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

| | | |
|---|---|---|
| SAMUEL JOSEPH | : | CIVIL ACTION |
| v. | : | |
| JOHN ASHCROFT, et. al. | : | NO. 01-2679 |

**MEMORANDUM**

**Padova, J.** **August 5, 2002**

Plaintiff Samuel Joseph brought this action against Attorney General John Ashcroft, Kevin Rooney, Charles Zemski, Kent Frederick, Jim Slovik, and Siobhan Cotter for violating his Fourth and Fifth Amendment rights by instituting removal proceedings against him as an alleged aggravated felon and detaining him in connection with those removal proceedings.[1] Before the Court is Defendants' Motion for Summary Judgment. For the reasons that follow, the Motion is granted.

I. BACKGROUND

Samuel Joseph is a native and citizen of Haiti who was admitted as a lawful permanent resident in 1989. In re Joseph, 22 I & N 660, Int. Dec. 3387 (April 23, 1999) ("Joseph I") at I. The Immigration and Naturalization Service ("INS") initiated removal proceedings against Joseph in November 1998, charging that he was

[1]John Ashcroft and Kevin Rooney, the Commissioner of the Immigration and Naturalization Service ("INS") were dismissed as Defendants in this action by Order dated May 30, 2002. The remaining Defendants are the District Director of the INS, the INS District Counsel, the IHP Director for the INS at Berks County Prison, where Joseph was detained by the INS, and the INS officer who initiated the removal proceedings. (Compl. ¶¶ 3-7.)

subject to removal pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii)[2] for having committed an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(S)[3] in Maryland in 1996. Id.; see also In re Joseph, 22 I & N 799, Int. Dec. 3398 (May 28, 1999) ("Joseph II") at 3. This charge was based on Joseph's January 19, 1996 conviction for "obstruction and hindering," a common law offense for which he was sentenced to one year incarceration. Joseph I at I. Joseph was convicted of "intentionally and knowingly obstruct[ing] and hinder[ing] a police officer . . . in the performance of the (police officer) victim's duties." Id. The criminal charging document for this conviction states that Joseph, "after departing his residence in a vehicle, was chased by a police officer and was finally apprehended in Delaware after jumping from his motor vehicle." Id. The record does not disclose why Joseph was chased by the police. Id.

After initiating the removal proceedings, the INS detained Joseph without bond pursuant to 8 U.S.C. § 1226(c)(1).[4] Id. He

---

[2]Section 1227(a)(2)(A)(iii) requires the removal of any alien who has been convicted of an aggravated felony at any time after admission into the United States. 8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 1999).

[3]Section 1101(a)(43)(S) defines aggravated felony to include "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." 8 U.S.C.A. § 1101(a)(43)(S) (West 1999).

[4]Section 1226(c)(1) provides: "The Attorney General shall take into custody any alien who (B) is deportable by reason of

then filed a motion with the Immigration Judge, asking to be released on his own recognizance, or on a reasonable bond, arguing that his offense was not an aggravated felony subjecting him to mandatory detention. Id. On January 20, 1999, the Immigration Judge found that Joseph was not removable as an aggravated felon, terminated the removal proceedings and ordered that he be released from custody. Id. On January 20, 1999, the INS attempted to file with the Immigration Judge a Form EOIR-43, "Notice of INS Intent to Appeal Custody Redetermination," the filing of which invokes an automatic stay of an immigration judge's release order pursuant to 8 C.F.R. § 3.19(i)(2).[5] Id. The Immigration Judge refused to accept the form EOIR-43 based upon his findings that Joseph was not

---

having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title." 8 U.S.C. § 1226(c)(1) (West 1999).

[5]8 C.F.R. § 3.19(i)(2) provides as follows:

> In any case in which the district director has determined that an alien should not be released or has set a bond of $10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon the Service's filing of a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR-43) with the immigration court within one business day of the issuance of the order, and shall remain in abeyance pending decision of the appeal by the Board of Immigration Appeals.

8 C.F.R. § 3.19(i)(2)(2001).

removable as an aggravated felon and was not subject to the mandatory detention provisions of Section 1226(c). Id.

The INS appealed from the Immigration Judge's release order and order terminating the removal proceedings on January 27, 1999 and filed a motion on February 10, 1999, asking the Board of Immigration Appeals ("BIA") to determine whether the automatic stay had been invoked or, in the alternative, to grant a stay. Id. On March 18, 1999, the BIA granted a temporary stay of the release order. Id. On April 23, 1999, the BIA issued its decision, holding that the Immigration Judge did not have the discretion to reject a timely filed Form EOIR-43. Id. at V. The BIA found that the INS had properly invoked the automatic stay provisions of Section 3.19(i)(2) when it attempted to file the Form EOIR-43 with the Immigration Judge. Id. The BIA further found that the automatic stay was in effect, staying the Immigration Judge's order that Joseph be released on bond, as of January 20, 1999. Id.

