

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

MARCELL RICARDO FULLWOOD, : CIVIL ACTION
Petitioner :
 :
vs. :
 :
 :
JANET RENO, et al. :
Respondents : NO. 98-4252

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 21st day of May, 1999, upon careful and independent consideration of the Petition for Writ of Habeas Corpus of Petitioner, Marcell Ricardo Fullwood, including the Memorandum of Law in Support of Preliminary Injunction, Stay of Deportation (Document No. 1, filed August 13, 1998), and after review of the Report and Recommendation of United States Arnold C. Rappoport dated October 22, 1998, and Objections of Petitioner Marcell Ricardo Fullwood to Report and Recommendation (Document No. 9, filed February 5, 1999), **IT IS ORDERED**, for the reasons set forth in the following Memorandum, that the Report and Recommendation of United States Magistrate Judge Arnold C. Rappoport dated October 22, 1998 is **REJECTED IN PART AND ADOPTED IN PART**, as follows:

1. That part of Magistrate Judge Rappoport's Report and Recommendation concluding that the Court has no jurisdiction to hear the petition is **REJECTED** in light of the Third Circuit's recent decision in Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999). Based on Sandoval, the Court concludes that it has subject matter

jurisdiction over the Petition for Writ of Habeas Corpus;

2. That part of Magistrate Judge Rappoport's Report and Recommendation addressing the merits of petitioner's claims is **APPROVED AND ADOPTED**, with the further analysis provided by the Court in the Memorandum accompanying this Order.

3. The Petition for Writ of Habeas Corpus is **DENIED**;

4. Respondent's Motion to Dismiss is **GRANTED**;

5. A certificate of appealability will not issue because petitioner has not made a substantial showing of the violation of a constitutional right.

MEMORANDUM

1. Facts and Procedural History

Petitioner, a native of Jamaica and a lawful permanent resident since 1989, was convicted of extortion, conspiracy and aiding and abetting in December, 1992 and sentenced, inter alia, to 57 months imprisonment. The mandate on his appeal was final on January 23, 1997.

On January 24, 1997, the Immigration and Naturalization Service began deportation proceedings. An Immigration Judge found petitioner deportable under INA § 241(a)(2)(A)(iii).¹ Petitioner

¹ Section 241(a)(2)(A)(iii), codified at 8 U.S.C. § 1251(a)(2)(A)(iii), provides that, "upon the order of the Attorney General," "[a]ny alien who is convicted of an aggravated felony at any time after entry is deportable." Among the category of "criminal offenses" rendering an alien deportable is aggravated felony; any alien who is convicted of an aggravated felony at any time after entry is deportable. It is uncontested that petitioner's extortion conviction qualifies as an "aggravated felony" within the meaning of § 241 as amended.

applied for a waiver under INA § 212(c) (repealed by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") section 304(b)), which was denied on November 14, 1997 because petitioner was found to be ineligible. The Board of Immigration Appeals affirmed, concluding that under § 440(d) of the Anti-terrorism and Effective Death Penalty Act ("AEDPA") petitioner was not eligible for waiver under INA 212(c).² Petitioner then filed a petition for review and for a stay of deportation proceedings in

² AEDPA § 440(d) amends 8 U.S.C. § 1182(c). As amended, the statute reads in full:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(I).

AEDPA § 440(d)(emphasis added). Section 1182(c) was repealed by the IIRIRA with respect to cases in which the INS instituted removal proceedings on or after April 1, 1997. See IIRIRA § 309. Because the INS initiated removal proceedings against petitioner before April 1, 1997, the repeal of § 1182(c) does not apply to this case. Sandoval v. Reno, 166 F.3d 225, 239 & n.7 (3d Cir. 1999).

the Third Circuit, which dismissed the petition for lack of jurisdiction and denied the request for a stay.

On August 13, 1998, petitioner filed the instant motion under 28 U.S.C. § 2241 claiming (1) applying AEDPA § 440(d) to his claims is an improper retroactive elimination of INA § 212(c) relief and (2) § 440(d) violates the 5th Amendment guarantee of equal protection by denying eligibility for waiver relief to immigrants in deportation proceedings but preserving such relief in exclusion proceedings.

