

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT



3 -----

4 August Term, 2003

5 (Argued: October 28, 2003

Decided: December 9, 2003)

6 Docket No. 03-2126

7 _____
8 FAZILA KHAN,

9 Petitioner-Appellant,

10 - v. -

11 JOHN ASHCROFT, Attorney General of the United States; DORIS MEISSNER,
12 Commissioner, Immigration and Naturalization Service; EDWARD MCELROY,
13 New York District Director, Immigration and Naturalization Service;
14 IMMIGRATION AND NATURALIZATION SERVICE; U.S. DEPARTMENT
15 OF JUSTICE,

16 Respondents-Appellees.
17 _____

18 Before: FEINBERG, KEARSE, and RAGGI, Circuit Judges.

19 Appeal from a judgment of the United States District Court for the Eastern District of
20 New York, Edward R. Korman, Chief Judge, dismissing habeas corpus petition challenging
21 constitutionality of AEDPA provision that eliminated Attorney General's discretionary authority to
22 grant waiver of deportation to an alien convicted of an aggravated felony, see Pub. L. 104-132,
23 § 440(d), 110 Stat. 1214, 1277 (1996), as applied to an alien whose offense conduct predated
24 AEDPA's effective date.

25 Affirmed.

MATTHEW L. GUADAGNO, New York, New York

(
K
e
r
r
y
W
i
l
l
i
a
m
B
r
e
t
z
,
J
u
l
e
s
E
.C
o
v
e
n
,
B
r
e
t
z
&
C
o
v
e
n
,
N

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

e
w
Y
o
r
k
,
N
e
w
Y
o
r
k
,
o
n
t
h
e
b
r
i
e
f
)
,
f
o
r
P
e
t
i
t
i
o
n
e
r
:
A
p
p
e
l

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

KRISTEN CHAPMAN, Assistant United States

a
n
t.
Attorney
,
Brookly
n, New
Y o r k
(Roslynn
R .
Mausko
p f ,
United
States
Attorney
for the
Eastern
District
of New
Y o r k ,
Varuni
Nelson,
Assistant
United
States
Attorney
,
Brookly
n, New
York, on
t h e
b r i e f) ,
f o r
Respond
e n t s -
Appellee
s.

38 KEARSE, Circuit Judge:

1 Petitioner Fazila Khan appeals from a judgment of the United States District Court for
2 the Eastern District of New York, Edward R. Korman, Chief Judge, dismissing her petition for a writ
3 of habeas corpus challenging the constitutionality of § 440(d) of the Antiterrorism and Effective Death
4 Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, 1277 (1996), which bars the United States
5 Attorney General from granting a discretionary waiver of deportation under former § 212(c) of the
6 Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1182(c) (1994) (repealed by the Illegal
7 Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div.
8 C, § 304(b), 110 Stat. 3009-546, 3009-597), to any alien who is removable from the United States by
9 reason of her conviction of an aggravated felony. The petition alleged that AEDPA § 440(d) cannot
10 constitutionally be applied to Khan, who pleaded guilty after the effective date of AEDPA, because
11 her offense conduct predated AEDPA's effective date. The district court dismissed the petition, citing
12 this Court's decision in Mohammed v. Reno, 309 F.3d 95 (2d Cir. 2002) ("Mohammed"). On appeal,
13 Khan contends principally (a) that the panel that decided Mohammed did not intend its decision to be
14 binding in other cases, and (b) that Domond v. INS, 244 F.3d 81 (2d Cir. 2001) ("Domond"), relied
15 on by Mohammed, was implicitly overruled by the Supreme Court in INS v. St. Cyr, 533 U.S. 289
16 (2001) ("St. Cyr II"). For the reasons that follow, we reject all of Khan's contentions and affirm the
17 judgment of the district court.

18 In November 1996, Khan, a citizen of Guyana who had been admitted to the United
19 States as a permanent resident alien, pleaded guilty to using a telephone to facilitate the distribution
20 of heroin, in violation of 21 U.S.C. §§ 843(b) and (d), an aggravated felony within the meaning of the
21 INA, see 8 U.S.C. § 1101(a)(43)(B) (defining "aggravated felony" to include any "drug trafficking
22 crime (as defined in section 924(c) of title 18")); 18 U.S.C. § 924(c)(2) (defining "drug trafficking

1 crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et
2 seq.)". As a result of that conviction, Khan was found removable from the United States, see 8
3 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after
4 admission is deportable."). Although former INA § 212(c) gave the Attorney General discretion to
5 waive deportation for certain permanent resident aliens, Khan was ruled ineligible for that relief in
6 light of AEDPA § 440(d), which made § 212(c) discretionary relief unavailable to any alien who "is
7 deportable by reason of having committed any criminal offense covered in [8 U.S.C.
8 § 1227(a)(2)(A)(iii)]." Pub. L. 104-132, § 440(d), 110 Stat. at 1277.

