

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

SONNY UDENZE,

Petitioner

: CIVIL ACTION

:

v.

:

:

WILLIAM RILEY, Interim Director of the
Philadelphia Office of the Bureau
of Immigration Customs and Enforcement
(BICE) of the Department of Homeland
Security, THEODORE NORDMARK, Assistant
Director for the Deportation and
Detention of BICE in Philadelphia, and
DEPARTMENT OF HOMELAND SECURITY,

:

:

:

:

:

:

:

:

NO. 03-2337

Respondents

MEMORANDUM AND ORDER

Norma L. Shapiro

August 22, 2003

Petitioner Sonny Udenze ("Udenze") petitions the court for a writ of habeas corpus under 28 U.S.C. § 2241, et seq., to review the lawfulness of his final order of removal.¹

I. FACTUAL BACKGROUND

Udenze is a native and citizen of Nigeria through birth. Sometime in the early to mid 1980s,² he entered the United States

¹His petition also requested a stay of the removal pending judicial review; by order dated June 18, 2003, the court enjoined respondents from executing the removal order during the pendency of this litigation including appeals, if any, to the Third Circuit Court of Appeals.

²Udenze's petition states that he has resided in the United States since his entry as a student in 1981; the government and the decision of the Immigration Court both state the U.S. Immigration and Naturalization Service admitted him into the United States on January 14, 1986.

legally at New York, New York as a non-immigrant student. Udenze applied for legalization in 1988 and was granted temporary resident status in 1989, but never obtained permanent resident status. In June, 1992, Udenze was convicted in United States District Court, Eastern District of New York for the offense of conspiracy to possess with intent to distribute more than 100 grams of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (841(b)(1)(B)(i); he was sentenced to ninety-eight months imprisonment and served approximately eighty-four months. Upon release in 2000, Udenze received a Notice to Appear informing him he was subject to removal pursuant to the Immigration and Nationality Act ("Act")³ and directing him to appear before an Immigration Judge ("IJ").

The IJ found Udenze removable as charged, but considered several applications for relief. At an evidentiary hearing, Udenze elected to pursue only his application for deferral under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 8 C.F.R. § 208.16, et seq.. In preparation for the hearing and in support of his claim that upon return to Nigeria he would be subjected to torture, Udenze submitted numerous reports detailing abusive

³Udenze was charged with violating section 237(a)(1)(A)(iii) of the Act for an aggravated felony conviction and section 237(a)(2)(B)(i) for a conviction related to a controlled substance.

conditions in his native country. (Pet. Exhs. E, G, I). Also submitted was the expert witness affidavit of Princeton University Professor Robert L. Tignor ("Professor Tignor"), in which he states that Udenze's "worry about his survival if he has to return to Nigeria is well founded." (Pet. Exh. D, 2). Two issues concerned Professor Tignor most: first, the Nigerian law⁴ enabling the state to impose an automatic five-year prison term on any Nigerian national convicted of an overseas drug offense (Pet. Exh. F); and second, Udenze's family history of supporting the Movement for the Survival of the Ogoni People ("MOSOP").

At the evidentiary hearing, Udenze testified that his father had been beaten and tortured, never to be seen by his family again, for his support of MOSOP; he also testified that his brother had suffered torture under the Abacha government in the 1990s because of his political views regarding the Ogoni people. Though Udenze stated that he was never "involved in politics," he testified that he supported the Ogoni people, and had contributed funds to their cause. Professor Tignor also provided oral testimony at the hearing.

In a decision dated August 31, 2001 (Pet. Exh. B), the IJ concluded that Udenze's conviction precluded all forms of relief but deferral of removal under the Convention Against Torture Act

⁴The 1990 National Drug Law Enforcement Administration Decree ("NDLEAD"), also known as "Decree 33."

and that, under the new Nigerian government, effective May 29, 1999, Udenze had nothing to fear upon return to his native country. According to the IJ:

The fact that [Udenze] is subject to incarceration in Nigeria if returned after deportation does not necessarily entitle him to protection under the Convention Against Torture. ... Even if the country of removal does have a provision that requires imprisonment of the alien, it cannot be assumed without evidence that the alien would be tortured during detention. (citation omitted).

