

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

ANDREI CRIVOSEIA : CIVIL ACTION  
 :  
 v. :  
 :  
 UNITED STATES ATTORNEY :  
 GENERAL JOHN ASHCROFT, et al. : NO. 03-CV-5340

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**OCTOBER , 2003**

Presently before the Court is a Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2241 by Petitioner Andrei Crivoseia ("Petitioner"), a non-criminal alien currently detained at the York County Prison in York, Pennsylvania, seeking release from custody of the United States Bureau of Immigration and Customs Enforcement ("BICE") during the pendency of his appeal of the Board of Immigration Appeals' ("BIA") decision to the United States Court of Appeals for the Third Circuit. The Government filed a Response to the Petition and Petitioner filed a Reply thereto. Upon review of the parties' submissions and following a hearing on the matter on October 20, 2003, for the following reasons, Petitioner's request for habeas relief is **DENIED**.

**I. BACKGROUND**

Petitioner, a native of the Ukraine and a citizen of Moldova, entered the United States in January 1997 at or near San Luis, Arizona, without inspection and without being admitted or paroled. After being apprehended by the United States Border

Patrol, Petitioner requested permission to apply for asylum in Canada. On or about January 27, 1997, he was paroled into Canada pursuant to the Reciprocal Arrangement Between the United States Immigration Service, Department of Justice and the Canada Employment and Immigration Commission for the Exchange of Deportees Between the United States of America and Canada (the "Reciprocal Arrangement").

After Petitioner's application for asylum in Canada was denied, he was returned to the United States pursuant to the Reciprocal Arrangement on March 2, 1999. On that date, he was issued a Notice to Appear, charging him as an arriving alien subject to removal. At a hearing before the Immigration Judge ("IJ") on February 3, 2000, Petitioner requested relief under Sections 208 and 241(b)(3) of the Immigration and Nationality Act (the "INA"), codified at 8 U.S.C. §§ 1158 and 1231(b)(3), and under the United Nations Convention Against Torture.<sup>1</sup>

In an Oral Decision dated July 9, 2001, the IJ addressed Petitioner's requests for relief. Regarding Petitioner's application for asylum under Section 208 of the INA, the IJ held that the application was time-barred since Section 208(a)(2)(B) requires submission of applications for asylum within one year of

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<sup>1</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984).

entry into the United States. Petitioner entered the United States in January 1997 and did not apply for asylum until March 2000, thus rendering his application untimely. The IJ nevertheless addressed the merits of Petitioner's application by reviewing the evidence presented and the applicable standards, and determined that, even if the application for asylum were timely, he would have denied the application based on the lack of credibility running throughout the case. For that same reason, the IJ denied Petitioner's request for relief from removal under Section 241(b)(3) and for protection pursuant to the Convention Against Torture.

Petitioner appealed the IJ's decision to the BIA, which dismissed it by Order dated April 4, 2003. Petitioner then filed a Motion to Reconsider the BIA's dismissal on or about April 23, 2003, which motion is currently pending.

On or about May 22, 2003, Petitioner filed a Petition for Review with the Third Circuit Court of Appeals. On September 11, 2003, the Third Circuit issued an order staying Petitioner's removal, but denying without prejudice his request for release. The Petition for Review of the BIA's decision is pending in the Third Circuit.

Prior to the Third Circuit's issuance of a stay of removal, in August 2003, the BICE took Petitioner into custody. He is currently detained at the York County Prison in York,

Pennsylvania.

On September 22, 2003, Petitioner filed the instant habeas petition in this Court seeking release from custody pending resolution of his Petition for Review by the Third Circuit. On September 24, 2003, this Court issued an Order enjoining the Government from deporting Petitioner until further Order of the Court. On October 20, 2003, at a hearing wherein all parties were present, this Court heard argument on Petitioner's motion for release from custody.

## **II. DISCUSSION**

Petitioner contends that his continued detention violates the Due Process Clause of the Fifth Amendment to the United States Constitution since his detention serves as direct punishment for the exercise of his right to judicial review and has no other purpose other than to coerce him into abandoning his Petition for Review pending in the Third Circuit. Petitioner further contends that he should be released from custody since he has attended all immigration court hearings, has never attempted to evade governmental officials, and is neither a danger to the community nor a flight risk. Indeed, during the hearing, the Government agreed that Petitioner is not a flight risk.

Conceding that this Court has jurisdiction to hear constitutional claims in the context of a habeas petition, the

Government argues that Petitioner's relatively brief detention is entirely consistent with regulatory, statutory and constitutional law, and that his petition should be denied. In addition, the Government responds that Petitioner was lawfully taken into custody in August 2003 pursuant to a final order of deportation and that Petitioner has failed to state a constitutional claim since there is no authority creating a Fifth Amendment due process right in an alien under final order of removal to be released from custody before expiration of the statutory removal period.

