

Mohammed should not be deported. According to the INS, Mr. Mohammed was deportable under § 241(a)(2)(B)(i) of the Immigration and Nationality Act (“INA”) because he had been convicted of a drug offense, under § 241(a)(2)(C) of the INA because he had been convicted of a firearms offense, and under § 241(a)(2)(A)(iii) because he had been convicted of an aggravated felony.

Mr. Mohammed’s deportation hearing was continued several times. At the second hearing, on October 11, 1995, Mr. Mohammed sought a waiver of deportation under § 212(c) of the INA. At the third hearing, held on January 24, 1996, Mr. Mohammed admitted that he had been convicted of a drug offense and a firearms offense, but denied that he was an aggravated felon. The immigration judge reviewed the convictions and found that Mr. Mohammed was an aggravated felon.

Section 212(c) of the INA permits waivers of deportation at the discretion of the Attorney General in certain limited circumstances. Here, if granted, the § 212(c) waiver would have removed Mr. Mohammed’s drug conviction as a ground for deportability. At the inception of his deportation proceedings, Mr. Mohammed met the basic eligibility criteria for a §212(c) waiver in that he had a more than seven years of legal residence in the United States. In addition, because, Mr. Mohammed’s mother is a United States Citizen, he could have applied for a discretionary adjustment of status under § 245 of the INA, which would relieve him of the effect of the firearms conviction.¹

On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) became effective. AEDPA eliminated aggravated felons from the class of aliens eligible for waiver of deportation under § 212(c). When the fourth deportation hearing convened on May 2, 1996, the

¹At the final hearing, Mr. Mohammed produced documents indicating that his mother was, in fact, a United States citizen. Neither he nor she, however, had taken the requisite steps to permit Mr. Mohammed to apply for an adjustment of status at that time.

immigration judge found, based on AEDPA, that Mr. Mohammed was no longer eligible to apply for a § 212 waiver. The immigration judge then announced his intention to order Mr. Mohammed deported and advised Mr. Mohammed's counsel of his right to appeal. Mr. Mohammed's counsel indicated that he wished to file an appeal.

Later on that day, Mr. Mohammed's counsel asked the immigration judge to re-open the hearing to allow Mr. Mohammed to waive his right to appeal. Mr. Mohammed then indicated his desire to waive his right to appeal. The judge ordered Mr. Mohammed's deportation and indicated that Mr. Mohammed had waived his right to appeal. Mr. Mohammed was deported on June 20, 1996 and, to date, has not filed an appeal.

On November 7, 2002, Defendant was indicted by a federal grand jury and charged with illegally entering the United States following a felony conviction, in violation of 8 U.S.C. §§ 1326(a) and (b)(1). He is currently before this Court on those charges. On December 10, 2002, he filed the Motion to Dismiss the Indictment that is the subject of this Memorandum and Order.

III. DISCUSSION

A. Standard for Motion to Dismiss Indictment

Federal Rule of Criminal Procedure 12(b)(2) authorizes dismissal of an indictment if its allegations do not suffice to charge an offense. *See United States v. DeLaurentis*, 230 F.3d 659, 660-61 (3d Cir. 2000). In analyzing a motion to dismiss an indictment under Federal Rule of Criminal Procedure 12(b), the Court “must accept as true the facts alleged in the indictment and determine if those facts constitute a violation of the law under which the defendant is charged.”

United States v. Ward, Crim. No. 00-681, 2001 U.S. Dist. LEXIS 15897, at *11, 2001 WL 1160168, at *4 (E.D. Pa. Sept. 5, 2001) (citations omitted).

Here, the United States has charged Mr. Mohammed with illegal re-entry in violation of 8 U.S.C. §§ 1326(a) and (b)(1). In order to make out its case under § 1326, the government must establish that Mohammed: (1) is an alien, (2) who previously was denied admission, was excluded, deported or removed; (3) and subsequently entered, attempted to enter, or was found in the United States; (4) without having the express consent of the Attorney General. *See* 8 U.S.C. § 1326(a). Mr. Mohammed seeks to annul the use of his deportation through collateral attack on the prior deportation proceeding.

B. Collateral Attack on Prior Deportation Proceeding

In *United States v. Mendoza-Lopez*, the Supreme Court held that where a deportation proceeding did not comport with due process, the defendant must be afforded an opportunity to collaterally attack the deportation order in a subsequent prosecution for illegal entry under 8 U.S.C. § 1326 in which the deportation is used as an element of the offense. 481 U.S. 828, 839 (1987). In 1996, Congress effectively codified this test, allowing a collateral attack only when the alien is able to demonstrate that: (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d). In addition, some courts require that the defendant show actual prejudice. *See, e.g., United States v. Lopez-Vasquez*, 227 F.3d 476, 483 (5th

Cir.2000); *United States v. Paredes- Batista*, 140 F.3d 367, 378 (2d Cir.1998); *United States v. Proa-Tovar*, 975 F.2d 592, 595 (9th Cir.1992)

1. Exhaustion of Administrative Remedies

“To exhaust administrative remedies, an alien is generally required to appeal from an Immigration Judge’s order to the Board of Immigration Appeals.” *United States v. Perez*, 213 F. Supp. 2d 229, 232 (E.D.N.Y 2002). Here, as discussed below, Mr. Mohammed waived his right to file such an appeal. He therefore failed to exhaust his administrative remedies.