On May 29, 1999, President Olusegun Obasanjo was inaugurated in Nigeria after winning the elections of February 1999. These elections mark the end of 16 years of military-lead regimes. The civilian, democratically-elected government stated as its goal the desire to reestablish democracy and protection for human rights in Nigeria. The U.S. Department of State reported that during the year 2000, while the government's human rights record was poor, there were improvements in several areas. The abuses of the previous military dictatorship in Nigeria are in the process of being curbed.

That prison conditions in Nigeria are poor and even life threatening does not mean that the respondent faces the clear probability of torture. The expert witness who testified on behalf of [Udenze] is not an expert regarding conditions in prison in Nigeria. ... Much of the evidence offered by [Udenze] on the question in issue on this case is out of date. It related to a period on Nigeria during the military dictatorship prior to 1999.

[W]e have what is called a response from Resource Information Center, Nigeria. This document is dated March 8, 1999, shortly after the civilian, democratically-elected government assumed power in Nigeria. The question was posed in this document asking whether a detainee with a past drug conviction overseas would be tortured on return to Nigeria under

the present government of Abukavar [predecessor to President Obasanjo who was elected in May]. Even as of March 1999, under the previous ruler, however, the document reflected the opinion that 'AI (Amnesty International) states that torture of a deportee under Abukavar is "less likely"'

The only other information in this record bearing on the specific issue under consideration are the two U.S. Department of State Country Reports for Nigeria, one for 1999, and the other for the year 2000. Both of these reports indicate that prison conditions in Nigeria are poor. ... The most recent information in this record regarding the possibility of torture in a Nigerian prison states that the law in Nigeria prohibits torture and provides for punishment of those guilty of the same. It's stated that there have been reports that there are regular beatings of detainees and convicted prisoners. ...

Torture must be instigated with the consent or acquiescence of a public official or other person acting in an official capacity. Pain inflicted by a non-governmental entity, without the consent or acquiescence of the government[,] is not in the scope of the Convention Against Torture. The existence of a consistent pattern of gross, flagrant, or mass violations of human rights does not by itself establish that an individual faces a clear probability of torture. (citation omitted). ...

In this case, while there continue to be reports of abuses by security officials in the prisons in Nigeria, [Udenze] has not shown that he faces a clear probability of being subjected to torture if returned to Nigeria.

(Pet. Ex. B, 5-8). The Board of Immigration Appeals ("BIA") summarily affirmed the decision of the IJ (Pet. Exh. C), which renders the IJ's decision the final determination in this matter.⁵ Udenze, filing this petition for writ of habeas corpus,

⁵Under section 242(a)(2)(C) of the INA, Udenze, as an aggravated felon, was not entitled to file a petition for review.

claims the IJ failed to consider the totality of the record.

II. CONVENTION AGAINST TORTURE

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), establishes that "it shall be the policy of the United States not to expel, ... or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." *Id.*; see also Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003). When a removable alien sustains his burden⁶ of proving that it is more likely than not he will be tortured⁷ by, at the instigation of,

8 U.S.C. § 1252(a)(2)(C).

⁶The burden of proof is on the applicant alien, whose testimony, if credible, may be "sufficient to sustain the burden without corroboration." 8 C.F.R. § 208.16(c)(2).

⁷The federal regulations implementing the Convention Against Torture define torture as follows:

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity

8 C.F.R. § 208.18(a)(1).

or with the acquiescence of a public official upon return to the country of removal, see 8 C.F.R. § 208.16(c)(4), CAT mandates protection.

In assessing whether it is more likely than not that an applicant would be tortured on return to the proposed country of removal, "all evidence relevant to the possibility of future torture shall be considered, including, but not limited to" the following:

- (i) Evidence of past torture inflicted upon the applicant;
- (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- (iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 208.16(c)(3). When an applicant has carried his burden, protection under CAT will be granted either by withholding of removal or by deferral of removal.⁸ 8 C.F.R. §

⁸Deferral of removal, unlike withholding of removal, is a temporary form of relief. Sulaiman v. Attorney General, 212 F. Supp. 2d 413, 415 n.3 (E.D. Pa. 2002). It is subject to further review by the INS and immediate discretionary review by the Attorney General. Id. In addition, it only guarantees deferral from deportation to the specific country where the alien is likely to be tortured; the alien may be deported to other countries. Edwards v. INS, 2003 U.S. Dist. LEXIS 6594, *7 (E.D. Pa. Mar. 31, 2003).

