

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

ALESKANDR CHMAKOV,	:	CIVIL ACTION
NADEJDA CHMAKOVA and	:	
DENIS CHMAKOV,	:	NO. 00-2128
Petitioners,	:	
	:	
v.	:	
	:	
J. SCOTT BLACKMAN, DISTRICT	:	
DIRECTOR OF IMMIGRATION AND	:	
NATURALIZATION SERVICE, :	:	
Respondent.	:	

MEMORANDUM

BUCKWALTER, J.

June 27, 2000

The Petitioners are natives and citizens of Uzbekistan. According to the Immigration and Naturalization Service (INS), they entered the United States on October 3, 1994 as visitors for pleasure. As non-immigrant tourists, their temporary status expired. Thus, in May of 1998, the INS commenced removal proceedings against them. The Petitioners applied for political asylum, but this application was denied by the Immigration Judge (IJ) on January 11, 1999.

A timely appeal was filed to the Board of Immigration Appeals (BIA), which dismissed the appeal in a per curiam order dated January 14, 2000. According to the Petition, it appears that on or about March 27, 2000 a Motion to Reopen and

Reconsider was filed with the Board of Immigration Appeals. On the same date, Petitioners applied to the INS for a stay of deportation and/or voluntary departure, pending the outcome of the Motion to Reopen. At least as of June 22, 2000, the date of oral argument before this court, no action has been taken on the motion by the BIA.

In addition to the motion aforesaid, Petitioners have filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C.A. § 2243, although it appears they mean § 2241. On April 28, 2000, I granted a stay of deportation until further order of the court. The basis of their claim is ineffective assistance of counsel. According to their brief, the counsel who represented Petitioners up to and including the appeal to the BIA failed to file a timely brief in the appeal of their asylum claim and therefore deprived them of the opportunity to effectively present a colorable claim to the BIA.

The colorable claim Petitioners had, which was not presented to the BIA follows:

1) The Immigration Judge misapplied the law. The Immigration Judge did not recognize that the numerous instances of mistreatment and discrimination that the Respondents encountered rose to the level of persecution, as contemplated in the Matter of O-Z- & I-Z-, Interim Decision 3346 (BIA 1998). Respondents testified as to beatings and illegal arrest by Uzbek police of Alexander [sic] Chmakov, due to his being Russian, and not Uzbek, i.e. due to his national origin. Transcript of the Immigration Court Proceedings before the Honorable Donald V. Ferlise, at 144-148. Immigration Judge apparently took this illegal arrest lightly, noticing that “[the authorities] stop everyone. And they couldn’t tell by looking at [Alexander Chmakov] that you are not Uzbek. Looking at you, you could be American for all that matters.” Transcript of the Immigration Court Proceedings before the Honorable Donald V. Ferlise, at 161. This statement is superfluous. It is a fact of common knowledge that Uzbeks are people of Turkish origin, dark skinned and dark haired. Encyclopedia Britannica, Illustrated Edition, 1999. Alexander [sic] Chmakov is of Slavic origin, he is light-haired, light-skinned individual. Consequently, it would be evidence for his attackers that he was Russian, and not Uzbek. The Immigration Judge clearly took this issue lightly in the present case.

Similarly, the Immigration Judge discounted an incident where the Uzbek nationalists severely beat Alexander Chmakov and vandalized his car. Transcript of the Immigration Court Proceedings before the Honorable Donald V. Ferlise, at 142-144. Alexander Chmakov was hospitalized for his injuries. *Id.* Alexander Chmakov filed a complaint with the police, but had to withdraw it upon further threats by Uzbek nationalists, supported by the Uzbek police themselves. *Id.*

The Immigration Judge discounted refused [sic] to consider multiple incidents of Mr. Alexander Chmakov's mistreatment at work, due to his national origin. Transcript of the Immigration Court Proceedings before the Honorable Donald V. Ferlise, at 134. The Immigration Judge discounted Alexander Chmakov's testimony as to this issue, by stating that "the respondent testified that four times he was promoted [sic] and also received four pay raises." The Immigration Judge failed to consider Alexander Chmakov's statement that the persecution and mistreatment based on his national origin started in 1989, after the nationalistic riots in the Uzbek town of Ferghana. Accordingly [sic], the raises and promotions Alexander Chmakov received at the Architectural Institute during his 20 years of work at the Institute prior to 1989 would be completely irrelevant to his asylum claim. As to the events after 1989, Alexander Chmakov testified that he was denied bonuses and pay raises based on his national origin. Transcript of the Immigration Court Proceedings before the Honorable Donald V. Ferlise, at 134.