2. Fundamental Unfairness

In *Mendoza-Lopez*, the Court found that a defendant facing criminal prosecution under § 1326 does have a liberty interest in not being imprisoned on the basis of a fundamentally unfair deportation proceeding that has never been subjected to judicial review. *See* 481 U.S. at 837. The Court, in a footnote, expressly declined to enumerate which procedural errors are “so fundamental that they may functionally deprive the alien of judicial review, requiring that the result of the hearing in which they took place not be used to support a criminal conviction.” *Mendoza-Lopez*, 481 U.S. at 839, n.17. In *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 (1953), the Court observed that in civil deportation proceedings, due process requires that an alien receive notice of the charges against him, a hearing before an executive or administrative tribunal, and a fair opportunity to be heard.

Here, Defendant contends that the immigration judge’s denial of § 212(c) relief based on an erroneous application of law rendered his deportation proceeding fundamentally unfair. In *INS v. St.*

Cyr, the Supreme Court held that the repeal of § 212(c) did not apply retroactively to aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of the plea under the law then in effect. 533 U.S. 289, 290 (2001). The Third Circuit has also held that AEDPA should not have been applied to aliens who were already in deportation proceedings when AEDPA became effective. *See Sandoval v. Reno*, 166 F. 3d 225, 242 (3d. Cir. 1999). Here, AEDPA was not enacted until some fourteen months after Mr. Mohammed's case began. Nevertheless, on May 2, 1996, eight days after AEDPA became effective, the Immigration Judge denied § 212 (c) relief to Mr. Mohammed based on the new act's provisions.

Several Circuit Courts have held, however, that eligibility for 212(c) relief was not a liberty or property interest warranting due process protection. *See, e.g., Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir.2002); *U.S. v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002). While the Third Circuit has not spoken on this issue, Defendant cites no authority for the proposition that an error of law, such as that which occurred here, constitutes a due process violation. Under these circumstances, and looking to *Kwong Hai Chew* and the language of § 1326(d) for guidance, I am remiss to expand the scope of the due process inquiry to include misapplications of substantive law. Therefore, I find that immigration judge's erroneous denial of § 212(c) relief did not result in a fundamentally unfair proceeding.

It is worth noting that even if I had found that the deportation hearing was fundamentally unfair, it would not affect the result, because, as discussed below, the Defendant was not deprived of an opportunity for judicial review.

3. Deprivation of Opportunity for Judicial Review

Where “defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.” *Medoza-Lopez*, 481 U.S. at 839. Specifically, a collateral attack may be made by alien who has effectively been denied direct appeal because he was not given proper notice of the right to appeal. *See United States v. Fares*, 978 F.2d 52 (2d. Cir. 1992); *United States v. Proa-Tovar*, 975 F.2d 592, 594 (9th Cir.1992) (en banc), *vacating*, 945 F.2d 1450 (9th Cir.1991); *United States v. Holland*, 876 F.2d 1533, 1536 (11th Cir.1989). Similarly, though an alien may waive his right to appeal, any such waiver must be considered and intelligent. *See Mendoza-Lopez*, 481 U.S. at 840, 107 S.Ct. at 2156-57; *see generally Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (effective waiver is an “intentional relinquishment or abandonment of a known right or privilege.”).

Here, unlike the defendants in *Mendoza-Lopez*, Mr. Mohammed was repeatedly informed of his right to appeal. He was also represented by counsel throughout his deportation proceedings. A review of the audio tape of those proceedings shows that after Mr. Mohammed requested that the May 2, 1996 proceedings be re-opened, the immigration judge asked his counsel once and Mr Mohammed four times whether he wished to waive his right to appeal. Both, without exception, indicated that Mr. Mohammed wished to waive his right to appeal. It must be conceded that the Immigration judge failed to explain the meaning of the right to appeal or the effect of waiver. The judge also engaged in an unnecessary discussion of the need to rid the United States of individuals like Mr. Mohammed and of the virtue of the federal law which he had just erroneously applied in Mr. Mohammed’s case. Nevertheless, both Mr. Mohammed and his counsel were apprised of Mr.

Mohammed's right to file an appeal and both made clear that Mr. Mohammed had chosen not to do so. Accordingly, I find that Mr. Mohammed's waiver of his appellate rights met constitutional standards and, thus, he was not deprived of an opportunity for judicial review.

4. Actual Prejudice

Even if Mr. Mohammed could show actual prejudice by establishing "a reasonable likelihood that but for the errors complained of [he] would not have been deported," *Lopez-Vasquez*, 227 F.3d at 485 (quoting *United States v. Benitez-Villafuerte*, 186 F.3d 651, 658-59 (5th Cir.1999)), such a showing accomplishes little where, as here, he cannot make out the other requisite elements of a collateral attack.

IV. CONCLUSION

For the foregoing reasons, I deny Defendant's motion.

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

UNITED STATES OF AMERICA	:	
vs.	:	CRIMINAL NO. 02-748
PAUL KENDALL MOHAMMED	:	

ORDER

AND NOW, this day of February, 2003, upon consideration of Defendant's Motion to Dismiss the Indictment, and the Government's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

Defendant's Motion to Dismiss the Indictment (Document No. 9) is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.