208.16(c)(4). Withholding of removal, however, is not available to an alien who has been "convicted by a final judgment of a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B)(ii). "For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B).

III. DISCUSSION

A. Jurisdiction

As a threshold matter, the government argues the court has no subject matter jurisdiction over Udenze's petition; it contends that an alien's claims for protection are outside the court's habeas jurisdiction because the Convention Against Torture Act is a non-self executing treaty which divests individuals of a private right of action. Under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Congress granted limited jurisdiction to federal courts to review CAT decisions only when "part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act." Because this action is brought pursuant to 28 U.S.C. § 2241, and Congress has not expressly conferred jurisdiction, the government argues, the court lacks subject matter jurisdiction.

Primarily relying upon INS v. St. Cyr, 533 U.S. 289, 299 (2001), where the court held that the jurisdiction-stripping provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which preclude judicial review of certain alien removal orders, do not deprive federal courts of jurisdiction to consider challenges by those aliens to their removal orders by § 2241 habeas petitions, our Court of Appeals has stated, "Both the Supreme Court and this Court have determined that notwithstanding the provisions of AEDPA or IIRIRA, district courts retain jurisdiction to hear habeas petitions filed by aliens subject to deportation for having committed certain criminal offenses." Chmakov v. Blackman, 266 F.3d 210, 213 (3d Cir. 2001). Holding that mere implications from statutory text or legislative history are not enough to repeal habeas jurisdiction, the Court of Appeals made clear that Congress "must articulate specific and unambiguous statutory directives to effect a repeal." Id. at 214 (quoting St. Cyr, 121 S. Ct. at 2278-79). The court has subject matter jurisdiction over Udenze's petition.

B. Scope of Review

The government next contends that, even if the court has jurisdiction over the § 2241 petition, it only extends to legal determinations and precludes review of factual findings. See

Sulaiman v. Attorney General, 212 F. Supp. 2d 413, 416 (E.D. Pa. 2002), aff'd without opinion, 2003 U.S. App. LEXIS 6788 (3d Cir. Pa. Mar. 22, 2003) (the scope of review of such claims is limited to pure questions of law and we have no jurisdiction to review a denial of discretionary relief to a criminal alien); but see Wang v. Ashcroft, 320 F.3d 130, (2d Cir. 2003) ("Wang does not merely contest the immigration court's factual determinations - he challenges its application of the facts to FARRA Accordingly, Wang's argument on appeal challenging the BIA's application of the particular facts in this case to the relevant law falls within the permissible scope of habeas review.").⁹

In Catney v. INS, 178 F.3d 190, 195 (3d Cir. 1999), the Court of Appeals acknowledged limitations on federal court review

⁹In Wang, 320 F.3d at 143, the Second Circuit stated that the IJ's denial of petitioner's claim under CAT because "there is no evidence in the record that China tortures deserters from its military," was not simply a finding of fact, but rather, an application of the facts to the legal standard set forth in 8 C.F.R. § 208.16, et seq.

[B]ecause the Constitution requires habeas review to extend to claims of erroneous application or interpretation of statutes neither AEDPA nor IIRIRA could have excluded such claims from the scope of habeas review. Accordingly, Wang's argument on appeal challenging the BIA's application of the particular facts in this case to the relevant law falls within the permissible scope of habeas review.

Id. (citing St. Cyr, 533 U.S. at 302). Finding no error in the BIA analysis, the Wang court declined to announce a standard of review since under any standard, it found no error in the BIA's analysis.

of BIA discretionary decisions:

Following passage of AEDPA and IIRIRA, we no longer have jurisdiction to review a denial of discretionary relief to a criminal alien. Further, we conclude that any challenge by a criminal alien to the BIA's interpretation of the immigration laws or to the constitutionality of these laws must be made through a habeas petition.