The government filed a motion to dismiss for lack of jurisdiction, arguing that INA § 106(a) removes jurisdiction over such petitions from district courts.³

Magistrate Judge Arnold C. Rappoport agreed with government that the Court was without jurisdiction.⁴ Reasoning that IIRIRA § 306(a) removed jurisdiction from the federal courts over claims arising from any decision by the Attorney General to remove an alien unless the claim is in the form of a timely

³ Before its amendment, § 106(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." The substituted language of AEDPA § 440(a) reads: "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in [the deportation provisions of the INA] shall not be subject to review by any court."

⁴ This case was referred to Magistrate Judge Rappoport for a Report and Recommendation by Order of the Court on August 25, 1998.

petition for review by the Court of Appeals,⁵ the Magistrate Judge concluded that habeas relief is no longer available to petitioner.

On an alternative ground, Judge Rappoport recommended that the petition should be denied on the merits. First, he concluded that there was no retroactive application of § 440(d), as the request for waiver was not made until after the enactment of the AEDPA. Second, he concluded that there was no violation of the equal protection clause because the differentiation about which petitioner complained was not wholly irrational.

Petitioner filed objections to the Report and Recommendation, stating that the District Court had jurisdiction under Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999), which was decided after the Report and Recommendation issued. Petitioner makes no argument with respect to jurisdiction or the merits of the case in his objections; he simply reprints the Sandoval opinion and does not address that portion of the Report and Recommendation dealing the merits of his petition.

⁵ Section 306(a) amends INA § 242(g), 8 U.S.C. § 1252(g), to provide:

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 Act.

Sandoval, 166 F.3d at 229-30.

2. Retroactivity

AEDPA § 440(d) took effect on April 24, 1996. Deportation proceedings against petitioner began on January 24, 1997. Thus, there is no retroactive application against petitioner, and the argument must be rejected. See Then v. INS, 37 F.Supp.2d 346, 358 (D.N.J. 1998)(concluding that retroactivity is not present where deportation proceedings begin after effective date of AEDPA); Olvera v. Reno, 20 F.Supp.2d 1062, 1066 (S.D. Tex. 1998)(same).

3. Equal Protection Clause

Petitioner argues that the equal protection clause was violated because of the unequal treatment of aliens in deportation proceedings and those in exclusion proceedings. The Court concludes that there is no violation of equal protection.

Prior to the AEDPA, INA § 212(c) permitted certain deportable aliens to apply to the Attorney General for a waiver of deportation. AEDPA § 440(d) added drug offenses to the list of deportable offenses that made aliens ineligible for discretionary relief, and removed the provision providing for waiver eligibility for individuals, such as petitioner, who had been sentenced to less than 60 months imprisonment. Discretionary relief remains, however, for aliens in exclusion proceedings.

A distinction between aliens involved in deportation proceedings and aliens involved in exclusion proceedings does not run afoul of the equal protection clause if it is not wholly

irrational. See Matthews v. Diaz, 426 U.S. 67, 82-83 (1976). The Court finds that the distinction between aliens who are in the country at the time of deportation proceedings, where such proceedings take place after incarceration, and aliens who left the country but are attempting to re-enter, is not wholly irrational because of the traditional distinction between the two classes of aliens.

For example, an alien could traditionally be excluded on many grounds that were not grounds for deportation, including poor health and the likelihood that he or she would become a public charge. See former 8 U.S.C. § 1182(a)(1)(A) & (4); grounds for exclusion also formerly had a lower evidentiary standard than corresponding grounds for deportation. Compare former 8 U.S.C. § 1182(a)(2)(A) with former 8 U.S.C. § 1251(a)(2). Finally, Congress gave the Attorney General discretion not to institute deportation proceedings against aliens who appeared to be deportable, Johns v. Department of Justice, 653 F.2d 884, 889 (5th Cir. 1981), but required aliens entering the country to be detained if they did "not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land . . ." See former 8 U.S.C. § 1225(b). See also Yang v. Maugans, 68 F.3d 1540, 1547 (3d Cir. 1995)(discussing distinction between importation and exclusion hearings); Olvera, 20 F.Supp.2d at 1070 ("It was certainly not irrational for Congress to provide the discretionary relief in § 1182(c) only to the narrow class of

aliens who, after residing legally in the United States for at least seven years, returned from a trip abroad only to wind up in exclusion proceedings.").

4. Conclusion

For the foregoing reasons, the Court concludes that it has jurisdiction over the Petition for Writ of Habeas Corpus, and that the Petition must be denied.

BY THE COURT:

JAN E. DUBOIS, J.