

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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MU-XING WANG, :
 :
 Petitioner, :
 :
 -against- : No. 3:01CV1353(GLG)
 : **MEMORANDUM DECISION**
 JOHN ASHCROFT, et al. :
 :
 Respondents. :
 -----X

Petitioner, Mu-Xing Wang, is a Chinese immigrant presently detained by the Immigration and Naturalization Service ("INS") pending his removal from the United States to China. Petitioner has been ordered removed from the United States because of his unlawful entry and his subsequent conviction of an aggravated felony. Pending before this Court is his petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241, in which he seeks relief from removal under the United Nations Convention Against Torture¹ ("CAT"), as well as a bond hearing or a

¹ The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)(ratified by the U. S. Senate on Oct. 21, 1994, effective in the United States on Nov. 20, 1994), see Regulations Concerning CAT, 64 Fed. Reg. 8478, 1999 WL 75823 (1999)(Background). On October 21, 1988, Congress passed implementing legislation. See Foreign Affairs Reform and Restructuring Act ("FARRA"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681-82 (1998), codified as Note to 8 U.S.C. § 1231. In addition, Congress directed the Attorney General to develop regulations to implement the United States' treaty obligations under CAT. See Regulations Concerning CAT, Interim Rule, 64 Fed. Reg. 8477 (Feb. 19, 1999). Article III of CAT provides that "[n]o State Party may expel, return ("refouler") or extradite a

conditional release from detention. For the reasons set forth below, his petition is DENIED.

Background

Petitioner is a thirty-year-old Chinese immigrant who, in 1993, entered the United States after deserting from the Chinese army in which he was serving. Upon entering the United States, petitioner was not inspected, admitted or paroled by an immigration officer. Petitioner relates that he had been smuggled out of China and into the United States by a group of Chinese gangsters known as "snakeheads," who charged petitioner and his family \$30,000 for their services. When petitioner and his family were unable to pay the full amount demanded, the gangsters severely beat and pistol-whipped petitioner's brother-in-law as a warning of the consequences of not paying. Petitioner claims that out of desperation to obtain money to repay this debt, in 1994, he broke into the home of the snakeheads and robbed them at gunpoint. In 1995, he was convicted in New Haven, Connecticut, Superior Court of robbery in the first degree and unlawful restraint in the first degree and was sentenced to a ten-year prison term, five years to serve and three years probation and a one-year concurrent term for the second offense. (Resp.'s Ex. C.)

person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

As a result of these convictions, on April 25, 1997,² the INS issued a notice to appear, charging petitioner with violations of §§ 212(a)(6)(A)(i) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(2)(A)(iii), as an alien present in the United States without having been admitted or paroled and as an alien ineligible for admission because of his conviction of an aggravated felony. (Resp.'s Ex. A, Notice to Appear; Resp.'s Ex. D, Add'l Charges of Inadmissibility.) Following a hearing, an Immigration Judge ("IJ") ordered petitioner removed to China. (Resp.'s Ex. E, Transcripts of Removal Hearing before IJ William A. Cassidy, dated Oct. 28, 1997 and Jan. 12, 1998; Resp.'s Ex. F, Order of Removal dated Jan. 12, 1998.) Petitioner then appealed this decision and asked for political asylum³ and withholding of

² Because petitioner's removal proceedings were commenced after April 1, 1997, the permanent rules of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), control. See IIRIRA § 309(c), 110 Stat. 3009-625.

³ Petitioner had previously filed two requests for political asylum, which were introduced at the hearing on his claim for relief under CAT. In the first, dated June 17, 1993, (Resp.'s Ex. P), petitioner made no mention of his desertion from the Chinese army. Instead he claimed that he was tortured mentally and physically because of his involvement in the student movement in the late 1980's and that his name had been put on a black list, which will result in his being treated like a criminal for the rest of his life. In a second application, dated October 27, 1997 (Resp.'s Ex. Q), petitioner related the problems he and his family had with the Chinese Mafia and "loan sharks," and that if he were returned to China, there would be "serious problems" for him and his family. He stated that he had served in the Chinese army but did not mention the alleged

