

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JUAN M. BENITES-RODRIGUEZ,
Petitioner,

v.

ALBERTO GONZALEZ, ET AL.,
Respondents.

CIVIL ACTION NO.
3:04cv1961 (SRU)

RULING ON MOTION TO TRANSFER

Petitioner Juan M. Benites-Rodriguez initiated this proceeding by filing, in the Second Circuit Court of Appeals, a petition for review of the Board of Immigration Appeals ("BIA") decision denying his application for cancellation of removal and his motion for suspension of deportation. The Court of Appeals transferred the petition to this court with instructions to "construe Petitioner's submissions as a petition brought pursuant to 28 U.S.C. § 2241 and address whether the BIA erred in failing to consider whether Petitioner was entitled to suspension of deportation under former 8 U.S.C. § 1254." Order of Transfer (Nov. 5, 2004) (citing *Restrepo v. McElroy*, 369 F.3d 627, 638-39 (2d Cir. 2004)).

Respondent Alberto Gonzales has moved to transfer the proceeding back to the Court of Appeals, pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, Division B ("REAL ID Act"). For the reasons that follow, the motion to transfer (doc. # 37) is denied.

I. Background

Benites-Rodriguez is a native and citizen of Peru, who entered the United States on or about October 26, 1989. He was served on September 19, 2000, with a Notice to Appear charging him with removability as an alien present in the United States without being admitted or paroled. *See* 8 U.S.C. § 1182(a)(6)(A)(i). Benites-Rodriguez conceded removability, but sought

cancellation of removal and moved for suspension of deportation.

On July 12, 2001, an Immigration Judge denied the application for cancellation of removal in an oral decision. Benites-Rodriguez filed a notice of appeal with the BIA. On May 1, 2002, the BIA affirmed the Immigration Judge's decision per curiam, without opinion. On May 29, 2002, Benites-Rodriguez filed a petition for review of the BIA's decision with the Second Circuit Court of Appeals. In a November 5, 2004 order, the Second Circuit denied the respondents' motion to dismiss the petition, and transferred that petition to this court. In the transfer order, the Second Circuit ordered that: "The District of Connecticut shall construe Petitioner's submissions as a petition brought pursuant to 28 U.S.C. § 2241 and address whether the BIA erred in failing to consider whether Petitioner was entitled to suspension of deportation under former 8 U.S.C. § 1254; *cf. Restrepo v. McElroy*, 369 F.3d 627, 638-39 (2d Cir. 2004)." After the parties had briefed the merits of the petition, the REAL ID Act of 2005 was enacted into law. On July 13, 2005, respondent Alberto Gonzales filed a notice of applicability of the REAL ID Act and moved to transfer this case to the Court of Appeals under the provisions of that statute.

II. Discussion

Section 106 of the REAL ID Act requires a district court to transfer to the court of appeals any petition for habeas corpus that challenges an order of removal, deportation or exclusion. Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 310-11 (May 11, 2005) (amending 8 U.S.C. § 1252); *Marquez-Almanzar v. I.N.S.*, 418 F.3d 210, 212 (2d Cir. 2005). Once transferred under the REAL ID Act, the habeas petition will then be treated as if it were a petition for review filed initially in the court of appeals. Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 310-11 (May

11, 2005) (amending 8 U.S.C. § 1252); *Marquez-Almanzar*, 418 F.3d at 212. Gonzales argues that Benites-Rodriguez’s petition for review, “although transferred to the District Court by the Second Circuit” should be transferred back to the Second Circuit because this court was directed to treat the petition for review as a petition for habeas corpus relief. I disagree.

First, the REAL ID Act does not apply here by its own terms. *See* Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 310-11 (May 11, 2005) (amending 8 U.S.C. § 1252). Benites-Rodriguez did not file a habeas petition in the district court; he filed a petition for review in the court of appeals. The fact that the Second Circuit transferred the petition for review to this court changes nothing. The REAL ID Act does not prohibit transfers or remands from the court of appeals to the district court. Nor does the fact that the Second Circuit directed that I treat the petition for review as a habeas petition transform the petition for review into a habeas corpus petition improperly filed in the district court.

Second, at this point, no purpose would be served by a transfer back to the court of appeals. A habeas petition challenging deportation must be transferred to the court of appeals, where it will be treated as a petition for review. Here, Benites-Rodriguez did what the REAL ID Act requires, he filed a petition for review in the court of appeals. The Second Circuit considered that petition and transferred it to this court. The purpose of the REAL ID Act has been met; no habeas petition has been improperly filed in this court, and the court of appeals has considered the petition for review and determined that it should be decided in this court in the first instance. The only effect of transferring the present petition back to the Second Circuit will be to delay deciding the merits of that petition. I must assume that the Second Circuit meant what it said and, if I were to grant the motion to transfer, the Second Circuit would simply transfer it – for a

third time – back to this court for decision. If I am wrong about that, the Second Circuit can soon say so on appeal from the decision on the merits.

III. Conclusion

Thus, because neither the language nor the purpose of the REAL ID Act supports the motion to transfer, that motion (doc. # 37) is DENIED.

It is so ordered.

Dated at Bridgeport, Connecticut, this 23rd day of February 2006.

/s/ Stefan R. Underhill

Stefan R. Underhill
United States District Judge