9 Khan's present habeas petition asserted, and she argues on this appeal, that AEDPA's
10 prohibition against discretionary relief under former INA § 212(c) cannot constitutionally be applied
11 to her because her criminal conduct occurred prior to AEDPA's April 24, 1996 effective date. We
12 hold that this argument is foreclosed by this Court's precedents. See, e.g., Mohammed, 309 F.3d at
13 102-03; Domond, 244 F.3d at 85-86.

14 In Domond, this Court held that the application of AEDPA § 440(d) to an alien whose
15 offense conduct occurred prior to AEDPA's effective date is not impermissibly retroactive where the
16 alien pleaded guilty after AEDPA's effective date. See 244 F.3d at 85-86. Using the analytical
17 framework set forth in Landgraf v. USI Film Products, 511 U.S. 244 (1994), we inquired, first,
18 whether Congress had expressed its intent as to whether AEDPA § 440(d) was to apply to an alien
19 whose criminal conduct predated AEDPA's enactment but whose conviction followed AEDPA's
20 effective date, and, second, if there was no clear expression of intent, whether the section had a
21 retroactive effect. See Domond, 244 F.3d at 84-85. We concluded that Congress's intent as to
22 retrospectivity was ambiguous. See id. at 85. We then concluded that § 440(d) imposed no new legal

1 consequences on such an alien, given that "[i]t is the conviction, not the underlying criminal act, that
2 triggers the disqualification from § 212(c) relief," *id.* at 85-86 (quoting *St. Cyr v. INS*, 229 F.3d 406,
3 418 (2d Cir. 2000) ("*St. Cyr I*") (other internal quotation marks omitted), *aff'd*, *St. Cyr II*, 533 U.S. 289
4 (2001)), and that the section thus did not have a retroactive effect. Accordingly, application of
5 § 440(d) to Domond did not violate his rights under the Due Process or Ex Post Facto Clauses.

6 Khan contends that the Supreme Court decision in *St. Cyr II* implicitly overruled our
7 decision in *Domond*. We disagree. In *St. Cyr II*, which affirmed this Court's decision in *St. Cyr I*, the
8 alien whose conduct constituted an aggravated felony had entered his plea of guilty prior to the
9 enactment of AEDPA and IIRIRA. In *St. Cyr I*, we therefore concluded that the application of
10 AEDPA § 440(d) to him would have a retroactive effect. *See* 229 F.3d at 418. Further, we reasoned
11 that, in light of "the dramatic impact removal would have on a legal resident's life," a lawful
12 permanent resident would likely elect to concede guilt to a crime rendering him removable "only . . . in
13 order to be eligible to apply for relief from removal." *Id.* at 419. As the retroactive application of
14 § 440(d) to an alien who had pleaded guilty prior to its enactment would upset his settled expectations,
15 we concluded that that application was impermissible. In affirming this ruling, the Supreme Court
16 stated that depriving an alien of the benefits of a plea entered into at a time when § 212(c)
17 discretionary relief was available would be contrary to "familiar considerations of fair notice,
18 reasonable reliance, and settled expectations." *St. Cyr II*, 533 U.S. at 323 (quoting *Landgraf*, 511 U.S.
19 at 270). The *St. Cyr II* Court concluded that "§ 212(c) relief remains available for aliens . . . whose
20 convictions were obtained through plea agreements and who, notwithstanding those convictions,
21 would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533
22 U.S. at 326 (emphasis added).

1 We see nothing in St. Cyr II that detracts from the result or reasoning of Domond. This
2 Court's decision in St. Cyr I had been issued shortly before the oral argument in Domond, and in
3 deciding the latter case, we noted the difference in the timing of the aliens' guilty pleas in the two
4 cases. We expressly applied the principle noted in St. Cyr I, i.e., that "[i]t is the conviction, not the
5 underlying criminal act, that triggers the disqualification from § 212(c) relief," Domond, 244 F.3d at
6 85-86 (quoting St. Cyr I, 229 F.3d at 418) (other internal quotation marks omitted). But whereas in
7 St. Cyr I, the alien's plea of guilty prior to the passage of AEDPA § 440(d) could have been entered
8 in reliance on the possibility of being granted a § 212(c) discretionary waiver of deportation, in
9 Domond we noted that, in contrast, "it cannot reasonably be argued that aliens committed crimes in
10 reliance on" such a possibility. Domond, 244 F.3d at 86. Thus, guided by the "familiar considerations
11 of fair notice, reasonable reliance, and settled expectations," id. at 85 (quoting Landgraf, 511 U.S. at
12 270), we concluded in Domond that the application of AEDPA § 440(d) to an alien who pleaded guilty
13 after that section became effective is not impermissible, see 244 F.3d at 86-87.