deportation under CAT on the ground that, if he were returned to China, he would be executed as a traitor for deserting the Chinese Army, and his family, who aided his desertion, would be severely persecuted or even executed. (Resp.'s Ex. G, First Appeal to BIA and Ltr. dated Jan. 23, 1998; Resp.'s Ex. H, Ltr. dated May 20, 1998 and Mot. for Hrg. on CAT Claim.) The Board of Immigration Appeals ("BIA") remanded his case to the IJ for a decision on his asylum and CAT claims. (Resp.'s Ex. I, BIA Decision dated Sept. 17, 1998.) The IJ found that petitioner, as an aggravated felon, was ineligible for asylum relief or any other form of relief from deportation. The IJ further held that he did not have the authority to conduct a hearing on petitioner's claim for relief under CAT, and ordered him removed to China. (Resp.'s Ex. J, IJ's Decision dated Oct. 29, 1998; Resp.'s Ex. K, Order of Removal dated Oct. 29, 1998.) Accordingly, petitioner was taken into custody by INS pending his removal to China. (Resp.'s Ex. L, Notice of Custody Determination.) Again, petitioner appealed. The BIA agreed that petitioner was not statutorily eligible for asylum and withholding of removal under INA §§ 208(a) and 241(b), 8 U.S.C.

physical torture by the military that is the subject of his current application. During his CAT hearing, when questioned about these earlier applications, petitioner explained that they had been prepared by someone else for him because he could not read or write English and that he had been advised not to mention his desertion from the Chinese military because the IJ would think he was a bad person when he was in China. (Tr. of CAT hearing dated Aug. 18, 1999, at 56.)

§§ 1158(a), 1251(b), because of his conviction of an aggravated felony but remanded the case for further proceedings on petitioner's CAT claim in light of intervening legislation and regulations authorizing IJ's to conduct such hearings. (Resp.'s Ex. M, BIA Decision dated Apr. 7, 1999); see 8 C.F.R. § 208.18(b)(1)(promulgated Feb. 19, 1999, authorizing an alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, to apply for withholding of removal under 8 C.F.R. § 208.16(c)).

During a lengthy hearing before the IJ, petitioner testified that he had been forced to join the Chinese military. (Resp.'s Ex. N, Tr. of Removal Hrg. before IJ John D. Carte, dated July 7, 1999 & Aug. 18, 1999 & Sept. 1, 1999.) He lived at a military base that housed approximately 1,000 persons. There was not enough food; they were forced to sleep on wooden boards on the ground; there were no showers; medical care was inadequate. (Tr. at 12-16.) In 1990, he had tried to escape but was captured and returned to the base, where he was beaten in the head with a rifle butt, kicked, and punched to the point of unconsciousness. (Tr. at 19-22.) As a result of being hit in the eye with a rifle butt, he has problems with his vision. (Tr. at 24.) Petitioner states that he was told that he would be beaten to death if he ever tried to escape again. (Tr. at 19.) He testified that he is certain that he will be arrested and put in prison if he is returned to China. (Tr. at 28, 30.) He knows of others who were

imprisoned and who were mistreated. (Tr. at 37.) During the hearing, the Government raised a number of questions as to why petitioner had not mentioned his beatings by the Chinese army in earlier applications for asylum, see Note 3, supra, and why his sister and brother-in-law, who petitioner claimed were lawfully in the United States, had not come forward to support his claims. Petitioner's explained that other people had prepared the earlier applications for him because he could not read or write English and he was advised not to tell the government of his desertion from the Chinese army. He gave various explanations for the absence of support from his relatives, including that it was too far for them to travel and they had to work (Tr. at 64), that they could not speak English and cannot drive (Tr. at 65), and that they do not like to deal with other people (Tr. at 68).

