



) STATES DISTRICT COURT
STRICT OF MINNESOTA
. No. 01-1963(DSD/FLN)

Samuel S. Badio,

Petitioner,

v.

ORDER

The United States of America
and the Department of Justice,
U.S. Immigration & Naturalization
Service and Curtis Aljets, its
District Director,

Respondents.

Douglas R. Rainbow, Esq., Rainbow Law Office, 250
Second Avenue South, Minneapolis, MN 55401, counsel
for petitioner.

Gregory G. Brooker, Assistant United States Attorney,
600 U.S. Courthouse, 300 South Fourth Street,
Minneapolis, MN 55415, counsel for respondents.

This matter is before the court upon petitioner's request
for a writ of habeas corpus. For the following reasons, the
court denies the petition.

BACKGROUND

Petitioner is 34-year-old alien national of Liberia who was
admitted to the United States as a lawful permanent resident on

FILED _____
RICHARD D. SLETTEN, CLERK
Judgment Ent'd. _____
Deputy Clerk's Initials _____

May 19, 1994. The respondent, Curtis Aljets, is district director of the United States Immigration and Naturalization Service ("INS"), an instrumentality of the United States Department of Justice.

On March 19, 1999, the District Court for Hennepin County, Minnesota found petitioner guilty of criminal sexual conduct in the third degree under Minnesota law. After petitioner had served his sentence, respondent took him into custody pursuant to 8 U.S.C.A. 1226. Petitioner has been in detention continuously since that time. There are currently no criminal charges pending against petitioner.

The procedural posture of this case is as follows. On October 15, 1999, the INS issued a Notice to Appear charging petitioner with being deportable under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony as defined in INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), sexual abuse of a minor. (Resp't Ex. A.) The INS detained Badio without bond pursuant to INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B). Id. at 4. Under INA 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B), detention of criminal aliens is mandatory. See 8 U.S.C. § 1226(c)(1999) ("The Attorney General shall take into custody any alien who ... is deportable by

reason having committed any offense covered in section 1227(a)(2)(A)(i), (A)(iii), (B), (C) or (D) of this title,....").

The immigration judge conducted Badio's removal hearing on November 18, December 2, and December 23, 1999, and January 27, February 3, February 24, and March 3, 2000. (Resp't Ex. H.) On December 2, 1999, petitioner's attorney conceded the charge of removability set forth in the Notice to Appear. Id. at 8-9. Petitioner applied for withholding of removal under INA § 241(b)(3)(A), 8 U.S.C. § 12319(b)(3)(A), and under Article 3 of the Convention Against Torture, as implemented in 8 C.F.R. 208.16(c). Id. at 9. At the hearing, the INS argued that petitioner was ineligible for withholding of removal because he had been convicted of a particularly serious crime. Id. at 9-10. In an oral decision on March 3, 2000, the immigration judge held that petitioner's conviction for criminal sexual conduct in the third degree was not a particularly serious crime and granted petitioner withholding of removal to Liberia under INA § 241(b)(3)(A). (Resp't Ex. F; Ex. I at 22.) Petitioner was ordered deported to any country but Liberia. (Resp't Ex. F; Ex. I at 25.)

Because petitioner was ordered deported from the United States and petitioner did not appeal this determination,

petitioner no longer retains permanent resident status. The INS reserved the right to appeal from the immigration judge's decision of March 3, 2000. (Resp't Ex. F; Ex. H at 259.) In its appeal, the INS challenged only the immigration judge's finding that petitioner's conviction was for a crime which was not particularly serious. (Resp't Ex. G.) Thus, petitioner's ultimate order of deportation was not appealed.

On December 12, 2000, the Board of Immigration Appeals ("BIA") determined that petitioner's conviction for criminal sexual conduct in the third degree was for a particularly serious crime, concluded that petitioner was statutorily ineligible for withholding of removal, and remanded the record to the immigration judge for a finding on petitioner's eligibility for deferral under the Convention Against Torture. (Resp't Ex. L.)

The immigration judge conducted hearings on January 25, February 8, March 22, and March 29, 2001. On March 29, 2001, the immigration judge rendered an oral decision granting petitioner deferral of removal to Liberia under 8 C.F.R. 208.17. (Resp't Ex. M; Ex. P.) At the hearing petitioner orally waived his right to an appeal of this decision. The INS, however, filed a timely appeal of the immigration judge's deferral decision with the BIA. (Resp't Ex. N.) The INS filed its brief

on August 2, 2001, and petitioner filed his response brief on October 3, 2001. The board is currently considering the appeal, but at this time has not yet issued a decision.

