

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JULIO CESAR PEREZ-PEREZ, : CIVIL ACTION
: NO. 99-1814
Petitioner, :
:
v. :
:
IMMIGRATION & NATURALIZATION, :
SERVICE, et al., :
:
Respondents. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

JULY 20, 2000

Petitioner, an Immigration and Naturalization Service ("INS") detainee, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging his continued detention pending deportation. Petitioner contends that the INS' actions in indefinitely detaining him violate his Fifth and Eighth Amendment rights. After receiving respondents' response to the petition, the court referred the matter to United States Magistrate Judge Jacob Hart for a report and recommendation. The Magistrate Judge, having reviewed the available record, recommended that the petition be denied, finding that respondent's detention of petitioner did not violate petitioner's constitutional rights.

Title 28 U.S.C. § 636 requires a district court to "make a de novo determination of those portions of the

[magistrate judge's] recommendations to which objection is made." The district court is authorized to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Id. In this case, the petitioner did not file any objections to the report and recommendation. However, given that the petitioner is pro se and in light of the legal developments occurring after the issuance of the report and recommendation and in the interest of justice, the court has reviewed the entire record and the parties' submissions in the absence of objections.

I. BACKGROUND

In August of 1981, petitioner, a Cuban national, was paroled into the United States.¹ Petitioner's immigration status immediately following his parole, however, is unclear from the record currently before the court.² What is clear is that in December of 1985, petitioner was convicted by a New Jersey state court of four counts of first degree armed robbery and possession of a weapon and sentenced to a term of twenty years imprisonment

¹ "Parole" as used here and in the context of an alien's initial entry denotes permission by the Attorney General for entry into the United States but does not constitute a formal admission. In this sense, "parole" is different from the conventional sense of parole in the context of incarceration. Ngo, 192 F.3d at 392 n.1.

² Respondents, without pointing to any evidence in the record, claim that petitioner then fled.

with a "no parole" term of ten years.³ After petitioner served eight years, he was located and identified by the INS as an illegal alien. At an exclusion hearing held on July 12, 1993, an immigration judge ordered petitioner deported to Cuba. The Board of Immigration Appeals affirmed the deportation order on October 8, 1993. In October of 1995, petitioner was released from the state prison system, at which point he became an INS detainee. Petitioner has remained in detention since that time and has not been deported to Cuba because apparently Cuba refuses to take him back.

II. DISCUSSION

From the records provided by respondents, it appears that the INS first reviewed petitioner's custody status in July of 1998. See Respondents' Resp., Ex. 1. At that review, petitioner apparently presented evidence that he had obtained his GED while in prison, that he had a job waiting for him upon his release, and that he had a familial network in the United States. See Attachments to Pet. Based on an interview with petitioner, two members of a three-member panel recommended that petitioner be released. See Respondents' Resp., Ex. 1. Upon further review, however, a deportation officer, a supervisory deportation

³ Petitioner thus qualifies as an "aggravated felon" for removal/exclusion purposes. See 8 U.S.C. § 1101(a)(43)(F).

officer, and the Assistant Director for Deportation determined, based on the nature of petitioner's 1985 conviction, that he posed a threat to the community and thus recommended further detention.⁴ Id. The Acting District Director of the INS affirmed the latter recommendation of detention. Id.

It further appears that petitioner's custody status was next reviewed in February of 1999. Id. The "Review for Release" form completed by INS officials after the hearing noted only the crime of which petitioner had been convicted in 1985. In response to the question, "Based upon this review, should this subject be considered a danger to the community if released? Please explain," the reviewer simply wrote, "Yes - history of violence." Id. No further information or explanation was provided. That review was later approved by the INS' Acting District Director. Id.

Petitioner then filed the instant petition in which he raised what the Magistrate Judge and respondents construed to be a due process argument.⁵ After the Magistrate Judge issued his

⁴ In so doing, the reviewing officials completed what is labeled a "Criminal Custody Worksheet," by which petitioner was assigned a grade based on the severity of the offense, type of prior felony convictions, history of escapes, history of violence, and institutional adjustment. Petitioner received a grade of six, based completely on his offense of conviction, a grade which fell just within the high end of the range for recommended release. See Respondents' Resp., Ex. 1.