As noted recently in Sackie v. Ashcroft:

Although the Third Circuit has yet to make a definitive statement on the standard of review of such petitions, most of the courts in this circuit are in agreement that habeas review is limited solely to questions of statutory and constitutional law; review of factual or discretionary issues is prohibited.

2003 U.S. Dist. LEXIS 11821, *5-6 (E.D. Pa. June 18, 2003)

(Joyner, J.) (gathering district court cases); see also Beshli v. Dep't of Homeland Sec., 2003 U.S. Dist. LEXIS 12845, *10 (E.D. Pa. July 22, 2003) (DuBois, J.).

In Sulaiman, petitioner, a Nigerian alien, was subject to removal and sought relief under CAT. Filing a writ of habeas corpus, petitioner challenged the BIA's factual determinations regarding the likelihood he would be tortured on return to Nigeria; he also claimed that the BIA had failed to give due consideration to all of the evidence submitted to the Board, as required under CAT. 212 F. Supp. 2d at 417. Under Catney, the district court, finding it did not have the power to review the merits of petitioner's claims, limited its review to whether the BIA's decision to deny relief violated the Constitution or the

laws of the United States. Id. at 416. Included among these reviewable legal challenges was petitioner's claim that BIA failed to consider all the evidence, but not the administrative court's determination that petitioner had not shown he was more likely than not to suffer torture upon return to Nigeria.

Like the petitioner in Sulaiman, Udenze challenges both the IJ's determination regarding the likelihood of torture on return to Nigeria and his failure to consider the record as a whole in making that determination. The court concludes its review of Udenze's claims is limited under § 2241; it will not review petitioner's challenge on the merits. The court construes Udenze's argument regarding failure to consider the entire record as a legal challenge under 8 C.F.R. § 208.16(c)(3) (requiring the BIA to consider all relevant evidence). See 8 C.F.R. § 208.16(c)(3). To prevail on this claim, Udenze must show that BIA failed to consider "relevant evidence" as required by the regulation.

C. Analysis

Udenze claims the IJ failed to consider relevant evidence including the U.S. Department of State Report of 2000 and testimony of Professor Tignor regarding ongoing human rights violations and prison conditions. Though Udenze concedes the regime in Nigeria has undergone some change, he argues the current government continues to engage in the arbitrary arrest,

detention, and rape of the Delta Rivers people, which includes the Ogoni people, and that there is a clear probability his mandatory imprisonment as a drug convict will subject him to torture.

In Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2001), the Court of Appeals repudiated petitioner's claim that the BIA was required to address explicitly each type of evidence that he presented in order to justify its prima facie denial of his motion. Holding the BIA's discussion sufficient, the Court stated:

The Board's opinion recognized and addressed [petitioner's] key contention under the Convention Against Torture--that if removed, [he] would end up in the Georgian criminal justice system, and that suspects and criminals in Georgia are tortured. The Board reasonably characterized the State Department report, which states that prisoners in Georgia are often subjected to physical abuse, but that such abuse is 'usually to extract confessions,' while Georgian security forces sometimes torture defendants in 'politically sensitive cases.' The Board stated that it surveyed the record. The State Department report apparently provided the chief basis for the Board's conclusions that Georgian police would not need to seek a confession from [petitioner], and thus would not torture him. While there is other evidence in the record that paints a darker picture than the qualified account in the State Department report, we have concluded ... that the Board could reasonably credit the State Department instead of the human rights groups or [petitioner]. Its citation and discussion show sufficiently that it 'comprehended and addressed [petitioner]'s torture claim.' The Board 'is not required to write an exegesis on every contention,' but only to show that it has reviewed the record and grasped the movant's claims.

Id. at 178 (internal citations omitted).

Sevoian sanctions the BIA's crediting one report over another, and perhaps, less than complete treatment of an applicant's claims; however, it does not nullify the requirements of CAT. See United States ex rel. Zhelyatdinov v. Ashcroft, 2002 U.S. Dist. LEXIS 26531, *23 (E.D. Pa. Dec. 27, 2002) (Baylson, J.) ("Although the Third Circuit has held that the BIA need not address explicitly each type of evidence, and need only show that it has reviewed the record and grasped the movant's claims this Court still has the obligation to determine whether there was at least some evidence in the record to justify the rebuttal of the presumption.").

