, does not comport with the fundamental protections to which Petitioner is entitled under the Constitution. Bi Zhu Lin, 183 F. Supp. 2d at 556.

An individualized bond hearing to consider Petitioner's circumstances affords the INS a means of determining the likelihood that he will flee or engage in further criminal activity. While prevention of such is undeniably a compelling state interest, reliance on a broad, irrebuttable presumption that Petitioner will abscond or commit further crimes is not narrowly tailored to further such an interest. See Bi Zhu Lin, 183 F. Supp. 2d at 558; Rogowski, 94 F. Supp. 2d at 184 (individualized bond hearings present a readily available, less restrictive means for the government to achieve its purposes).

For the foregoing reasons, we hold that section 236(c) as applied to Petitioner violates his substantive due process rights.³ Accordingly, we GRANT the Supplemental Petition for Habeas Corpus Relief [**Doc. #16**] and order that the INS hold an

³ Since we find that section 236(c) is unconstitutional as applied to Petitioner on substantive due process grounds, we need not consider his procedural due process argument.

immediate bond hearing to determine Petitioner's eligibility for release on bond pending resolution by the Immigration Court of his claim for section 212(c) relief.

SO ORDERED.

Dated: June 24, 2002
Waterbury, Connecticut

_____/s/_____
GERARD L. GOETTEL,
United States District Judge