

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

NOEL ATKINSON : CIVIL ACTION  
 :  
 v. :  
 :  
 IMMIGRATION AND :  
 NATURALIZATION SERVICE : NO. 02-705

MEMORANDUM ORDER

This is a habeas corpus action. Petitioner seeks release from INS custody pending his removal from the United States.

Petitioner is a lawful permanent resident and a citizen of Jamaica. He pled guilty in a New York state court on June 29, 1990 to possession of a controlled substance. He was sentenced to one year imprisonment and served eight months. Petitioner pled guilty in a New York state court in November 1994 to robbery. He was sentenced to three to six years of imprisonment and served four years.

On December 22, 1995, the INS initiated deportation proceedings pursuant to 8 U.S.C. §§ 1251(a)(2)(A)(iii) and 1251(a)(2)(B)(i), providing respectively for deportation upon conviction of an aggravated felony and a controlled substance offense.<sup>1</sup> Petitioner had a deportation hearing on June 13, 1996 before an Immigration Judge ("IJ") who found petitioner subject

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<sup>1</sup> In 1996, 8 U.S.C. § 1251 was renumbered to 8 U.S.C. § 1227. The government ultimately proceeded only on the basis of petitioner's narcotics conviction. See Atkinson v. INS, 2001 WL 1223481, \*1 (S.D.N.Y. Oct. 15, 2001).

to deportation and declined consideration of a wavier under 8 U.S.C. § 1182(c).<sup>2</sup>

Petitioner appealed the IJ's decision to the Board of Immigration Appeals ("BIA") which affirmed that decision on February 25, 1997. Petitioner then filed a petition for review in the Second Circuit Court of Appeals. On May 6, 1997, the Circuit Court transferred the matter to the District Court for review as a habeas petition. While the petition was pending, the Second Circuit held in a separate case that the 1996 revisions to § 1182(c) did not apply retroactively to cases pending when the waiver provision was amended. In light of this decision, the petitioner's habeas petition was dismissed and the matter remanded to the BIA to reconsider whether petitioner was eligible for a waiver.

The BIA found that petitioner was eligible for a waiver and remanded his case to the IJ on November 29, 1999. The IJ denied any relief pursuant to § 1182(c) on August 4, 2000. Petitioner appealed and the BIA affirmed the IJ's decision on February 26, 2001, at which time the removal order became final.

Once the INS received the required travel documents from the Jamaican government, it attempted to effect petitioner's removal on three separate occasions. Petitioner's first scheduled removal on April 23, 2001 was obstructed when he tore

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<sup>2</sup> Section 1182(c) was subsequently repealed on September 30, 1996.

up and swallowed the travel documents. Petitioner's next scheduled removal on May 29, 2001 did not occur because of overbooking of the selected flight. Petitioner's scheduled removal on June 28, 2001 was prevented by a stay he obtained in the Southern District of New York on June 27, 2001 in connection with a second habeas petition.

On August 20, 2001, while petitioner's second habeas petition was pending in the District Court, the INS conducted a "Post-Order Custody Review."<sup>3</sup> The INS officer conducting the review ultimately recommended that petitioner remain in custody because he posed a "significant flight risk." The District Court dismissed petitioner's second habeas petition on October 15, 2001. Petitioner has appealed that decision to the Second Circuit.<sup>4</sup>

On February 11, 2002, petitioner filed the instant action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He asserts that his detention is "prolonged, indefinite and unlawful" and in violation of his due process right to liberty. Petitioner seeks release on his own recognizance and "a declarative injunctive stay of transfer out of this court's jurisdiction."

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<sup>3</sup> Petitioner also had a custody review on June 28, 1999.

<sup>4</sup> It appears that the stay issued in New York remains in effect pending resolution of petitioner's appeal.

After an order of removal is issued, the Attorney General shall remove the alien from the United States within ninety days. See 8 U.S.C. § 1231(a)(1)(A). If removal is stayed to allow for judicial review, the ninety-day period begins to run on the date of the court's final order. See 8 U.S.C. § 1231(a)(1)(B)(ii). The detention of an alien subject to an order of removal for ninety days while the order is effectuated clearly comports with due process. See Zadvydas v. Davis, 121 S. Ct. 2491, 2505 (2001) (adopting presumption of reasonableness of detention for six months to effectuate order of removal).

Petitioner's order of removal became final on February 26, 2001. Petitioner's removal had been scheduled three times in the six months following that date and on two occasions did not occur because of his own obstructive actions. Petitioner cannot secure release from detention which has been prolonged beyond the ninety-day removal period or presumptively reasonable six-month period because of a judicial stay entered at his request to block his removal pending resolution of a habeas petition. See Ma v. Ashcroft, 257 F.3d 1095, 1104 n.12 (9th Cir. 2001); Michel v. INS, 119 F. Supp. 2d 485, 497-98 (M.D. Pa. 2000). See also Copes v. McElroy, 2001 WL 830673, \*6 (S.D.N.Y. July 23, 2001); Lawrence v. Reno, 2001 WL 812242, \*1 (S.D.N.Y. July 18, 2001).

There is no showing that the custody review afforded petitioner did not comport with due process. Petitioner was interviewed. Letters and other documents submitted by petitioner

were accepted and reviewed. The INS official conducting the review completed a custody review worksheet and explained his findings. In view of the record, the conclusion that petitioner poses an undue risk of flight also seems quite reasonable.

In a reply brief, petitioner also challenged the constitutionality of § 236(c) of the Immigration Act which provides for the mandatory detention of certain criminal aliens. See 8 U.S.C. § 1226(c). Section 1226(c)(1)(A) provides that "the Attorney General shall take into custody any alien who is deportable by reason of having committed any offense covered in section 1182(a)(2) of this title." Section 1182(a)(2)(A)(i)(II) includes violations of any law of a state relating to a controlled substance.

"Ordinarily, once there has been an order of removal, the section applicable would be INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2001), which governs post-final-order detention." Patel v. Zemski, 275 F.3d 299, 304 n.3 (3d Cir. 2001). Petitioner relies on the portion of Patel in which the Court found that the petitioner's continued custody pursuant to § 1226(c) violated his due process rights. This, however, was only because the government had not made a prompt individualized determination whether the continued detention was necessary to prevent risk of flight or danger to the community. See Patel, 275 F.3d at 315. Moreover, the holding in Patel is limited to the "mandatory detention of aliens after they have been found

subject to removal but who have not yet been ordered removed because they are pursuing their administrative remedies." Id. at 314.

Petitioner is the subject of a final order of removal. Nevertheless, he was given a custody status review after which it was determined that he posed a significant flight risk. Petitioner's status was again evaluated when he requested release pending his removal. In a letter dated March 25, 2002, the INS informed petitioner that he had not demonstrated that repatriation to Jamaica was not likely in the foreseeable future and consequently he would remain in custody. It clearly appears that petitioner would indeed have been removed some time ago had it not been for actions undertaken by him to thwart removal.

Petitioner is clearly not entitled to the relief he seeks.

**ACCORDINGLY**, this            day of June, 2002, upon consideration of petitioner's Petition for Writ of Habeas Corpus and Stay of Transfer of Jurisdiction, and the government's response thereto, **IT IS HEREBY ORDERED** that said petition is **DENIED** and the above action is **DISMISSED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**