Petitioner now files a petition for a writ of habeas corpus under 28 U.S.C. § 2241, *et. seq.*, challenging his detention. For the reasons stated, the court denies petitioner's request for habeas corpus relief.

DISCUSSION

A. Standard of Review

Judicial review of immigration matters is limited. As the Supreme Court stated in Hampton v. Mow Sun Wong: "the power over aliens is of a political character and therefore subject only to narrow judicial review." 426 U.S. 88, 102 n.21 (1976). In Fiallo v. Bell, 430 U.S. 787, 792 (1977), the Supreme Court again underscored the "limited scope of judicial inquiry into immigration legislation." In Galvan v. Press, the Supreme Court emphasized this point, explaining:

Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process ... But that formulation of these policies is entrusted exclusively to Congress has become about as

firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. ... 347 U.S. 522, 531 (1954).

While this congressional power is subject to constitutional limitations, see Zadvydas v. Davis, 121 S. Ct. 2491, 2501 (2001), the court's review of Badio's detention status is nevertheless narrow.

B. Petitioner's Detention

Petitioner contends that he is entitled to habeas corpus relief because his detention violates the United States Immigration and Naturalization Act and the Fifth, Sixth and Eighth Amendments. He cites Zadvydas v. Davis, 121 S. Ct. 2491 (2001) to support his position that the INS's authority to detain certain people to process them for deportation is subject to constitutional limits. While the court recognizes the constitutional limitations Zadvydas imposes on post-removal-order detentions, the court concludes that Zadvydas does not apply to petitioner's pre-removal-order detention. The court further concludes that § 1226(c) does not violated the Fifth Amendment's due process clause and therefore denies petitioner's request for habeas corpus relief.¹

¹Although petitioner also claims that his detention violates the United States Immigration and Naturalization Act and the Sixth and Eighth Amendments, the court finds these arguments
(continued...)

1. Zadvydas Does Not Apply to Pre-removal-order
Detentions

Petitioner argues that his detention is unconstitutional under Zadvydas. Zadvydas, however, is limited to detained aliens, unlike Badio, who have received final removal orders and are awaiting removal from this country pursuant to 8 U.S.C. § 1231(a)(6). In Zadvydas, the Supreme Court considered "whether this post-removal statute authorizes the attorney general to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal." Id. at 2495. The Supreme Court held that the post-removal statute, when read together with the Constitution, "limits an alien's post-removal- period detention to a period reasonably necessary to bring about that alien's removal from the United States." Id. at 2498. The Court emphasized that "it does not permit indefinite detention." Id. In reaching this conclusion, the Court distinguished post-removal-period detention from "detention pending a determination of removability or detention during the subsequent 90-day removal period," finding that the former has no termination point. Id.

¹(...continued)
unpersuasive, given the paucity of analysis petitioner's brief provides on these claims.

at 2503.

While no circuit has determined whether Zadvydas applies to pre-removal-order detentions, two circuit courts that considered pre-removal-order detentions pre-Zadvydas concluded that they do not violate the Fifth Amendment due process clause. Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999)(mandatory detention statute does not violate due process), see also Richardson v. Reno, 162 F.3d 1338, 1364 n. 119 (11th Cir. 1998), rev'd on other grounds, 526 U.S. 1142 (1999)("Congress acts well within its plenary power in mandating detention of a criminal alien with an aggravated felony conviction facing removal proceedings."). The one district court that has considered whether § 1226(c) detentions are constitutional post-Zadvydas found that Zadvydas does not apply to pre-removal-order detentions and concluded that such detentions satisfy procedural and substantive due process. Yanez v. Holder, 149 F. Supp. 2d 485 (2001).²

²Pre-Zadvydas, district courts around the country were split on whether § 1226(c) is constitutional. See, e.g., Koita v. Reno, 113 F. Supp. 2d 737 (M.D. Pa 2000)(finding that mandatory detention violates alien's substantive due process rights); Radoncic v. Zemski, 121 F. Supp. 2d 814 (E.D. Pa. 2000)(holding that indefinite detention of an alien pending removal proceedings implicated a fundamental liberty interest and denied alien's due process rights); Son Vo v. Greene, 109 F. Supp. 2d 1281 (D. Colo. 2000)(holding mandatory detention statute unconstitutional); Danh v. Denmore, 59 F. Supp. 2d 994 (N.D. Cal. 1999)(finding that mandatory detention provision of Immigration and Nationality Act violated substantive due process (continued...))