On April 29, 1999, shortly after the BIA's decision, the Office for Immigration Litigation of the INS ("OIL") suggested that the INS adopt new guidelines with respect to the bond eligibility of aliens convicted of aggravated felonies. (Compl. Ex. 2.) The Complaint alleges that these new guidelines would have required the INS to release Joseph despite the BIA's decision. (Compl. ¶ 22.) Under these new guidelines, aliens who had been released from custody prior to October 8, 1998 would not be not subject to

mandatory detention pursuant to 8 U.S.C. § 1226(c) during removal proceedings.[6] (Compl. Ex. 2.)

On May 19, 1999, the BIA dismissed the INS's appeal from the Immigration Judge's orders releasing Joseph on his own recognizance and extinguished the automatic stay. Joseph II at 12. The INS released Joseph on his own recognizance on May 19, 1999 as required by the BIA's order extinguishing the automatic stay. (Def.'s Ex. 3.) On May 28, 1999, the BIA issued a decision explaining why it dismissed the INS' appeal of the Immigration Judge's release order and finding "that it is substantially unlikely that the offense of simply obstructing or hindering one's own arrest will be viewed as an obstruction of justice aggravated felony under section 101(a)(43)(S) of the Act for removal purposes." Id. On July 19, 1999, the INS withdrew its appeal of the Immigration Judge's termination of the removal proceedings. (Ans. ¶ 26.)

## II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine

---

[6]Prior to October 8, 1998, bond determinations for aliens convicted of aggravated felonies were governed by the Transition Period Custody Rules, Section 303(b)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. 104-28, Div. C., Title III, § 303(b)(3), 110 Stat. 3009-586 (1996). Pursuant to these Rules, lawfully admitted aliens who had been convicted of aggravated felonies could be released from detention during the pendency of their removal proceedings under certain circumstances.

issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

Evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. However, "mere allegations, bare assertions or suspicions are not sufficient to defeat a motion for summary judgment." Felton v. Southeastern Penn. Transp. Auth., 757 F. Supp. 623, 626 (E.D. Pa. 1991) (citation omitted).

## III. DISCUSSION

The Complaint alleges three causes of action. In Count I, the Complaint alleges that Joseph's Fourth Amendment rights were violated by his detention after April 29, 1999 or May 19, 1999 because, after either of those dates, Defendants were not justified in asserting that he was subject to mandatory detention pursuant to 8 U.S.C. § 1226(c). In Count II, the Complaint alleges that Joseph's Fifth Amendment rights were violated by Defendants' continuation of his detention and removal proceedings. In Count III, the Complaint alleges that Joseph's Fourth Amendment right to be free from malicious process was denied when Defendants continued their detention and removal efforts against him after April 29, 1999 and May 28, 1999.

Defendants have moved for summary judgment on all three counts of the Complaint based upon qualified immunity. Defendants argue that they are entitled to summary judgment because they did not violate any of Joseph's clearly established constitutional rights. Qualified immunity means that:

> Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In addition, and particularly in § 1983 cases involving alleged violations of the Fourth Amendment, the Supreme Court has emphasized that the inquiry is whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession. . . .

Sharrar v. Felsing, 128 F.3d 810, 826 (citations omitted). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The Court evaluates Defendants' claim of qualified immunity using the two-step process laid out by the Supreme Court in Saucier v. Katz, 121 S. Ct. 2151, 2156-2157 (2001). The first step is to determine, in the light most favorable to Plaintiff, whether the facts show a violation of a constitutional right. Id. at 2156. If there is no constitutional violation, Defendants are entitled to immunity. Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2002). If the Court determines that there is evidence of a constitutional violation, the Court moves on

to the second step, determining "whether the right was clearly established." Saucier, 121 S. Ct. at 2156. The Court examines whether "in the factual scenario established by the plaintiff, would a reasonable police officer have understood that his actions were prohibited. . . . If it would not have been clear to a reasonable officer what the law required under the facts alleged, he is entitled to qualified immunity. If the requirements of the law would have been clear, the officer must stand trial." Bennett, 274 F.3d at 136-37 (emphasis in original).

A. Count I

Joseph claims that his Fourth Amendment rights were violated by his continued detention after the INS allegedly changed its policy with respect to the mandatory detention of aliens who were released from imprisonment prior to October 8, 1998. However, Joseph has submitted no evidence that the INS adopted the change recommended by the OIL, or that the change was intended to be applied retroactively to aliens who had been detained by the INS pursuant to Section 1226(c) prior to April 29, 1999, the date on which the OIL proposed the new policy. On November 3, 1999, the BIA examined this issue and determined that aliens who had been released prior to October 8, 1998 were not subject to mandatory detention. See In re Adewunmi Adeniji, 22 I. & N. Dec. 1102 (1999). This decision was not reached until months after Joseph was released from detention and the INS dropped its appeal.