Following the hearing, the IJ denied petitioner's application for relief under CAT, finding that petitioner had not met his burden of proof,⁴ that he did not testify credibly, and that he had not established the statutory and regulatory

⁴ The burden of proof is on the applicant for withholding of removal to establish that it is more likely than not that he would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2). Evidence to be considered in assessing whether it is more likely than not that an applicant would be tortured in the country of removal includes: evidence of past torture inflicted upon the applicant, evidence of gross, flagrant or mass violations of human rights within the country, and other relevant information regarding conditions in the country of removal. 8 C.F.R. § 208.16(c)(3)(i)-(iv); see also Thavarajah v. District Director, INS, No. 99-4120, 210 F.3d 355 (table), 2000 WL 427378, at *3-4 (2d Cir. Apr. 19, 2000).

requirements for relief under CAT. (Tr. at 75; Resp.'s Ex. W, IJ Decision dated Sept. 1, 1999.) Accordingly, Petitioner was ordered removed. (Resp.'s Ex. X, Order of Removal dated Sept. 1, 1999.) Petitioner appealed.

The BIA affirmed and dismissed the appeal. (Resp.'s Ex. Y, BIA Decision dated Apr. 25, 2000.) The BIA agreed with the IJ that petitioner had not met his burden of proving that it was more likely than not that he would be tortured if removed to China, see 8 C.F.R. § 208.16(b), but the BIA did not affirm the IJ's decision on the basis of the adverse credibility finding. (BIA Decision at 2-3.) Citing the definition of "torture" found in CAT and set forth in the Code of Federal Regulations,⁵ the BIA

⁵ The following definitions incorporate the definition of torture contained in Article I of CAT, subject to the reservations, understandings, declarations and provisos contained in the United States Senate's resolution, ratifying CAT.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to

noted that "torture" does not include pain or suffering arising only from or incidental to lawful sanctions, so long as those sanctions do not defeat the object and purpose of CAT. (BIA Decision at 3; see Note 4, supra.) The BIA found it significant that petitioner did not present any specific evidence concerning his past torture by the Chinese military until his 1999 application for relief under CAT, despite the fact that this information would have been relevant to his earlier applications for asylum and withholding of deportation or removal, and the BIA agreed with the IJ that the absence of this information in earlier applications raised serious questions as to whether petitioner was exaggerating his past history. (BIA Decision at 4.) The BIA's primary focus, however, was on fact that the alleged torture occurred or would occur in the context of military discipline and noted that "[i]t is almost axiomatic that the execution of a deserter by the military forces of a country is not persecution, and properly implemented, is not torture."

torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

8 C.F.R. § 208.18(a)(1), (2), (3).

(BIA Decision at 5.) The BIA concluded:

We do not question the [petitioner's] evidence that there has been torture in China, nor do we question his characterizations of that torture. However, we must decide cases on the specific facts presented. In this case, there is no evidence in the record that China tortures deserters from its military. In light of the basic needs of a military system to discipline its members, we are hesitant to ascribe the [petitioner's] characterization of torture to military discipline without more specific evidence. . . . Without more specific evidence, we are not persuaded by the [petitioner's] arguments.

(BIA Decision at 6.)

Petitioner then sought review of the final order of removal in the United States Court of Appeals for the Second Circuit.

(Resp.'s Ex. AA.) Pursuant to a stipulation between the parties, the appeal was withdrawn, subject to reinstatement, pending the Second Circuit's decision in Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. Sept. 1, 2000), aff'd, --- U.S. --, 121 S. Ct. 2268 (June 25, 2001).⁶ (Resp.'s Ex. BB.) On October 30, 2000, INS conducted a custody review and determined that petitioner should not be released for several reasons: (1) his conviction was for a

⁶ In Calcano-Martinez, the issue pending before the Second Circuit was whether the permanent rules under the IIRIRA barred courts of appeals from reviewing claims against final orders of removal filed by certain classes of criminal aliens. The Court ultimately held that they did preclude such review, but that they did not repeal a federal court's jurisdiction to hear challenges to removal orders by writ of habeas corpus pursuant to 28 U.S.C. § 2241. This decision was subsequently affirmed by the Supreme Court.

crime of violence in which a weapon was used;

(2) petitioner had failed to submit documentation evidencing close family ties in the United States, his employment history, education level, or vocational training; (3) the letter from his sponsor with whom he would reside, should he be released, gave the same address as his residence at the time of his arrest; and (4) INS interpreted petitioner's sworn statement that he would rather stay in jail than be killed or beaten and starved in China as an indication that he would not surrender to INS if released. Thus, INS concluded that petitioner was "considered to pose a threat and/or danger to the community & a flight risk." (Petition for Habeas Corpus Relief, Ex. 3.) Petitioner's custody status was to be reviewed again in six months.

