

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

EL-SAYED AHMED ABDELKAWY : CIVIL ACTION
:
v. :
:
COMMISSIONER of the UNITED STATES :
IMMIGRATION & NATURALIZATION :
SERVICE : 98-784

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

August 11, 1998

Plaintiff El-Sayed Ahmed Abdelkawy ("Abdelkawy"), a deported alien, petitions the court to issue a writ of mandamus ordering defendant Commissioner of the United States Immigration and Naturalization Service ("INS") to return him to the United States while his appeal from deportation is pending. The government has filed a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted.¹ For the reasons stated below, the government's motion will be granted.

BACKGROUND

Abdelkawy is a native of the United Republic of Egypt. (Compl. ¶ 4). On April 24, 1994, Abdelkawy was apprehended by

¹Counsel for plaintiff submitted a response to the government's motion to dismiss in the form of a one page letter. The letter stated an opposition to the government's motion; included were letters documenting an unsuccessful attempt to resolve this issue. Plaintiff's letter merely stated the file date of the Plaintiff's appeal to the immigration judge's order denying the motion to reopen and the issue before the court; it failed to cite any authority.

border patrol agents at the Delta Airline counter in El Paso International Airport. (Id.) With the assistance of an interpreter, a border patrol agent (the "agent") interviewed Abdelkawy, (Record of Deportable Alien (Form I-213), attached as Ex. 1 to Def.'s Brief ["Form I-213"]), and then charged him with entering the United States without proper immigration documents. (Id.) The INS personally served Abdelkawy with an Order to Show Cause ("OSC") why he should not be deported and oral notice that a hearing would be set. (Order to Show Cause and Notice of Hearing (Form I-221), attached as Ex. 2 to Def.'s Brief ["OSC"]). Abdelkawy informed the agent his United States address was in Teaneck, New Jersey. (Form I-213). The agent advised Abdelkawy a notice of hearing would be sent to that address and he had an obligation to notify the Office of the Immigration Judge in El Paso of any change of address. (Id.) Abdelkawy was released on his own recognizance.

Abdelkawy flew to Newark, New Jersey to meet his brother, Abdel Ahmed Abdelkawy, a United States citizen, and subsequently resided with Abdel Ragab, his brother's friend, at the Teaneck, New Jersey address. (Compl. ¶ 5). A deportation hearing was held on September 26, 1994. Abdelkawy failed to appear and a deportation order was entered in absentia. (September 26, 1994 Deportation Order, attached as Ex. 3 to Def.'s Brief).

On November 13, 1996, Abdelkawy married Kimberly J. Upchurch

("Upchurch"), a native-born United States citizen. (Compl. ¶ 9). Upchurch filed an Immediate Relative Petition on Abdelkawy's behalf in May, 1997; Abdelkawy simultaneously filed an Application for Adjustment of Status. (Compl. ¶¶ 9-10). When Abdelkawy appeared for an interview in October, 1997, he was taken into custody because of the deportation order. (Compl. ¶¶ 11a-12a, 11b²). While in custody, Abdelkawy filed a motion to reopen and a motion for change of venue; Abdelkawy avers he failed to appear at his 1994 deportation hearing because he did not receive notice of the date. (November 3, 1997 Decision, attached as Ex. 4 to Def.'s Brief; Compl. ¶ 7).

On November 3, 1997, the immigration judge ("IJ"), denying the motion to reopen, held the INS had complied with the Immigration and Naturalization Act ("INA") notice requirements. (Id.) The IJ noted Abdelkawy waited almost three years to inform the court of his address change by filing an application for adjustment of status. (Id.) The IJ concluded proper notice of the hearing was sent to the address originally provided by Abdelkawy; even though the letter was returned "ATTEMPTED-UNKNOWN", the IJ held the INS notified Abdelkawy by sending the letter to the address he had provided. Abdelkawy was deported to

² Plaintiff's Complaint is misnumbered. The Complaint contains two paragraphs numbered eleven (hereinafter "11a" and "11b") and two paragraphs numbered twelve (hereinafter "12a" and "12b").

Egypt on November 10, 1997. (Compl. ¶¶ 14, 17). On December 3, 1997, Abdelkawy filed an appeal of the denial of his motion to reopen with the Board of Immigration Appeals ("BIA"). (Compl. ¶ 18). This mandamus action was filed on February 18, 1998. Abdelkawy seeks an order compelling the INS to return him to the United States during the pendency of his appeal. (Compl. at 7-8).