Following these decisions, this court concludes that Zadvydas does not support petitioner's claim because Zadvydas only applies to post-removal-order detentions. As the Supreme Court noted in Zadvydas, pre-removal-order proceedings do have a termination point. They are necessarily limited by the duration of the alien's removal proceeding. Unlike the post-removal-order detention in Zadvydas, detention during removal proceedings is not affected adversely by uncontrollable factors such as the recalcitrance of another nation's refusal to agree to prompt return of its nationals. To the contrary, detention during these proceedings is affected by factors within all of the parties' control, such as the scheduling of removal hearings and the alien's choice to challenge his removal or to seek discretionary relief or protection from removal. Thus, Zadvydas does not apply to petitioner's claim because pre-removal-order proceedings do have a termination point. **2. Due Process**

²(...continued)
as applied to resident aliens); Bouayad v. Holmes, 74 F. Supp. 2d 471 (E.D.Pa 1999)(holding mandatory detention of alien unconstitutional); Avramenkov v. INS, 99 F. Supp. 2d 210 (D. Conn. 2000)(finding that mandatory detention statute did not violate alien's substantive due process or equal protection rights); Okeke v. Pasquarell, 80 F. Supp. 2d 635 (W.D. Tex. 2000)(holding mandatory detention statute does not violate substantive due process.); Diaz-Zaldierna v. Fasano, 43 F. Supp. 2d 1114 (S.D. Cal. 1999)(holding mandatory detention statute does not violate due process).

Although Zadvydas does not apply to pre-removal-order detentions, petitioner is nevertheless entitled to due process. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Reno v. Flores, 507 U.S. 292, 307 (1993). This protection applies to aliens that are in the United States legally and illegally. See Plyler v. Doe, 457 U.S. 202, 210 (1982). "[O]nce an alien gains admission to our country and begins to develop ties that go with permanent residency, his constitutional status changes accordingly." Landon v. Plasencia, 459 U.S. 21, 32 (1982).

The Fifth Amendment includes both procedural and substantive due process requirements. The substantive due process component precludes the government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952) or interferes with rights implicit in the concept of ordered liberty, Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) overruled on other grounds by Benton v. Maryland, 395 US 784 (1969). See Salerno, 481 U.S. 739, 746 (1987). The procedural due process requirement prohibits the government from depriving an individual of life, liberty or property without a fair procedure. See Mathews v. Eldridge, 424 U.S. 319, 350 (1976). The court finds that petitioner's detention satisfies both substantive and procedural due process.

a. Substantive Due Process

The scope of constitutional protections in deportation proceedings is more narrow than in a criminal proceeding. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984). The Salerno standard dictate that § 1226(c) will be upheld if the statute is regulatory in nature and not excessive in its purpose. United States v. Salerno, 481 U.S. at 747. Since § 1226(c) is regulatory in nature, Cardoso v. Reno, 127 F. Supp. 2d 106, 113 (D. CT 2001); Welch v. Reno, 101 F. Supp. 2d 347, 355 (D. MD 2000); Reyes v. Underdown, 73 F. Supp. 2d 653, 657(W.D. LA 1999), the next step in Salerno is to determine whether § 1226(c) is excessive in furthering its legislative objective.

In Salero, defendants were committed for pretrial detention pursuant to the Bail Reform Act and asserted that this pretrial detention violated substantive due process. Salerno, 481 U.S. at 744. In evaluating whether the pretrial detention was excessive, the Supreme Court recognized that the statute's purpose was to prevent danger to the community. Id. at 747. The Court also noted that the Act limited the circumstances under which detention may be sought to the most serious of crimes. Id. Further, the Supreme Court found that the period of detention was limited by the Speedy Trial Act and that the confinement conditions reflected the detention's regulatory

nature. Id. Based on these factors, the Supreme Court concluded that the pretrial detention was not excessive and thus did not violate substantive due process, emphasizing that “the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.” Id. at 748.