Petitioner then filed this petition for habeas corpus relief. The Government responded with two primary arguments. First the Government asserts that this Court lacks jurisdiction to review petitioner's CAT claim. Second, focusing on the petitioner's lack of credibility, the Government argues that petitioner's claim has no merit.

Discussion

I. Jurisdiction

The Government asserts that § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") expressly grants exclusive jurisdiction in the Court of Appeals to review CAT

claims, and, therefore, this Court lacks jurisdiction over this matter. See FARRA, § 2242(d)(codified as Note to 8 U.S.C. § 1231); 8 C.F.R. § 208.18(e)(1) & (2).⁷ Citing this Court's decision in McDaniel v. INS, 142 F. Supp. 2d 219 (D. Conn. 2001), petitioner responds that despite this right of appeal to the Court of Appeals, this Court retains jurisdiction under the "general" habeas corpus statute, 28 U.S.C. § 2241, to review legal questions raised by his CAT claim.

We agree with the Government that this Court lacks jurisdiction to hear a direct appeal of the BIA's decision dismissing petitioner's CAT claim. FARRA expressly vests

⁷ The Code of Federal Regulations, 8 C.F.R. § 208.18(e), provides:

(1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.

jurisdiction over such appeals in the Court of Appeals as part of their review of final orders of removal under INA § 242, 8 U.S.C. § 1252. See 8 C.F.R. § 208.18(e)(1). However, we agree with petitioner that this Court has jurisdiction under the general habeas statute, 28 U.S.C. § 2241, to consider petitioner's CAT claim to the extent that he alleges that he is in federal custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); see McDaniel, 142 F. Supp. 2d at 223-24; Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1016, n.13 (9th Cir. 2000)(holding that FARRA did not limit habeas corpus review of CAT claims); Soto v. Ashcroft, No. 00 CV5986 AJP, 2001 WL 1029130, at *7 (S.D.N.Y. Sept. 7, 2001)(holding that the district court had jurisdiction under § 2241 to review petitioner's CAT claim insofar as he alleged that, as a matter of law, his return would violate the treaty); Merisier v. INS, No. 00 CIV 0393 GPD AJP, 2000 WL 1281243, at *11 (S.D.N.Y. Sept. 12, 2000) (same); see also Calcano-Martinez v. INS, - U.S. -, 121 S. Ct. 2268 (2001); INS v. St. Cyr, --- U.S. -, 121 S. Ct. 2271 (2001). Contrary to the Government's contention that Congress, in passing § 2242 of FARRA, spoke with "sufficient clarity to strip the district courts of jurisdiction" over § 2241 habeas petitions, we find nothing in the language of the Act or the legislative history that indicates that Congress clearly intended to forbid habeas review under § 2241. Absent a statement of such clear Congressional intent and guided by the

Supreme Court's holdings in St. Cyr and Calcano-Martinez, we hold that this Court has jurisdiction under § 2241 to hear petitioner's legal challenges to his removal.

II. Plaintiff's Entitlement to Relief Under CAT

In this case, petitioner challenges the denial of CAT relief on two grounds: (1) that the evidence presented before the IJ established that the Chinese government engages in gross, flagrant, and mass violations of the human rights of political and criminal prisoners, and, thus, petitioner carried his burden of proof on his CAT claim; and (2) that the BIA erred in holding that military discipline can never constitute torture under CAT.

As noted above, this Court does not sit as an appellate court to review the decision of the BIA. Our jurisdiction in ruling on petitioner's § 2241 habeas petition is far more circumscribed. Although the exact scope of our review of factual determinations is not at all well defined, see Soto v. Ashcroft, 2001 WL 1029130, at *7, it is clear that § 2241 does not vest this Court with the authority to review credibility determinations made by the IJ or to reweigh the evidence. A number of cases have applied a "substantial evidence" standard and have emphasized that the scope of our review under § 2241 is "exceedingly narrow." See Deng v. McElroy, No. 00-4148, 2001 WL 505738, at *2 & n.1 (2d Cir. May 10, 2001); Soto, 2001 WL 1029130, at *7.

