

The facts of this case are set forth in detail in the court's June 6, 2000 Memorandum.² The court incorporates by reference the facts and analysis from that prior Memorandum. Of particular importance is the fact that on October 28, 1999, the BIA granted INS's motion to reopen Welch's case. (06/06/2000 Mem. Op. at 5.) In the reopened proceedings, INS has taken the position that proceedings against Welch began with the 1994 Order to Show Cause and, therefore, pre-IIRIRA law should govern Welch's current deportation proceedings. (Resps. Opp'n at 14.) Welch, on the other hand, maintains that, because the convictions that were the basis for the 1994 Order to Show Cause have been vacated, any action against him must proceed pursuant to the post-IIRIRA law in effect at the time of his 1999 guilty plea, and that under the post-IIRIRA law he is entitled to seek discretionary relief from deportation. (Pet. Supp. Mem. at 6-7.)

ANALYSIS

I. Jurisdiction

INS challenges the court's jurisdiction to hear Welch's petition. It argues that, since Welch's case is currently

²At the time of the court's prior Memorandum, Welch was being held in the custody of the INS. As a result of the court's June 6, 2000 Order, an Immigration Judge released Welch on \$1,500 bond. (Letter from Mary Ellen Fleck to Chambers of 6/19/00)

pending before the Immigration Court, his habeas petition is an attempt to interfere with the Attorney General's adjudication of a pending case. Relying on Section 242(g) of the INA, 8 U.S.C. § 1252(g), INS maintains that this court is barred from hearing such a challenge. See Resps. Suppl. Mem. at 4-5. That Section provides:

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.

In Reno v. American-Arab Anti-Discrimination Committee, 119 S. Ct. 936 (1999) ("AADC"), the Supreme Court defined the jurisdictional limitations of Section 1252(g) narrowly. According to the Court, Section 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" Id. at 943 (emphasis omitted). The Court noted:

There are of course many other decisions or actions that may be part of the deportation process - such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order.

Id. "Because some of the[se] examples could be squeezed into one of the three listed actions if the actions were to be read expansively, the examples reinforce the Court's express statement that § 1252(g) 'applies only to three discrete actions' and its description of its reading of § 1252(g) as a 'narrow' one." Mustata v. U.S. Dep't of Justice, 179 F.3d 1017, 1021 (6th Cir. 1999) (quoting AADC, 119 S. Ct. at 943, 945).

Unlike the petitioners in AADC, Welch does not contest the Attorney General's use of her discretion, which was Congress' main concern in enacting the jurisdictional limits in IIRIRA. See AADC, 119 S. Ct. at 945 (describing the "main theme" of IIRIRA as protecting the Executive's discretion from the courts). Nevertheless, INS contends that Welch's petition presents a challenge to the Attorney General's decision to adjudicate the case and, therefore, falls within the three listed actions of Section 1252(g). That interpretation of Welch's petition is not accurate. Welch recognizes that the Attorney General, through the immigration courts, will eventually decide his case. Welch only challenges the statute under which that adjudication must proceed. Accordingly, Section 1252(g) does not bar Welch's challenge. See Selgeka v. Carroll, 184 F.3d 337, 342 (4th Cir. 1999) (holding that

Section 1252(g) does not bar an alien's plea for an immigration judge to hear his asylum application because the alien does not contest Attorney General's authority to decide the case but "expressly recognizes that the Attorney General, through its designee, the BIA, will eventually adjudicate his case."); Mustata, 179 F.3d at 1022-23 (stating that Section 1252(g) did not encompass aliens' claim that the assistance they received during their administrative immigration proceedings was constitutionally defective).

Moreover, because Welch's petition invokes this court's general habeas jurisdiction under 28 U.S.C. § 2241, INS's reliance on Section 1252(g) and AADC is misplaced. The AADC Court did not address the effect of Section 1252(g) on general habeas jurisdiction. See AADC, 119 S. Ct. at 942, 942 n.7. The Fourth Circuit has held that IIRIRA did not eliminate federal district courts' Section 2241 habeas jurisdiction. See Bowrin v. INS, 194 F.3d 483, 488-89 (4th Cir. 1999).³ Accordingly, while district courts reviewing Section 2241 habeas petitions brought by aliens may not consider factual or

³The court is aware of the Fourth Circuit's decision in Mapoy v. Carroll, 185 F.3d 224 (4th Cir. 1999). Since Bowrin was decided after Mapoy, and since the Bowrin panel was presumably aware of the Mapoy decision, this court will treat Bowrin as the controlling law. Notably, the Fourth Circuit has not relied on Mapoy since its issuance.

discretionary issues, they may address both statutory and constitutional questions when presented. See id. at 490.⁴ Here, Welch's challenge involves only constitutional and statutory questions and, therefore, may be reviewed under the court's general habeas jurisdiction.⁵

Finally, INS challenges the court's jurisdiction on the basis of administrative exhaustion. See Resps. Suppl. Mem. at 6 (citing 8 U.S.C. § 1252(b)(9) and (d)(1) (Supp. IV 1998)). This challenge is unpersuasive. INS has argued that Welch was in administrative proceedings prior to April 1, 1997, and IIRIRA's transitional rules should apply. See Resps. Suppl. Mem. at 8-10. Welch contests INS's interpretation of the statute. Importantly, Welch also argues that, if the INS's statutory interpretation is correct, the statute as applied violates his Equal Protection rights. Because the Immigration Court cannot address this constitutional challenge to the

⁴In reaching this conclusion, the Fourth Circuit relied on the AADC Court's narrow reading of Section 242(g). Bowrin, 194 F.3d at 488.

