

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

SELIM **GEREIS** YACOUB : CIVIL ACTION  
V. :  
KENNETH ELWOOD, DISTRICT :  
DIRECTOR : NO. 01-0809

MEMORANDUM AND ORDER

McLaughlin, J.

January 14, 2002

Petitioner Selim Yacoub ("Yacoub") has filed a ~~pro se~~ petition **for** a writ *of* habeas corpus pursuant to 28 U.S.C. § 2241, challenging his "indefinite" detention under the Immigration and Nationality **Act**, 8 U.S.C. § 1226(c). Section 1226(c) governs detention of criminal aliens during removal proceedings, before a final order of removal is entered. **An** immigration judge has ordered Yacoub removed **from** the United States, but **has** deferred his removal in an order that **is currently** on appeal **by** the government.

After careful and independent consideration *of* the petition and supplemental filings by both the government and the petitioner, and after review **of** the Report and Recommendation ("R & R") **of** the United States Magistrate Judge, the R & R is approved in part and disapproved **in** part. The recent Third Circuit decision in ~~Patel v. Zenski~~, No. 01-2398, 2001 WL 1636227 (3d Cir. Dec. 19, 2001), requires **that** the petitioner be released from custody unless the government makes a prompt individualized determination **of** whether continued detention is necessary to prevent **risk** of flight or danger to the community.

The factual and procedural history of this case are as given in the R & R and are incorporated herein. To summarize, Yacoub, a native of Lebanon who legally entered this country in 1978, pled guilty in 1999 to charges of bank fraud, making a false statement on a loan application, and credit card fraud. He served a fifteen-month sentence. His convictions subjected him to removal under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 439(c), 110 Stat. 1277, and the Illegal Immigration Reform and Responsibility Act of 1996, codified at 8 U.S.C. § 1227(A)(2)(A)(iii). His conviction for aggravated felonies also subjected Yacoub to mandatory detention pending removal. See id. §§ 1101(A)(43)(M) (aggravated felonies); 1226(c) (1) (mandatory detention).

Yacoub was released from his criminal imprisonment directly into INS custody in September 2000. He formally requested a custody determination in the Immigration Court. On November 30, 2000, his release was denied as unauthorized under 8 U.S.C. § 1226(c)(1).

On January 11, 2001, at the petitioner's Master Hearing before the Immigration Court, he conceded through counsel his removability as an aggravated felon. On March 28, 2001, he appeared again in Immigration Court on his application for relief under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Treaty ("CAT"). See 8 U.S.C. § 1231(b)(3)(B); 8 C.F.R. §§ 208.16 - 208.18.

On April 2, 2001, the immigration judge issued a written decision and order, in which he ordered Yacoub removed, but granted a

deferral of removal under the CAT.<sup>1</sup> The petitioner did not appeal the underlying removal order, but the INS appealed the grant of CAT relief to the Bureau of Immigration Appeals ("BIA"). The CAT appeal remains pending.

**Meanwhile,** on February 16, 2001, Yacoub filed this petition. In it, he argued that the mandatory detention provision of 8 U.S.C. § 1226(c) violates his substantive and procedural due process rights, and requested a release on bond until removal. The petitioner also sought immediate release from custody based on alleged inadequate medical care he has received while incarcerated. Days before the Magistrate Judge issued the R & R, the petitioner submitted a motion for summary judgment, arguing that the recent Supreme Court case of Zadvydas v. Davis, 121 S. Ct. 2491 (2001) mandated his release.

The Magistrate Judge, in an R & R issued July 31, 2001, found that the removal order in the case was final, notwithstanding the appeal of the CAT relief to the BIA. Accordingly, the Magistrate Judge recommended that the petitioner's challenge to 8 U.S.C. § 1226 be dismissed as moot, because detention after entry of a final removal order is governed instead by 8 U.S.C. § 1231. See R & R at 8-9 & nn.8 & 11. The Magistrate Judge thus recommended that the INS conduct a bond review under 8 C.F.R. § 241.4, the regulation setting forth review

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<sup>1</sup> The deferral prevents Yacoub from being removed to Lebanon, because the immigration judge found that Yacoub may be subject to torture there, as defined by the CAT. The immigration judge erroneously stated that "removal from the United States to *Vietnam* is hereby deferred." I.J. Opinion at 9.

procedures for aliens detained beyond the "removal period." See id. at 12; 8 U.S.C. § 1231(a) (1) (removal period).

On August 31, 2001, the INS conducted a bond review hearing. The INS determined that Yacoub should continue in custody. See Band Review Worksheet, attached to Government's Supplemental Response to Petition for Writ of Habeas Corpus, Docket No. 10. The INS decision indicated that Yacoub's release from custody was denied because his removal order was not administratively final, rendering him "statutorily ineligible for release...." Decision **by** District Director, attached to Government's Supplemental Response to Petition for Writ of Habeas Corpus, Docket No. 10.