In Yanez v. Holder, 149 F. Supp. 2d 485 (N.D. Ill. 2001), petitioners, aliens removable as aggravated felons, sought a writ of habeas corpus claiming that their pre-removal-order detentions violated the Fifth Amendment’s due process clause. In evaluating their substantive due process claim, the court noted that all the defendants were convicted of criminal offenses and did not contest such convictions. The court further noted that the mandatory detention was limited to a small class of aliens convicted of certain enumerated crimes and that Congress, by mandating the detention of these aliens, presumed that such aliens pose a danger to the community and/or flight risk. Id. at 493. The court therefore concluded that § 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, did not violate petitioners’ substantive due process rights “because the means that Congress chose to further its legislative regulatory goals

are not excessive." Id.

As in Salero and Yanez, petitioner's detention in this case does not violate substantive due process. Similar to the Act in Salero, § 1226(c) limits the class of persons who can be detained prior to a final removal order being issued. Moreover, as in Salero and Yanez, the purpose of mandatory detention under § 1226(c) is to protect the public from potentially dangerous criminal aliens. In addition, as in Yanez, § 1226(c) seeks to prevent aliens from absconding during removal proceedings, to correct procedures under which twenty percent of criminal aliens released on bond did not report for deportation hearings and to restore public faith in the immigration system. See S. Rep. No. 104-48, 1995 WL 170285 at 1-6, 9; Cardoso 127 F. Supp. 2d at 113. Moreover, petitioner's detention is limited by the length of the deportation proceedings, and, like the petitioner in Yanez, petitioner in this case is convicted of one of the enumerated crimes and does not contest his conviction. Thus, as in Salero and Yanez, the aggregation of these factors indicates that the petitioner's detention does not violate substantive due process.

b. Procedural Due Process

Procedural due process requires that, "when government action depriving a person of life, liberty or property survives substantive due process scrutiny, it must still be implemented in a fair manner." Salerno, 481 U.S. at 746. In determining whether a process is fair, the court considers (1) the private interest that will be affected by the official action, (2) the probability of error and the effect of additional safeguards on that rate of error and (3) the government interest involved, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews, 424 U.S. at 335.

In Parra v. Perryman, petitioner, an alien who had committed an aggravated felony, sought a writ of habeas corpus. 172 F.3d 954, 956 (7th Cir. 1999). He argued that his pre-removal-order detention under § 1226(c) violated procedural due process. In conducting its due process analysis under Mathews, the court in Parra concluded that the alien's interest was "liberty *in the United States* by someone no longer entitled to remain in this country," that the probability of error was zero since the alien conceded all the elements requiring removal and that the public interest was "substantial," given the high flight rate of those released on bail. Id. Based on this analysis, the court

concluded that aliens covered by § 1226(c) who have little hope of obtaining relief from removal do not have a procedural due process right to be released from detention pending their removal proceedings. Id. Like the petitioner in Parra, petitioner has the liberty interest of a person who does not have a legal right to remain in the country, whereas the government's interest in prohibiting the flight of detained aliens³ and protecting public safety is substantial. Moreover, as the court found in Parra, the probability of error is zero since petitioner conceded his charge of removability. Further, comprehensive administrative procedures protect against the erroneous application of § 1226(c). Sections 3.19 and 236.1 of Title 8 of the Code of Federal Regulations govern jurisdiction of the INS and immigration judge to make bond determinations. See 8 C.F.R. §§ 3.19 & 236.1 (2000). An alien may seek a redetermination from the immigration judge in order to dispute his or her inclusion within a category of aliens covered by § 1226(c)'s detention requirement. See id. at §§

³Between 1993 and 1995, the United States Senate undertook a major study of the immigration laws, including the detention provisions pertaining to criminal aliens. See, e.g., S. Rep. No. 104-48, 104th Cong., 1st Sess. (1995)(1995 WL 170285 (Leg. Hist.) at 1, 5). The Senate cited one report which showed that in 1993, out of 1695 orders to surrender for deportation sent to criminal and non-criminal aliens, 1486 of the aliens (87.7%) failed to report for deportation. Id. at 23.

3.19(h)(2)(i)(D), (h)(2)(ii) & 236.1(d)(1). An alien may also appeal any adverse decision to the BIA. See id. at § 236.1(d)(3). Thus, as in Parra, on balance, petitioner's detention satisfies the procedural due process requirements and petitioner does not have a right to habeas relief under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that petitioner's petition for a writ of habeas corpus is denied.

Dated: November 21, 2001

David S. Doty, Judge
United States District Court