⁵The fact that Welch has been released on bail does not eliminate this court's Section 2241 jurisdiction. Courts have long recognized that the "in custody" requirement of Section 2241 encompasses individuals released on bail. See, e.g., Hensley v. Municipal Court, 93 S. Ct. 1571, 1575-76 (1973); Nakell v. Attorney General of North Carolina, 15 F.3d 319, 323 (4th Cir. 1994); Dry v. CFR Court of Indian Offenses, 168 F.3d 1207, 1208 (10th Cir. 1999).

statute, requiring administrative exhaustion would be futile. See 06/06/2000 Mem. Op. at 9-10 (citing cases to support this proposition). Accordingly, the court will not require Welch to exhaust his administrative remedies.

II. Welch's Statutory Challenge

As a general rule, post-IIRIRA law applies to removal proceedings commenced after April 1, 1997, the effective date of the amendments. See IIRIRA § 309(c); Bowrin, 194 F.3d at 487. But, IIRIRA contains transitional rules that apply to aliens already "in exclusion or deportation proceedings" as of that date. Id. INS contends that the transitional rules preclude Welch from applying for discretionary cancellation of removal by virtue of his conviction for a misdemeanor firearm offense. See Pet. Suppl. Mem., Ex. 2 at 39 ("Cancellation of removal is not available [under the transitional rules] if you've been convicted of a firearms violation."). Under the post-IIRIRA law, on the other hand, only aliens who have been convicted of "aggravated felonies" are prohibited from applying for discretionary relief. See 8 U.S.C. § 1229(b) (2000). None of Welch's misdemeanor convictions appear to fall within the statutory definition of an "aggravated felony." See 8 U.S.C. § 1101(a)(43). It is likely, therefore, that he would be eligible to apply for

discretionary cancellation of removal under the post-IIRIRA law. See Pet. Suppl. Mem., Ex. 2 at 39 ("it appears that the bar to cancellation of removal would not apply to the petitioner and indeed he may be able to apply for cancellation of removal.").⁶

Welch's July 22, 1994 convictions have been vacated. Therefore, the April 1999 guilty plea is the only remaining conviction for which Welch may be deported. Nonetheless, INS maintains that pre-IIRIRA law applies to Welch because, based on his 1994 conviction, he was "in deportation proceedings" prior to the effective date of the IIRIRA amendments. See Resps. Suppl. Mem. at 8-9.

INS's position is contrary to both the Attorney General's regulations and the INS's position in other cases. 8 C.F.R. § 240.40 states that a deportation proceeding is commenced by the filing of an Order to Show Cause with the Immigration Court, "and an alien is considered to be in deportation proceedings only upon such filing" 8 C.F.R. § 240.40. Here, the appropriate charging document is the Amended Order to Show Cause, which was filed on December 13, 1999. The non-amended Order to Show Cause was based on a vacated 1994

⁶INS has not contested Welch's ability to apply for cancellation of removal under post-IIRIRA laws.

conviction upon which INS admitted it would not deport Welch. See Resps. Opp'n at 7 n.7. Therefore, the Amended Order to Show Cause is the only charging document under which INS can proceed. Because that document was filed after the effective date of the IIRIRA amendments and relates to a 1999 conviction, post-IIRIRA law must apply to Welch.⁷

The court's conclusion is further buttressed by Welch's Equal Protection claim. To apply a law to Welch that would not apply to other aliens convicted of the same offense on the same date would raise serious Equal Protection issues. When possible, courts should read both statutes and regulations in a manner that avoids serious constitutional problems. See, e.g., Vermont Agency of Nat. Resources v. United States, 120 S. Ct. 1858, 1870 (2000) (statutes); Comet Enters. Ltd. v. Air-A-Plane Corp., 128 F.3d 855, 859 (4th Cir. 1997) (stating that agency regulations should be construed in such a way as to avoid constitutional concerns). To avoid this

⁷The court recognizes that, superficially, this reasoning may seem inconsistent with its holding in Woo v. Reno, (Civil No. CCB-00-2630) (Memorandum and Order issued September 20, 2000). In Woo, this court found that, for purposes of determining the applicable law, proceedings against an alien had commenced when an Order to Show Cause was served on him, not when it was filed with an Immigration Court. That Order to Show Cause, however, was based on a valid guilty plea. In this case, the determinative fact is not the timing of INS's issuance of the non-amended order, but the fact that it is now invalid because it is based on a vacated conviction.

constitutional problem and to give the statute and regulations their most natural reading, Welch's deportation proceedings shall be subjected to post-IIRIRA law, including the ability to apply for cancellation of proceedings pursuant to 8 U.S.C. § 1229b.

A separate Order follows.

Date

Catherine C. Blake
United States District Judge