Under 8 C.F.R. § 208.16(c)(3), immigration courts must consider "all evidence relevant to the possibility of future torture ... including but not limited to ... evidence of gross, flagrant or mass violations of human rights within the country of removal." Considering Udenze's claim of torture as a prisoner in Nigeria, the IJ stated:

Torture must be instigated with the consent or acquiescence of a public official or other person acting in an official capacity. Pain inflicted by a non-governmental entity, without the consent or acquiescence of the government[,] is not in the scope of the Convention Against Torture. The existence of a consistent pattern of gross, flagrant, or mass violations of human rights does not by itself establish that an individual faces a clear probability of torture.

(Pet. Ex. B, 5-8). It is not clear to the court that the IJ considered the existence of a consistent pattern of gross, flagrant, or mass violations of human rights, except to assume that under Nigeria's new regime such violations would not be as pervasive.

The U.S. Department of State Report of 2000 explicitly states:

Despite these new controls [under the Obasanjo government], members of the security forces, including the police, anticrime squads, and the armed forces committed numerous, serious human rights abuses. ...

... [L]ethal force was used when protests or demonstrations were perceived as becoming violent or disruptive, or in the apprehension and detention of criminal suspects. The state anticrime task forces remained the most egregious human rights offenders. ... They operated with impunity in the apprehension, illegal detention, and sometimes execution of criminal suspects.

Criminal suspects die from unnatural causes while in official custody, usually as the result of neglect and harsh treatment.

(Pet. Ex. E).

Also submitted in evidence by Udenze, but not considered as required under CAT, was the written inquiry of Amnesty International dated October 11, 2000, regarding Decree 33.

Paragraph two reads:

As stated in our first letter Amnesty International is concerned for the safety of failed asylum seekers,

aliens with drug convictions, or other aliens forcibly removed to Nigeria. The 1990 Nigerian law "Decree 33" makes a drug conviction abroad a serious crime in Nigeria. Amnesty International has received reports of deportees being detained, tortured, and re-prosecuted under Decree 33, even, in some cases, when they did not commit crimes in the United States. In addition, deportees who are members of opposition groups or are related to people opposed to the Nigerian government have reportedly 'disappeared' after being returned to the Nigerian authorities.

(Pet. Ex. I).

Not only is there evidence of an ongoing pattern of human rights abuses, but also evidence that such torture takes place with the consent or acquiescence of the government responsible for imprisoning its citizens. It should have been considered by the IJ in assessing whether Udenze could demonstrate it is more likely than not he will be subjected to torture if returned as a convicted drug trafficker to Nigeria. This action is remanded to the BIA for a more complete evaluation of the relevant evidence as required under CAT.

An appropriate order follows.

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

SONNY UDENZE,

Petitioner

: CIVIL ACTION

:

v.

:

:

WILLIAM RILEY, Interim Director of the

:

Philadelphia Office of the Bureau

:

of Immigration Customs and Enforcement

:

(BICE) of the Department of Homeland

:

Security, THEODORE NORDMARK, Assistant

:

Director for the Deportation and

:

Detention of BICE in Philadelphia, and

:

DEPARTMENT OF HOMELAND SECURITY,

:

NO. 03-2337

Respondents

ORDER

AND NOW, this 22nd day of August, 2003, upon consideration of Petition for Writ of Habeas Corpus (Paper #1), Government's Response to Petition for Writ of Habeas Corpus (Paper #6), Reply Brief of Petitioner (Paper #9), and following oral argument held on June 17, 2003, where counsel for all parties were heard, it is **ORDERED** that:

1. The Petition for Writ of Habeas Corpus (Paper #1) is **GRANTED** and this action **REMANDED** to the Board of Immigration Appeals for further consideration consistent with this opinion; and,

2. The court's June 18, 2003 order enjoining the government from executing removal (paper #10) is **VACATED as MOOT**. Petitioner will not be subject to deportation unless and until a new final order of deportation is entered.

S.J.