Applying this standard to the facts of this case, we find that the BIA's determination that petitioner failed to carry his burden of proof was supported by substantial evidence. Contrary to petitioner's present contention, the BIA did not question petitioner's evidence that there had been torture in China, nor did it question his characterization of that torture. (BIA Decision at 6.) The BIA, however, was unwilling to ascribe the petitioner's "characterization of torture to military discipline without more specific evidence." We find no error of law in that regard.

The Regulations provide that, in assessing whether it is more likely than not that an applicant for relief under CAT would be tortured in the proposed country of removal, all evidence must be considered including evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country where he likely would not be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information regarding conditions in the country of removal. 8 C.F.R. § 208.16(c)(3). Petitioner offered little evidence other than his own testimony concerning the beatings he received after his first attempted desertion, that he had been told he would be beaten to death if he attempted to desert again, that he would be imprisoned if returned, and the fact that persons he knew had not fared well in Chinese prisons. Petitioner does not deny that he

was a military deserter. Further, he made no showing that he would be subjected to punishment other than that which would result from lawful sanctions imposed because of his second desertion from the military or that the punishment imposed would defeat the object or purpose of CAT. Petitioner did not carry his burden of proof in that regard.

As to petitioner's claim that the BIA erred as a matter of law in holding that military discipline can never constitute "torture" under CAT, petitioner overstates the holding of the BIA. In accordance with the definition of "torture" taken from Article I of CAT, the BIA recognized that "[t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions," although, as it noted, this exclusion does not apply to sanctions that defeat the object and purpose of CAT's prohibition on torture. See 8 C.F.R. § 208.18(a)(3). The BIA then cited cases in which it had held that conscription was not a form of persecution, and that execution of a deserter by military forces, if properly implemented, is not torture. (BIA Decision at 5.) Indeed, the BIA noted that the United States specifically recognizes that death is an appropriate punishment for desertion in time of war. Id. (citing U.C.M.J. Art. 85, 10 U.S.C. § 885). The BIA held, "[i]n light of the regulations implementing the Convention Against Torture, it is incumbent upon the [petitioner] to show that the threats of death were more than the threat of a lawfully imposed sanction

under Chinese law that would defeat the purposes of the convention." Id. at 6. Thus, the BIA did not hold that military sanctions can never violate CAT, as petitioner suggests. Instead, it recognized that punishment inflicted upon military personnel for desertion was a lawful sanction. It further found that petitioner had failed to carry his burden of proving that he would face punishment above and beyond that lawfully imposed, or that the punishment he would receive would defeat the underlying purpose of CAT. We find no error in the legal standard applied by the BIA, or in its finding that petitioner had failed to carry this burden.

III. Petitioner's Due Process Right to a Bond Hearing

The second challenge that petitioner raises in his habeas corpus petition is that his detention without an opportunity for a bond hearing violates his right to procedural due process.⁸ The government asserts that petitioner, as an alien who entered this

⁸ Because petitioner is subject to a final order of removal, his detention is governed by INA § 241, 8 U.S.C. § 1231, which states that "[u]nder no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B)." 8 U.S.C. § 1231(a)(2). "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. § 1231(a)(6). The Regulations, 8 C.F.R. § 241.4, govern the procedures to be followed during this period of detention beyond the removal period.

country illegally, has no constitutional rights. Relying on the Supreme Court's recent decision in Zadvydas v. Davis, - U.S. -, 121 S. Ct. 2491, 2500 (2001), the Government argues that an alien who has never been lawfully admitted into the United States is treated, for constitutional purposes, as if he were stopped at the border. (Gov't's Response at 51.) However, as petitioner points out, the Court in Zadvydas was discussing a case in which the alien had been refused admission to the United States and was being detained on Ellis Island. See Shaughnessy v. United States ex rel. Mezei, 342 U.S. 206, 215-16 (1953). The Court noted that the alien's presence on Ellis Island did not count as entry into the United States. Hence, the alien was treated, for constitutional purposes, as if stopped at the border. Zadvydas, 121 S. Ct. at 2500. Thus, the distinction drawn by the Court was between an alien who had entered the United States and one who had not. The Court did not hold, as the Government suggests, that an alien who has entered unlawfully has no constitutional rights. Indeed, the Supreme Court specifically held in Zadvydas,