DISCUSSION

The government has filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Whether the court has subject matter jurisdiction in view of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 ("IIRIRA"), is a complex jurisdictional issue the court need not resolve when the motion to dismiss for failure to state a claim is dispositive. See, e.g., Hinds v. Federal Deposit Insurance Corp., 137 F.3d 148, 166 (3d Cir. 1998) (court need not decide complex question of subject matter jurisdiction when the moving party is entitled to relief on other grounds); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 623 (3d Cir. 1996) (court should avoid deciding complicated question of subject matter jurisdiction when "unnecessary to the disposition of the case"), aff'd sub nom., Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 335 U.S. 41, 45-46 (1957).

When deciding a motion to dismiss, the court properly may consider "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see Williams v. Stone, 923 F. Supp. 689, 690 (E.D. Pa. 1996), aff'd, 109 F.3d 890 (3d Cir.), cert. denied, 118 S. Ct. 383 (1997). The court may properly consider the INS orders and forms attached to the government's motion to dismiss without converting the motion to one for summary judgment.

II. Writ of Mandamus

Abdelkawy seeks mandamus relief to compel the INS to return him to the United States pending his appeal of the denial of his motion to reopen his deportation on the ground that his deportation in absentia violated due process for failure to provide him with notice of the hearing.

Abdelkawy seeks mandamus relief, pursuant to the Mandamus Act, providing: "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

Mandamus relief is available only if the defendant owes plaintiff a clear, ministerial and non-discretionary duty. See Heckler v. Ringer, 466 U.S. 602, 616 (1984); Richardson v. United States, 465 F.2d 844, 849 (3d Cir. 1972), rev'd on other ground, 418 U.S. 166 (1974). The duty owed must be a "legal duty which is a specific, plain ministerial act." Harmon Cove Condominium Assoc., Inc. v. Marsh, 815 F.2d 949, 952 (3d Cir. 1987); see Naparano Metal & Iron Co. v. Secretary of Labor, 529 F.2d 537, 542 (3d Cir. 1976) (stating there must be a legal duty owed). An act is ministerial when its performance "is positively commanded and so plainly prescribed as to be free from doubt." Richardson, 465 F.2d at 849; see United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969).

In order for a legal duty to be imposed upon an agency,

there must be a mandatory statutory requirement. Title 8 U.S.C. § 1105a(c) provides: "[a]n order of deportation ... shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order." Section 1105a(c) forecloses review of a departed alien's deportation order; the statute does not require the INS to return an alien to the United States.

In Marrero v. INS, 990 F.2d 772 (3d Cir. 1993), the Court of Appeals concluded § 1105a(c) does not bar all deported aliens from seeking judicial review. The court held there is appellate jurisdiction to review an order forcibly deporting an alien if the record reveals a "colorable" due process claim, provided administrative remedies have been properly exhausted. See id. at 777. The review is not barred merely because the alien is no longer in the United States.

But the INS is not required to return a forcibly deported alien because the alien's absence does not impede review of his claim. Section 1105a(c) does not "positively command" the INS to return Abdelkawy; such duty is not plainly required and free from doubt. Abdelkawy has failed to show he has a "clear and indisputable" right to a writ of mandamus. See United States v. Helstoski v. United States, 576 F.2d 511, 516 (3d Cir. 1978),

aff'd, 442 U.S. 477 (1979).³ The court will not issue a writ compelling the INS to return Abdelkawy, but this is without prejudice to exhaustion of administrative remedies and appellate review. The government's motion to dismiss for failure to state a claim will be granted.

An appropriate Order follows.

³The Mandamus Act further requires that all other avenues of relief have been exhausted. See Heckler, 466 U.S. at 616. It is irrelevant whether Abdelkawy has satisfied this requirement because it is clear the INS does not owe him a duty; accordingly, a writ of mandamus cannot be issued.

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ORDER

AND NOW, this 11th day of August, 1998, upon consideration of the government's motion to dismiss petitioner El-Sayed Ahmed Abdelkawy's ("Abdelkawy") petition for writ of mandamus, Abdelkawy's response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that the government's motion to dismiss is **GRANTED**.

Norma L. Shapiro, J.