Consequently, there is no evidence on the record before the Court that Joseph's detention after April 29, 1999 violated his rights under the Fourth Amendment. Defendants are, therefore, entitled to qualified immunity with respect to Joseph's claims that his continued detention after April 29, 1999 violated his Fourth Amendment rights.

Joseph also contends, in Count I, that his continued detention after May 19, 1999 violated his rights under the Fourth Amendment. On May 19, 1999, the BIA "extinguished the automatic stay that had been attached upon the tendering of the Form EOIR-43." Joseph II at 12. That same day, the INS released Joseph on his own recognizance, as ordered by the Immigration Judge prior to the imposition of the stay. (Defs.'s Ex. 3.) There is no other evidence on the record before the Court that would demonstrate that Joseph's detention after May 19, 1999 violated his rights under the Fourth Amendment. Defendants are, therefore, entitled to qualified immunity with respect to this claim. Accordingly, Defendants' Motion for Summary Judgment is granted as to Count I of the Complaint.

B. Count III

Plaintiff claims that he was denied his Fourth Amendment right to be free from malicious process when Defendants continued their detention efforts against him after April 29, 1999 and continued their removal efforts against him beyond May 28, 1999. As

Plaintiff does not allege any specific use of process against him after April 29, 1999 or May 28, 1999, it appears that he intended to bring a claim related to malicious prosecution. As discussed in section III.A., above, there is no evidence on the record before the Court that Joseph's continued detention after April 29, 1999 violated his rights under the Fourth Amendment. Moreover, Joseph has submitted no other evidence that the INS' continuation of its appeal of the Immigration Judge's detention order after April 29, 1999 violated his Fourth Amendment rights. Defendants are, therefore, entitled to qualified immunity on Plaintiff's claim in Count III that Defendants' detention efforts after April 29, 1999 violated his rights under the Fourth Amendment.

On May 28, 1999, the BIA determined that Joseph was not subject to mandatory detention. Joseph II at 12. The BIA also considered, but did not decide, whether the INS was likely to succeed in its removal proceedings against him. The BIA found that it was unlikely that it would ultimately find Joseph's offense to be an aggravated felony subjecting him to removal. Id. However, the BIA did not completely rule out the possibility that the INS could succeed on the merits of the removal proceeding: "We do not purport to make a final ruling on whether the respondent's conviction falls within the aggravated felony provision of section 101(a)(43)(S). The possibility remains that the Service might offer some convincing argument in its merits appeal." Id. The BIA did

not require the INS to drop its removal proceedings against Joseph, or state that Joseph could not be removed on the charges against him. Id. Joseph has submitted no other evidence that Defendants' continued prosecution of the removal action violated his Fourth Amendment rights. Defendants are, therefore, entitled to qualified immunity on this claim. Consequently, Defendants' Motion for Summary Judgment is granted as to Count III of the Complaint.

C. Count II

Joseph claims that his right to due process under the Fifth Amendment was violated by Defendants' continued detention of him and continued removal efforts against him. Plaintiff has submitted no evidence to support this claim. For this reason, and the reasons discussed above, in Sections III. A. and B. of this Memorandum, the Court finds that there is no evidence that Defendants' continued detention of Joseph and continuing removal proceedings against him constitute a violation of his Fifth Amendment right to due process. Defendants are, therefore, entitled to qualified immunity on Joseph's claim pursuant to the Fifth Amendment and summary judgment is granted in favor of Defendants on Count II of the Complaint.

IV. CONCLUSION

For the reasons stated above, summary judgment is granted in favor of Defendants and against Joseph on all counts of the Complaint. As the Court has found that Defendants are entitled to

qualified immunity on all of Joseph's claims that his constitutional rights were violated, the Court need not address Defendants' remaining arguments in favor of summary judgment.

An appropriate order follows.

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

| | | |
|---|---|---|
| SAMUEL JOSEPH | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| JOHN ASHCROFT, et. al. | : | NO. 01-2679 |

O R D E R

**AND NOW,** this 5th day of August, 2002, in consideration of Defendants' Motion for Summary Judgment (Docket No. 33) and Plaintiff's response thereto, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** pursuant to Federal Rule of Civil Procedure Rule 56 and all claims are **DISMISSED** with prejudice. The Clerk of Court shall close this case for statistical purposes.

BY THE COURT:

_____
John R. Padova, J.