

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

SELIM YACOUB : CIVIL ACTION
 :
 v. :
 :
 KENNETH ELWOOD et al. : NO. 02-1480

MEMORANDUM AND ORDER

McLaughlin, J.

August 14, 2002

Petitioner Selim Yacoub has filed this counseled petition for a writ *of* habeas corpus pursuant to 28 U.S.C. § 2241, challenging the lawfulness *of* a final order *of* removal entered against him by the Board of Immigration Appeals ("BIA").¹

The following facts are taken from the IJ's and the BIA's written decisions, and are not disputed by the petitioner or the government. Yacoub is a native of Lebanon, who legally entered the United States in 1978. He pled guilty in 1999 to charges of bank fraud, making a false statement on a loan application, and credit card fraud, for which he served a fifteen-month prison sentence. Under the Illegal Immigration Reform and Responsibility

¹ The petitioner also requested a stay of removal in his petition. He later filed a separate request for a stay of removal which the government did not oppose, and which was subsequently granted by order of this Court dated May 7, 2002. The Court here thus addresses only the petition for the writ *of* habeas corpus.

Act of 1996, codified at 8 U.S.C. § 1227(a) (2)(A)(iii), the crimes constituted aggravated felonies, and his convictions thus made him removable from the country. Id.²

In September 2000, Yacoub was released from his criminal imprisonment directly into INS custody. At his Master Hearing before the Immigration Court, Yacoub conceded through counsel his removability as an aggravated felon. In a later proceeding, he testified in support of his application for relief under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Treaty (the "Convention"). See 8 U.S.C. § 1231(b) (3) (B); 8 C.F.R. §§ 208.16 - 208.18. The Convention prohibits the removal of aliens to countries where it is more likely than not that they will be tortured. 8 C.F.R. § 208.16(c) (2).³

² 8 U.S.C. § 1227(a) states: "Any alien (including an alien crewman) in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens: . . . (2)(A)(iii) Any alien who is convicted of an aggravated felony any time after admission is deportable."

Congress has replaced the term "deportation" with "removal," but the nomenclature change is not yet reflected in all existing U.S. Code sections. Patel v. Ashcroft, 294 F.3d 465, 469 n.4 (3d Cir. 2002).

³ The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") authorized the promulgation of regulations implementing the Convention. FARRA § 2242(b), 112 Stat. 2681-822 (1998). FARRA states:

POLICY - It shall be the policy of the United States not to expel, extradite, or otherwise

(continued..)

According to Yacoub, before leaving Lebanon, he had sided with Phalangist Christian forces in the civil war that broke out in that country in 1975. While in the United States, he continued to engage in political activities relating to the Phalangist Christian movement.⁴ Upon returning to Lebanon in 1992 for a funeral, he met with Phalangist party officers and decided to run for parliament. While campaigning, he was detained by four Hizballah members for twenty-four hours, during which time he was interrogated, and hit twice - once knocking him to the floor. He left Lebanon the following day.

On April 2, 2001, the Immigration Judge issued a written decision ordering that Yacoub be removed from the United States. The Immigration Judge, however, granted Yacoub deferral of removal to Lebanon' under the Convention because he found that it was more

³(...continued)
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, regardless of whether the person is physically present in the United States.

Id.

⁴ The BIA noted that there was a lack of evidence corroborating the petitioner's testimony on this point. Petition, Ex. C, at 3.

⁵ Although the Immigration Judge stated in his order that "the respondent's removal from the United States to Vietnam is hereby deferred", it is obvious that this was merely a clerical error and the Immigration Judge meant to specify deferral from removal to Lebanon. Petition, Ex. B, at 9 (emphasis added).

likely than not that Yacoub would be tortured if he were to return to Lebanon due to his affiliation with the Phalangist Christians. Petition, Ex. B., at 8.

The INS appealed the decision to the BIA.⁶ On January 31, 2002, the BIA issued a decision sustaining in part and reversing in part the Immigration Judge's decision. The BIA sustained the Immigration Judge's holding as to Yacoub's removability, but reversed the finding under the Convention that it was more likely than not that Yacoub would be tortured in Lebanon. The BIA found, instead, that the "evidence does not indicate that the respondent would likely be subject to detention and torture by Lebanese officials" and therefore reversed the grant of deferral of removal. Petition, Ex. C, at 2, 4.

Yacoub presents the following question for the Court's consideration: "Did the BIA err in improperly evaluating the evidence of the likelihood of torture to befall the petitioner in denying his claim for deferral under the Convention Against Torture?" Memorandum in Support of Petition, at 4.

The Court must first determine whether it has jurisdiction to entertain this petition. The 1996 amendments to

⁶ During the pendency of the appeal at the BIA, Yacoub filed an earlier petition for habeas corpus with this Court, arguing that his detention would be indefinite until the appeal was decided. See Yacoub v. Zemski, Civ. No. 01-809. The Court ordered a bond review hearing for the petitioner, by order dated January 14, 2002. Yacoub, Civ. No. 01-809, Docket No. 16. The BIA rendered its decision on the appeal on January 31, 2002.

the Immigration and Nationality Act prohibited or curtailed judicial review for certain immigration-related decisions. One such provision states:

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [an aggravated felony]

8 U.S.C. § 1252(a)(2)(C).

This and other new jurisdiction-stripping provisions in the immigration statutes⁷ did not make clear how, if at all, they affected the availability of habeas review. The Supreme Court in Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289 (2001), addressed the question, holding that habeas jurisdiction under section 2241 was not repealed by the new provisions.