As a preliminary matter, the 1996 amendments to the INA preclude this Court's review of the Attorney General's factual determinations or discretionary decisions.<sup>2</sup> See, e.g., I.N.S. v. St. Cyr, 533 U.S. 289 (2001); Liang v. I.N.S., 206 F.3d 308 (3d Cir. 2000); DeSousa v. Reno, 190 F.3d 175 (3d Cir. 1999). Thus,

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<sup>2</sup> Section § 1252(g) precludes judicial review of the Attorney General's discretionary decision to execute a removal order, and provides that:

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 execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). This provision limits the power of federal courts to review the discretionary decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders. See Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999).

"only questions of pure law will be considered on § 2241 habeas review." Sulaiman v. Attorney General, 212 F. Supp. 2d 413, 416 (E.D. Pa. 2002). Accordingly, we address only Petitioner's due process argument, as the merits of his case are currently being reviewed by the Third Circuit.

In support of his due process argument, Petitioner cites to the decision in Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001), in which the Third Circuit held that district courts have jurisdiction to entertain constitutional claims filed by non-criminal aliens in habeas corpus petitions. 266 F.3d at 212. Following entry of an order of removal, the Chmakovs filed a habeas petition in April 2000 alleging a Fifth Amendment due process violation based on ineffective assistance of counsel in their proceedings before the BIA and, on April 28, 2000, their removal was stayed. Id. at 213. The District Court subsequently dismissed their habeas petition for lack of jurisdiction and, during the pendency of the aliens' appeal of that dismissal, the Immigration and Naturalization Service took the aliens into custody on December 24, 2000. The Chmakovs were released on August 8, 2001.<sup>3</sup> However, the decision in Chmakov does not

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<sup>3</sup> It was unclear to the Third Circuit why the Chmakovs were even taken into INS custody on December 24, 2000, after both the District Court and the Third Circuit stayed their deportation as of April 28, 2000. On July 30, 2001, the Third Circuit ordered INS to show cause why the Chmakovs, who by then had been in custody for more than seven months, should not be released on their own recognizance pending the outcome of their appeal. The

create a Fifth Amendment due process right in an alien under final order of removal to be released from custody before the expiration of the statutory removal period.

The INA provides for an alien's removal within 90 days of entry of a final removal order or entry of a reviewing court's final order. 8 U.S.C. §§ 1231(a)(1)(A) and (a)(1)(B)(i)-(iii). At the time that Petitioner filed his instant petition, he had been in custody for less than two months, a period well within the 90-day statutory removal period. Since Petitioner is still within this 90-day statutory period, his continued detention is lawful.

Further, the United States Supreme Court interpreted 8 U.S.C. § 1231(a)(6) to limit an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. Zadvydas v. Davis, 533 U.S. 678 (2001). For "the sake of uniform administration in the federal courts," the Supreme Court recognized that extending the detention period for an alien in deportation proceedings up to six months is a "presumptively reasonable period of detention."

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Chmakovs were released on August 8, 2001. Chmakov, 266 F.3d at 213 n.4.

In this case, Petitioner's situation is distinguishable, as his stay was ordered by both the Third Circuit and this Court after he was taken into BICE custody, and his continued detention falls within the statutory 90-day detention period, discussed infra.

Id. at 701. After six months, if the alien can show the court "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the Government must then rebut the alien's showing in order to continue detention. Id. The Supreme Court also noted that the "6-month presumption, of course, does not mean that every alien not removed must be released after six months." Id. To the contrary, "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." Id.

In this case, Petitioner has not made a showing respecting the likelihood of his removal in the reasonably foreseeable future, except to the extent that he has indicated, in his Reply and at the hearing, that his wife, who is also a Moldovan national, has been selected for consideration in the Diversity Visa program. Petitioner contends that if his wife is selected for a visa through this program, he would be eligible to apply for an adjustment of status on that basis. Petitioner submitted a copy of the notification letter to the Court, however, the letter states that selection for the program alone does not guarantee that she will receive a visa since the number of applicants selected is greater than the number of visas available. While Petitioner may have a future opportunity to apply for an adjustment of status, Petitioner has failed to make

a present showing as to how Petitioner's removal is not likely in the reasonably foreseeable future. Nor has Petitioner demonstrated that his continued detention is unlawful, or otherwise motivated by some animus of the BICE to prevent Petitioner from asserting his right to judicial review of the BIA's decision.

### **III. CONCLUSION**

Accordingly, Petitioner's habeas petition is **DENIED WITHOUT PREJUDICE** to his ability to refile a habeas petition when the statutory period for removal and post-removal-period detention has expired and he can make the requisite showing that there is no significant likelihood of removal in the reasonably foreseeable future.

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O R D E R

**AND NOW**, this                    day of October, 2003, upon  
consideration of the Petition for Writ of Habeas Corpus filed by  
Petitioner Andrei Crivoseia ("Petitioner") (Doc. No. 1), the  
Government's Response (Doc. No. 4), and Petitioner's Reply  
thereto (Doc. No. 6), and the matters addressed at a hearing  
before the Court on October 20, 2003, it is **ORDERED** that  
Petitioner's habeas petition is **DENIED WITHOUT PREJUDICE** to his  
ability to refile a habeas petition when the statutory period for  
removal and post-removal-period detention has expired and he can  
make the requisite showing that there is no significant  
likelihood of removal in the reasonably foreseeable future.

BY THE COURT:

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JAMES MCGIRR KELLY, J.