

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

ATHANASIOS ZISIMOPOULOS,
Petitioner/Plaintiff,

v.

Civil Action
No.98-1863

JANET RENO, Attorney General,
DORIS MEISSNER, Commissioner,
Immigration and Naturalization
Service, and J. SCOTT
BLACKMAN, Acting District
Director,
Respondents/Defendants.

Gawthrop, J.

July 14, 1998

M E M O R A N D U M

Petitioner Athanasios Zisimopoulos seeks relief from an order of deportation. Presently before the court is the government's motion for dismissal of the petition of habeas corpus for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

Petitioner Athanasios Zisimopoulos was deported from the United States in May 1981 pursuant to a final order of deportation issued by an immigration judge. In 1986, petitioner reentered the United States without inspection. Mr. Zisimopoulos has since married a United States citizen with whom he has three children, all of whom are also United States citizens.

In November 1997, Mr. Zisimopoulos was arrested and charged with criminal conduct, not here at issue. On December 1, 1997,

the Immigration and Naturalization Service ("INS") advised petitioner that his prior order of deportation was reinstated and that he was subject to removal without a hearing pursuant to Section 241(a)(5) of the Immigration and Nationality Act ("INA").¹ 8 U.S.C. § 1231(a)(5). Section 241(a)(5) permits the INS to reinstate removal orders against aliens who illegally reenter the country after being ordered removed. Id.

On April 7, 1998, Mr. Zisimopoulos filed this petition to prevent the INS from removing him from the United States. As a jurisdictional basis for his petition, he relies upon the general grant of habeas jurisdiction bestowed on the federal district courts under 28 U.S.C. § 2241. He also says he is entitled to review of his final order of deportation as a matter of constitutional right. He argues that Section 241(a)(5) does not apply to him because his deportation order was entered prior to April 1, 1997, the effective date of section 241(a)(5), and it cannot be applied retroactively. He claims application of this

¹Section 241(a)(5) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. § 1231(a)(5).

section to him would violate his Fifth Amendment rights to due process and equal protection.²

The respondents claim that petitioner is requesting this court to review a decision of the Attorney General executing a removal order and that such review is prohibited by recent changes in immigration laws contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Specifically, the IIRIRA amended the INA to include Section 242(g) which restricts the jurisdiction of certain courts to review particular claims.³

²In his response to the government's motion, petitioner also argues that section 241(a)(5) cannot apply to an order of deportation because the provision expressly refers only to an order of removal. It is true that Mr. Zisimopoulos was first ordered to leave the country in 1981 under what was then called an order of deportation. Section 309(d)(2) of the IIRIRA, however, expressly states that "any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." Pub. L. 104-208, 110 Stat. 3009 (1996); see also De Leon v. Reno, No. 97-02484, 1998 WL 289321, at *1 n.1 (N.D. Cal. Mar. 26, 1998) ("The IIRIRA . . . changed the nomenclature of immigration orders such that what were formerly referred to as orders of deportation or orders of exclusion are now both referred to as orders of removal."). Thus, the name of petitioner's order of deportation is not a distinguishing factor.

³Specifically, Section 242(g) of the INA provides:
Exclusive Jurisdiction -- 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

See 8 U.S.C. §1252(g). Respondents claim that Section 242(g) bars this court from reviewing Mr. Zisimopoulos's petition. I agree.

"Section 242(g) deprives this court of jurisdiction to hear any claim by an alien arising from action of the Attorney General to execute a removal order against the alien under the INA." Mendez-Tapia v. Sonchik, 998 F. Supp. 1105 (D. Ariz. 1998) (holding district court lacked jurisdiction to review order reinstated under Section 241(a)(5)); Ayala v. Reno, 995 F. Supp. 717, 717 (W.D. Tex. 1998)(same). Because reinstatement of a deportation order under section 241(a)(5) involves action to remove an alien, the jurisdictional limitations of section 242(g) apply to this action. Id. Further, this amendment to the INA took effect before the reinstatement here, and applies to all past, pending, and future immigration proceedings. Thus, it applies to the reinstated order at issue here.