The events Alexander Chmakov testified to, clearly amount to the history of past persecution. The Immigration Judge did not challenge Alexander Chmakov's credibility. Consequently, due to credible evidence of past persecution, the Immigration Judge should have applied a presumption of a well-founded fear of persecution, because INS was unable to establish, by a preponderance of the evidence establishes that, conditions in the respondent's country have changed to such an extent that he no longer has a well-founded fear of being persecuted in that country. Matter of H-, Interim Decision 3276 (BIA 1996).

In its response, the government argues that the Petition should be dismissed for two reasons:

- (1) Failure to state a claim upon which relief can be based; or
- (2) Lack of subject matter jurisdiction.

With regard to the first reason, counsel for both parties cite Castaneda-Suarez v. INS, 993 F.2d 142, for the proposition that an alien may have a viable claim of ineffective assistance of counsel where counsel is "so ineffective as to have impinged upon the fundamental fairness of the [deportation proceedings] in violation of the Fifth

Amendment due process clause.” Due process challenges also require a showing of prejudice to succeed. Getachew v. INS, 25 F.3d 841, 845 (9th Cir. 1994).

The sole relief Petitioner seems to be requesting is that this court order a stay of deportation at least pending the disposition of their Motion to Reopen and Reconsider. I would be persuaded to grant that relief under the reasoning in Castro-Carvache v. INS, 911 F.Supp. 843 (E.D. Pa. 1995)¹, but for my belief that the government is correct as to its second argument.

The law which deprives this court of jurisdiction is set forth in 8 U.S.C. § 1252(g) (INA 242(g)) as follows:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Of course, what Petitioners are seeking to do in this court arises from the Attorney General’s proposed action to execute a removal order.² Such an action is

1. Judge Pollak said in Castro-Carvache:

I am not prepared to assume that competent counsel could not have -- by brief, before the Board of Immigration Appeals -- put a better face on the record actually made before the Immigration Judge, than Mr. Castro was able to, in what the Board of Immigration Appeals characterized as a *pro forma* statement of issues. These are issues of great constitutional moment that cannot be shut off from inquiry by an administrative denial of a motion for a stay of deportation. And, by the same token, these are issues that should not, in my judgment, be assessed anticipatorily by a district court before they are scrupulously examined by the responsible administrative tribunal, in this instance, the Board of Immigration Appeals.

2. The removal order’s effective date at least as of the time this petition was filed was 30 days after April 24, 2000. A letter from INS to Petitioners’ present counsel dated April 20, 2000 stated, “Due to short notice of this denial, voluntary departure for all three respondents will be extended for an additional thirty days beginning April 24,

(continued...)

covered under § 1252(g), *supra*. See Reno v. American Arab Antidiscrimination Committee, 525 U.S. 471 (1999).

An exception to § 1252(g) provides that judicial review of a final order of removal as in this case is by a timely filed petition for review before the Court of Appeals. See 8 U.S.C. § 1252(a)(1) which provides in part:

Judicial review of a final order of removal . . . is governed only by Chapter 158 of Title 28 . . . except as provided in subsection (b) of this section

There does not appear to be clear Third Circuit authority on the jurisdictional issue in this case. My decision is not inconsistent with Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999), Catney v. INS, 178 F.3d 190 (3d Cir. 1999), DeSousa v. Reno, 190 F.3d 175 (3d Cir. 1999), or Liang v. INS, 206 F.3d 308 (3d Cir. 2000), which deal with an altogether different issue; namely, 8 U.S.C. § 1252(a)(2)(C) (INA § 242(a)(2)(C)), which provides:

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

2. (...continued)
2000.”

The above section on its face abolishes all review. This apparently in part led to the holding in Sandoval that for reasons stated therein § 1252(g) does not eliminate 2241 habeas jurisdiction in a district court over a claim by an alien with a criminal conviction.³ Petitioners do not fit into that category.

Since Petitioners may avail themselves of a petition for review of a final order of removal by filing the same with the Court of Appeals, I do not believe that the same consideration that prompted Sandoval, *et al.*, are present.

An order follows.

3. Liang, the most recent of the four cases cited above, concluded as follows:

Because we lack jurisdiction under INA § 242(a)(2)(C) over the petitions for review brought by Cinquemani, Rodriguez, and Liang challenging their final orders of removal, the petitions will be dismissed without prejudice to Rodriguez's pending petition under 28 U.S.C. § 2241 for a writ of habeas corpus.

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J. SCOTT BLACKMAN, DISTRICT	:	
DIRECTOR OF IMMIGRATION AND	:	
NATURALIZATION SERVICE, :	:	
Respondent.	:	

ORDER

AND NOW, this 27th day of June, 2000, it is hereby ORDERED that the
Petition for Writ of Habeas Corpus is DISMISSED for lack of subject matter jurisdiction.

BY THE COURT:

RONALD L. BUCKWALTER, J.