[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders. . . . But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

Id. (internal citations omitted)(emphasis added); see also

Gutierrez-Parra v. Ashcroft, No. 3:01CV1183(AVC), slip op. at 3 (D. Conn. filed Oct. 4, 2001)(rejecting similar argument by Government); Badio v. United States, - F. Supp. 2d -, No. Civ. 01-1963(DSD/FLN), 2001 WL 1485632, at *4 (D. Minn. Nov. 21, 2001)(holding that it is well established that the Fifth Amendment entitles aliens to due process in deportation proceedings); Shaughnessy, 345 U.S. at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in the due process of law.")

Turning to the merits, we must evaluate petitioner's procedural due process claim under the test set forth in Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976), which requires us to consider the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Citing this Court's recent decision in Gutierrez-Parra (Covello, J.), petitioner argues that his interest in freedom from mandatory detention warrant that he receive a bond hearing before an IJ. That case, however, is factually distinguishable from the instant case. There, the petitioner was held in custody

pending a removal hearing, at which he intended to argue that his felony conviction, which would normally render him inadmissible, was waivable based on a showing of family hardship. The Court concluded, "[a]s long as a waiver from deportation is potentially available to the petitioner, this country remains the petitioner's home and accordingly, the petitioner enjoys a due process right to be free from detention without a bond hearing." Id. at 7. In the instant case, however, petitioner has already been ordered removed and has exhausted all appeals in that regard. The only possible avenue for relief from removal is through this habeas petition. This Court has determined that petitioner is not entitled to relief under CAT. Petitioner's only remaining avenue of relief is through an appeal of this Court's decision. If the Second Circuit deems it appropriate, it may enter a stay of removal. However, because petitioner is already subject to a removal order and China has agreed to accept his return, petitioner is no longer entitled to remain in the United States. His private interest in freedom from incarceration is minimal. See Parra v. Perryman, 172 F.3d 954, 957-58 (7th Cir. 1999).

Moreover, in this case, petitioner does not face the prospect of an extended period of detention without the opportunity for a bail hearing. The Government represents that, following the BIA's affirmance of the Order of Removal on April 25, 2000, it was prepared to remove petitioner and had obtained

approval from China to do so. Its efforts in that regard were delayed by the ensuing appeals and petitioner's requests for a stay. The Government agreed not to recommence the removal process until this Court renders a decision on this habeas petition. Once it is notified of this Court's ruling, the Government states that it can remove the petitioner within thirty days. (Response to Pet. for Writ of Habeas Corpus at 45, n.8.) Based upon this representation that removal will occur in a reasonably short period of time and that China is willing to accept petitioner's return, petitioner does not face the prospect of an indefinite detention, unlike the detainee in Zadvydas.

Turning to the other factors that we are required to consider under Mathews, 424 U.S. at 335, we find that there is little probability of error, because the removal order is final and petitioner does not dispute his convictions. See Yanez v. Holder, 149 F. Supp. 2d 485, 493 (N.D. Ill. 2001). Additionally, the Government has a substantial interest in safeguarding the public from criminal aliens and in ensuring that criminal aliens, who have an obvious motivation to flee, will be present when it is time for them to be removed. Id. at 494. Moreover, petitioner has already received at least one or more custody status review hearings, see 8 C.F.R. § 241.4, at which it was determined that he posed a threat or danger to the community and a flight risk. This Court finds that there has been no violation of petitioner's due process rights in not providing him with a

bail hearing.

Conclusion

Accordingly, petitioner's Petition for Writ of Habeas Corpus
is DENIED.

SO ORDERED.

Dated: December 7, 2001.
Waterbury, Connecticut.

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