In reaching this conclusion, the Supreme Court discussed the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. Id. at 297 (citing Ex Parte Yerger, 8 Wall. 85, 102 (1869)). The Court observed that the relevant jurisdictional-stripping passages in the immigration laws refer only to "judicial review" or "jurisdiction to review," but

⁷ Other jurisdiction-stripping provisions include 8 U.S.C. § 1252(a)(2)(A) (barring review relating to inspection of aliens arriving in the United States), § 1252(a)(2)(B) (barring review of denials of certain types of discretionary relief), § 1252(b)(9) (requiring all questions of law and fact be raised only in review of a final order), and § 1252(g) (barring review of decisions by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders).

not to habeas, which, in the immigration context, has an historically different meaning. Id. at 311 (citing Heikkila v. Barber, 345 U.S. 229 (1953)). The Court concluded that the statutes did not reflect a "clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law. . . ." Id. at 314.

Nonetheless, not all questions that can be heard on direct review are appropriate for review on habeas. "[T]he limited role played by the courts in habeas corpus proceedings [is] far narrower than the [direct] judicial review authorized by the APA" St. Cyr, 533 U.S. at 312 (citation omitted). As the St. Cyr Court noted, habeas review historically has been available for purely legal questions, but not for factual or discretionary determinations made by the executive. See id. at 306-07 (citing, inter alia, Ekiu v. United States, 142 U.S. 651, 659 (1892)⁸, and

⁸ In Ekiu, 142 U.S. at 660, the Supreme Court, describing the availability and scope of the habeas review to redress an immigration-related question, held that:

The final determination of those facts [relevant to determining whether an alien can land in the United States] may be in trusted [sic] **by** congress to executive officers; and in such a case, . . . [the executive officer] is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.

Gedlow v. Uhl, 239 U.S. 3, 9 (1915)). In its discussion, the Court drew careful distinctions between purely legal inquiries - for instance, those involving "specific statutory standards,, - which were appropriately heard on habeas, and other inquiries, which were not. See St. Cyr, 533 U.S. at 307-08 (citing, inter alia, Gerald L. Neuman, Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 Harv. L. Rev. 1963, 1991 (2000)).

Courts have interpreted the appropriate scope of habeas review after St. Cyr to be limited to legal questions. See Carranza v. INS, 277 F.3d 65, 72 & n.6 (1st Cir. 2002) (only legal questions are appropriate for habeas review because they do not involve second-guessing agency's factual findings); Sol v. INS, 274 F.3d 648, 651 (2d Cir. 2001) (habeas statute review is for statutory or constitutional errors, not fact-intensive review which is "vastly different"); Bradshaw v. INS, No. 01-5221, 2002 WL 1160832, at *1 (E.D. Pa. June 3, 2002) ("Habeas review is limited to questions of statutory and constitutional law; review of purely factual or discretionary issues is prohibited."); Shittu v. Elwood, 204 F. Supp. 2d 876, 878 (E.D. Pa. 2002) (holding habeas review limited to errors of law, citing St. Cyr).

The question presented by Yacoub's petition is not a purely legal question; it is factual. See Sevoian v. Ashcroft, 290 F.3d 166, 170 (3d Cir. 2002). In Sevoian, the Court of Appeals reviewed the BIA's denial of a motion to reopen an immigration

proceeding in which the non-criminal petitioner wished to raise a claim under the Convention. The BIA had denied the motion because it found that the petitioner had not presented sufficient evidence to make out a prima facie case for relief. The Court of Appeals held that the BIA's determination was a finding of fact. Id. at 175. As in Sevoian, the BIA's conclusion that "the evidence does not indicate that the respondent would likely be subject to detention and torture by Lebanese officials" reflects the BIA's weighing of the evidence, and its making a factual finding as to Yacoub's claim. Petition, Ex. C, at 2. Cf. Gao v. Ashcroft, No. 01-3472, 2002 WL 1805566, at *4 (3d Cir. Aug. 7, 2002) (qualification for asylum - whether applicant has shown well-founded fear of future persecution - is a factual determination); Ezeagwuna v. Ashcroft, No. 01-3294, 2002 WL 1752292, at *12 (3d Cir. July 30, 2002) (same for withholding of removal, where standard is whether it is more likely than not that life or freedom of alien will be threatened on proscribed grounds).'

⁹ The government argues that the decision of the Attorney General under the Convention is discretionary and, therefore, not subject to habeas review. That position is inconsistent with the language of the statute and the Third Circuit's statement in Sevoian that "relief under the Convention Against Torture . . . is not committed to the Attorney General's discretion." Sevoian, 290 F.3d at 172; FARRA § 2242(b)9, 112 Stat. 2681-822 (1998). As stated above, however, the Court does agree that the Court does not have habeas jurisdiction over this petition because it challenges the Attorney General's factual findings.

The Court holds that it does not have jurisdiction to review on habeas a factual question like the one presented here. The petition is denied.

An appropriate Order follows.

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

SELIM YACOUB

v.

KENNETH ELWOOD et al.

.
:
:
:
:

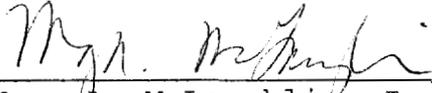
CIVIL ACTION

NO. 02-1480

ORDER

AND NOW, this 14th day of August, 2002, upon consideration of the Petition for Writ of Habeas **Corpus** (Docket No. 1), the government's response thereto, and the petitioner's reply, IT IS HEREBY ORDERED THAT the petition for habeas corpus is DENIED for lack of subject matter jurisdiction, and a certificate of appealability is DENIED, for the reasons set forth in a Memorandum of today's date.

BY THE COURT:



Mary A. McLaughlin, J.

filed 8/15/02:

*S. Britt, usg
J. Sheehan, usg
B. Morley, usg.*