To the extent, though, "that constitutional rights applicable to aliens may be at stake, judicial review may not be withdrawn by statute." Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996) (citing Felker v. Turpin, 518 U.S. 651 (1996)); see also Webster v. Doe, 486 U.S. 592, 603 (1988) ("[S]erious constitutional questions . . . would arise if a federal statute

execute removal orders against any alien
under this Act.
8 U.S.C. § 1232(g).

were construed to deny any judicial forum for a colorable constitutional claim."). Thus, although the IIRIRA may deprive district courts of jurisdiction over statutory habeas claims, constitutional habeas remains intact. See Wozcina v. INS, 990 F. Supp. 55, 56-57 (D. Conn. 1997) (noting the courts of appeals that have considered the matter appear to agree that constitutional habeas jurisdiction remains under IIRIRA); Williams v. INS, 114 F.3d 82, 84 n.4 (5th Cir. 1997) (joining First, Second, Third, and Ninth Circuits in this observation); see also Morel v. INS, No. 95-3271, 1998 WL 231060, at *2 (3d Cir. May 11, 1998) (suggesting jurisdiction over claims of "substantial Constitutional error" remains under changes to immigration law included in Antiterrorism and Effective Death Penalty Act). Indeed, a number of federal district courts have suggested that jurisdiction remains to hear habeas petitions for alleged substantial constitutional violations. See Jurado-Gutierrez v. Greene 977 F. Supp. 1089, 1091 (D. Colo. 1997) (collecting cases). The issue, then, is whether petitioner alleges a colorable, substantial constitutional violation such that this court has jurisdiction under the Constitution to hear this claim.

Although the cases suggesting that constitutional habeas still exists have not supported a finding of such jurisdiction, I find the case at bar distinguishable because the petitioner

stands charged with violations of state criminal law, and the case has yet to be tried. I inquired of the District Attorney of Carbon County, Gary Dobias, Esquire, and he assured the court that he fully intends to prosecute this case. He further said that were Mr. Zisimopoulos to be shipped back to Greece, he would take steps to have him brought back to this country in order to have him stand trial. He further stated that he has asked the INS to defer the deportation until after the criminal matter has been concluded, which entreaty they did not treat favorably. The criminal case probably will not reach the trial stage for several months, until the early autumn. There are various technical medico-legal issues - notably that a death seems to have been occasioned by a heart attack, which took place after Mr. Zisimopoulos had struck the soon-to-be decedent, thus raising interesting questions of causation. In any event, the district attorney fully intends to try the case.

During oral argument, counsel for Mr. Zisimopoulos asserted that his client has rights under the Sixth Amendment to confront the witnesses against him, to participate actively with counsel in his own defense, and to be a witness at his own trial. By prematurely exporting him, Mr. Zisimopoulos would be deprived of these rights. At that trial, Mr. Zisimopoulos would have a fundamental constitutional right to be a witness on his own behalf. See U.S. v. Verduogo-Urquidez, 494 U.S. 259, 265-66

(1990) (referring to "person" and "accused" used in Fifth and Sixth Amendments regulating procedure in criminal cases as inclusive of illegal aliens). This raises a matter of constitutional dimension.

It may seem anomalous to seek to protect someone by letting him stand trial for manslaughter and assault, when a contrary order would likely whisk him away from the prosecutor for, perhaps, ever. But he is presumed innocent, and he has a right to go to trial to seek to be cleared of this alleged criminality. Even though he might never be convicted otherwise, an open charge of homicide on one's Interpol rap sheet can nevertheless have dire consequences. I thus conclude that I have habeas corpus jurisdiction at least to the extent that petitioner raises claims of serious constitutional violations. Accordingly, I shall stay the petitioner's order of deportation pending his criminal trial in state court. The trial should be soon, so the length of this stay should be brief.