⁵ The Illegal Immigration and Reform and Immigrant Responsibility Act ("IIRIRA") of 1996 provides that criminal

report and recommendation denying the petition, the Third Circuit decided Ngo v. Immigration & Naturalization Service, 192 F.3d 390 (3d Cir. 1999). In Ngo, the Third Circuit held that “[e]ven an excludable alien is a ‘person’ for purposes of the Fifth Amendment and is thus entitled to substantive due process.”⁶ Id. at 396. The court concluded, nonetheless, that the INS’ prolonged detention of excludable aliens who have committed serious crimes is constitutional so long as the INS provides “individualized periodic review” of the alien’s eligibility for release on parole.⁷ Id. at 392. The Third Circuit stated, “When detention is prolonged, special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable.” Id. at 398. At oral argument in Ngo, the INS informed the Third

aliens be detained during removal proceedings, which should take approximately ninety days. See 8 U.S.C. § 1231(a)(2). If removal is not completed within the ninety days, the Attorney General retains the discretion to detain aliens believed to be a danger to the community or a risk of flight. See 8 U.S.C. § 1231(a)(6).

⁶ Because petitioner was merely “paroled” into the United States in 1981, both respondents and the Magistrate Judge refer to petitioner as an excludable alien. Cf. Ngo, 192 F.3d at 392, 396 (classifying native of Vietnam who was paroled into the United States as excludable alien). Petitioner does not dispute this characterization. The court notes that amendments to the IIRIRA now refer to “inadmissible” aliens rather than “excludable” aliens.

⁷ At issue in Ngo was whether the Attorney General was under any time restraints, imposed by due process, in which to remove an alien. See 8 U.S.C. § 1231.

Circuit that it had adopted Interim Rules to be followed when assessing the need for continued detention of an excludable alien.⁸ Id. at 399. The Third Circuit approved of those Interim Rules, concluding that compliance with such rules would satisfy the due process concerns accompanying indefinite detention of excludable aliens. Id. Thus, Ngo rendered the discussion by the Magistrate Judge in his report and recommendation concerning due process as it relates to the detention of excludable aliens in this case largely moot.

Applying the teachings of Ngo to the current record, the court finds Ngo almost indistinguishable from the instant case. Ngo was a Vietnamese national who was also paroled into the United States and who was held in custody by the INS for nearly five years. Although the INS reviewed Ngo's custody status periodically, the court held that "repeated[] deni[al] of parole by INS officials based on no more than a reading of his file that listed years-old convictions for firearm, attempted robbery, and bail jumping offenses," was inadequate. Id. at 398. The court found the INS at odds with due process considerations for not inquiring as to the circumstances surrounding the bail

⁸ The Interim Rules contain, inter alia, provisions for six-month reviews, annual personal interviews, prior written notification of the reviews, notice of the option to be represented by an attorney and to introduce evidence, review of the decision by INS headquarters, refusal to presume continued detention based upon criminal history, and a written explanation for a custody decision. See Ngo, 192 F.3d at 399-401.

jumping, not determining whether petitioner was likely to repeat such conduct, and for simply citing to the petitioner's nearly ten-year old convictions as justification for detention. Id. "Due process is not satisfied ... by rubberstamp denials based on temporally distant offenses." Id. As a remedy, the Third Circuit ordered the district court to grant Ngo's petition and release him unless, within thirty days, the INS began the review process outlined in the INS' Interim Rules, appended to the Ngo opinion. Id. at 399.

Likewise, here, in the two reviews of petitioner's custody status that it apparently did hold, the INS merely pointed to petitioner's now fifteen-year old conviction for armed robbery and concluded that he had a history of violence. No inquiry, at least from the current record, appears to have been made into any other factors or into petitioner's behavior since the time of his fifteen-year-old conviction as support for continuing detention. Cf. id. at 398-99 ("To presume dangerousness to the community and risk of flight based solely on his past record does not satisfy due process."). Thus, on this record, the review of petitioner's custody status comes dangerously close to the proverbial rubber-stamping referred to in Ngo.⁹

⁹ Although petitioner entered the United States directly from Peru in 1981, it may be that, during the course of his two reviews, he may have been treated by the INS as a 1980 Mariel

III. CONCLUSION

Because Ngo was decided subsequent to the issuance of the Magistrate Judge's report and recommendation, respondents should be given an opportunity to establish their compliance with the "rigorous review" outlined in the INS' Interim Rules and expanded upon in Ngo. Id. at 398 (noting that "grudging and perfunctory review is not enough to satisfy" due process). Therefore, the matter shall be remanded to the Magistrate Judge for further proceedings to determine whether respondents have complied with the Interim Rules and the teachings of Ngo.

An appropriate Order shall issue.

Cuban, subject to the rules applicable to Mariel Cubans, rules which later formed the basis for the Interim Rules announced by the INS in Ngo. On remand, the Magistrate Judge should have the INS address under what rules of procedure were the reviews conducted in this case.

EDUARDO C. ROBRENO, J.