The Court disagrees with the Magistrate Judge that the removal order in this case is final. 8 C.F.R. § 240.14 (2001), which is titled "Finality of order" under the larger heading of "Removal Proceedings," **specifically** states that "the order of the immigration judge shall become final in accordance with § 3.39 of this chapter." According to section 3.39, an immigration judge's order is not considered to be final if it has been appealed. 8 C.F.R. § 3.39 (2001) ("the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first" (**emphasis added**)). The **INS**, as well as the alien, is entitled to appeal a decision of the immigration court in a removal proceeding. See 8 C.F.R. § 240.2 (2001). Thus, because the INS here has appealed the decision issued by the immigration judge, the immigration judge's order is not final.

There is another provision on the finality of removal orders, located at 8 C.F.R. § 241.1 (2001), in the part of the regulations dealing with apprehension and detention of aliens ordered **removed**. Section 241.1 lists a variety of situations in which orders of removal become final:

**An order** of removal made by the immigration judge at the conclusion of proceedings under section 240 of the [Immigration and Nationality] Act [governing proceedings to determine removability] shall become final:

- (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
- (b) Upon waiver of appeal by the respondent;  
[or]
- (c) Upon expiration of the time allotted for an appeal is the respondent does not file an appeal within that time....<sup>2</sup>

8 C.F.R. § 241.1 (emphasis added).

Although in (b) and (c), the regulation suggests that only appeals by respondent - the alien - affect finality, section (a) appears to encompass appeals generally. Even if it did not, a review of the regulations as currently embodied, their predecessor regulations, and the statements made by regulators in promulgating and amending the regulations, establishes that 241.1 was not intended to override 3.39.

The language in section 3.39 was introduced before the concept of "removal" had evolved; instead, aliens were either

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<sup>2</sup> The regulation also has provisions which this Court will not address, because they relate to situations clearly not implicated in this case. See id. (d)-(f).

"deported" or "excluded" pursuant to immigration proceedings. See 1 Charles Gordon et al., Immigration Law and Procedure § 1.03[2](b) (1999). When section 3.39 was first proposed for comment,<sup>3</sup> the regulators **explained that the rule intended** to unify the standard for finality of **orders** in **all** immigration judge proceedings - exclusion and deportation. See 50 Fed. Reg. 51695 (Dec. 19, 1985). In fact, the notice pointed out specifically **that** the proposed rule's language **was** "consistent **with** the **provisions** of 8 C.F.R. 243.1 **dealing** with final orders of deportation." Id.

Later, when the category of "removal" was created, the notice **of** the new rules stated that the removal procedures were meant to "in nearly all respects resemble present day deportation **or** exclusion proceedings, with some minor differences outlined below and implemented by this **proposed** rule." 62 Fed. Reg. 448 (Jan. 3, 1997). There was no suggestion in the notice that any of the new **regulations** would alter the **standard** set forth in 3.39. See id. at 448-454.

Because the removal order in this case is not **final**, the **Supreme** Court's holding in Zadvydas v. Davis, 121 S. Ct. 2491 (2001), **does** not apply. However, Patel v. Zemski, No. 01-2398, 2001 WL 1636227 (3d Cir. Dec. 19, 2001), **does**. Patel, **like** this case, involved a habeas corpus petition challenging **the** constitutionality of an **alien's** detention under 8 U.S.C. § 1226(c). The Court of **Appeals** held that mandatory detention of **aliens** who are subject to removal, but not yet

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<sup>3</sup> The paragraph was then located of 8 C.F.R. § 3.37; it assumed its current location **in 1987**.

finally ordered removed, violates due process unless the aliens have been "afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight **risk or danger** to the community." **Id.** at \*12.

Here, Yacoub was given an individualized hearing after **the** R & R. However, the hearing officer listed, as one of the **reasons for** denying release, that Mr. Yacoub was "statutorily ineligible for release" because his removal order was not final. See Post Order Custody Review Worksheet and Decision by District Director, attached to Government's Supplemental Response to **Petition** for Writ of Habeas Corpus, Docket No. 10. Patel has now **held** that, for **1226(c)** to be constitutional, an alien detained under the statute must be released unless the government makes a prompt, individualized determination as **described** above. This Court does not know what the decision might have been if the hearing officer knew that he was not barred from granting release. The Court thus orders another bond review hearing be held, in light of the decision of the Third Circuit in Patel, to **assess** whether Mr. Yacoub poses a flight **risk or a danger** to the community.

As to Mr. Yacoub's claim of inadequate medical attention, the Court adopts the R & R. It is denied without prejudice to raise it elsewhere, because a habeas proceeding is not the appropriate avenue to raise a claim of inadequate medical treatment.

**An** appropriate Order follows.



3. The petitioner's Motion for Summary Judgment is

DENIED.

BY THE COURT:

  
Mary A. McLaughlin, J. \_\_\_\_\_