

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

BOWLEY GARY : CIVIL ACTION  
 :  
 v. :  
 :  
 :  
 U.S. IMMIGRATION AND :  
 NATURALIZATION SERVICE : NO. 00-3775

M E M O R A N D U M

DUBOIS, J.

AUGUST 29, 2000

On July 26, 2000, Bowley Gary, an inmate at Montgomery County Correctional Facility in Norristown, Pennsylvania, filed an Application for Leave to Proceed In Forma Pauperis and a Pro Se Petition for Writ of Mandamus pursuant to 28 U.S.C. § 1361 against the United States Immigration and Naturalization Service ("INS"). In the Petition for Writ of Mandamus, he seeks an order directing the INS to deport him to his "native land"<sup>1</sup> pursuant to a deportation order issued in November, 1999.<sup>2</sup> Petitioner complains that he is being improperly held in custody in view of the deportation order. In the alternative, petitioner seeks an order directing that he be released because he has been in custody more than ninety days since issuance of the deportation order and he is

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1. Petitioner does not identify his "native land".

2. Petitioner did not provide the Court with a copy of the deportation order.

not a risk of harm to the community and has employment prospects in this country. The Petition goes on to state that petitioner believes he is being held in INS custody in order to provide "jobs to American citizens" and that the six month review afforded to detainees while in custody is a "sham". Lastly, he seeks money damages in the event the INS does not deport him within the time specified in this Court's order.

It appears from petitioner's Application to Proceed In Forma Pauperis that petitioner is unable to pay the cost of commencing this action. Accordingly, leave to Proceed In Forma Pauperis is granted.<sup>3</sup> However, for the reasons which follow, this action will be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

#### **I. DISCUSSION**

Petitioner filed his Petition for Writ of Mandamus under 28 U.S.C. § 1361. This statute grants federal courts "jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The writ of mandamus is intended to provide a remedy for a petitioner "only if he has exhausted all other avenues of relief and only if the [respondent] owes him a

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3. Petitioner will not be required to comply with the provisions of 28 U.S.C. § 1915(a)(2) because a mandamus action is not considered a civil action. See Madden v. Myers, 102 F.3d 74 (3d Cir. 1996).

clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616 (1984).

Mandamus is considered an "extraordinary remedy", Mallard v. U.S. District Court for the Southern District of Iowa, 490 U.S. 296, 308 (1989), and a "drastic remedy that is 'seldom issued and its use is discouraged'". In re Patenaude, 210 F.3d 135, 140 (3d Cir. 2000) (citations omitted). Mandamus should only be issued if there is a "clear abuse of discretion" or "usurpation of the judicial power." Mallard, 490 U.S. at 309 (citations omitted); In re Roberts, 178 F.3d 181, 183 (3d Cir. 1999).

Title 8 U.S.C. § 1231(h) of the Immigration and Nationality Act of 1952, as amended, ("INA") governs the detention and removal of aliens who have been ordered removed. That statute provides that "nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."

The courts have consistently held that neither the language nor the legislative history of § 1231(h) or its predecessor sections create a private cause of action on the part of an alien seeking to expedite his deportation. See United States v. Marin-Castaneda, 134 F.3d 551, 556 (3d Cir.), cert. denied, 523 U.S. 1144 (1998); Perez v. INS, 979 F.2d 299, 301 (3d Cir. 1992).

See also Barbaro v. INS and Doheny, No. 99-5318 (E.D. Pa. Dec. 6, 1999) (dismissing Petition for Writ of Mandamus as frivolous).

Section 1231(h) and the cases interpreting it make it absolutely clear that the INA does not provide inmates with a private right of action against the Attorney General, officials of the INS or the INS in order to compel deportation. Accordingly, the mandamus action to compel petitioner's immediate deportation or for compensation for lack of prompt compliance with an order directing petitioner's removal must be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

Plaintiff is claiming, in the alternative, that he is entitled to immediate release pending his removal from this country. That claim is likewise legally frivolous under 28 U.S.C. § 1915(d)(2)(B)(i). A request for such relief may only be brought in a petition for writ of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475 (1973); Chi Thon Ngo v. INS, 192 F.3d 390 (3d Cir. 1999).

An appropriate order follows.

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O R D E R

AND NOW, to wit, this 29<sup>th</sup> day of August, upon consideration of the Petition of Bowley Gary for a Writ of Mandamus Pursuant to 28 U.S.C. § 1361 and the accompanying Application for Leave to Proceed In Forma Pauperis, **IT IS ORDERED** as follows:

1. The Motion of Petitioner, Bowley Gary, for Leave to Proceed In Forma Pauperis is **GRANTED**;

2. The action is **DISMISSED** as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i); and

3. A certificate of appealability will not be granted because petitioner has not made a substantial showing of a denial of a constitutional right. (28 U.S.C. § 2253(c)).

**BY THE COURT:**

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JAN E. DUBOIS, J.