14 In sum, the same considerations and principle that led us to reach a different decision
15 in Domond than we had reached in St. Cyr I lead us to conclude that Domond remains good law in
16 the wake of the Supreme Court's decision in St. Cyr II. Given that St. Cyr II, like Domond, evaluated
17 aliens' expectations in light of "the time of their plea under the law then in effect," 533 U.S. at 326,
18 we see no basis for concluding that St. Cyr II overruled Domond.

19 Indeed, this Court has repeatedly followed Domond in the wake of St. Cyr II. See, e.g.,
20 Beharry v. Ashcroft, 329 F.3d 51, 63 (2d Cir. 2003) (noting that even if the petitioner had properly
21 exhausted his administrative remedies, we would affirm the denial of his habeas petition on the basis
22 of Domond, as "Domond remains good law"); Mohammed, 309 F.3d 102-03.

1 In Mohammed, we expressly explored "the continued validity, in light of . . . St. Cyr
2 III, 533 U.S. 289, . . . of our decision in Domond." Mohammed, 309 F.3d at 97. We observed that
3 Domond had
4 explicitly noted the Supreme Court's instruction in Landgraf that "reasonable
5 reliance" and "settled expectations" provide "guidance in determining
6 retroactive effect," Domond, 244 F.3d at 85 (quoting Landgraf, 511 U.S. at
7 270, 114 S.Ct. 1483), and concluded, as we had previously observed in St.
8 Cyr I, 229 F.3d 406 (2d Cir. 2000), aff'd, 533 U.S. 289, 121 S.Ct. 2271, 150
9 L.Ed.2d 347 (2001), that "[i]t would border on the absurd" to suppose that an
10 alien might have been deterred from committing a crime had he known that,
11 in addition to the prospect of imprisonment and deportation following release,
12 he could not ask for discretionary relief from deportation. Domond, 244 F.3d
13 at 84 (quoting St. Cyr I, 229 F.3d at 418).

14 Mohammed, 309 F.3d at 102. We noted that the Supreme Court in St. Cyr II simply affirmed our
15 ruling in St. Cyr I that aliens who pleaded guilty prior to the effective date of AEDPA had reasonable
16 expectations with respect to continued eligibility for discretionary § 212(c) relief, and that the St.
17 Cyr II Court had not disturbed Domond's holding that those were expectations that could not
18 reasonably be shared by aliens who pleaded guilty after AEDPA became effective. See Mohammed,
19 309 F.3d at 102-03.

20 Accordingly, in Mohammed, we lifted a stay of removal that had been granted on the
21 premise that the elimination of § 212(c) discretionary relief for aggravated felons had an
22 impermissibly retroactive effect on an alien whose plea of guilty to an aggravated felony was entered
23 after the effective date of AEDPA, because we concluded that, in light of the continued vitality of
24 Domond, Mohammed had no substantial likelihood of success on appeal.

25 In the course of our discussion, we stated that "at least for purposes of considering the
26 pending motion to lift the stay, . . . Domond remains binding authority in this Circuit," Mohammed,

1 309 F.3d at 10; and Khan contends that the words "at least for purposes of considering the pending
2 motion to lift the stay" indicate that the Mohammed panel "did not intend for other courts to be bound
3 by its decision" (Khan brief on appeal at 13). We reject the contention that the Mohammed panel's
4 view of Domond was somehow intended to be less than precedential. The question of Domond's
5 continued validity was essential to an evaluation of Mohammed's entitlement to a stay. We considered
6 "the gravity of the injury to the alien if a stay is denied," 309 F.3d at 102, and we ruled that in order
7 to retain his stay, Mohammed need not show more than a 50 percent chance of success on appeal, see
8 id. We concluded that he simply could not meet that standard in light of Domond. The reasoning in
9 Mohammed, which reaffirmed the result and rationale of Domond in refusing to lift the stay of
10 removal, is equally applicable in the instant case, where the challenge to a finding of ineligibility for
11 § 212(c) relief is made in a petition for habeas corpus. Indeed, Mohammed has been relied on by this
12 Court in addressing the merits of petitions for habeas corpus. See, e.g., Rankine v. Reno, 319 F.3d
13 93, 100-01 (2d Cir.) (noting that the impermissible retroactive effect of § 440(d) identified by the
14 Supreme Court in St. Cyr II stemmed from "the alien's reliance on the prior availability of
15 discretionary relief in deciding whether to plead guilty" (quoting Mohammed, 309 F.3d at 103)), cert.
16 denied, 124 S. Ct. 287 (2003).

17 Finally, we note that in a number of appeals in which the appellants have made a
18 retroactivity argument similar to Khan's, this Court has rejected the argument summarily on the basis
19 of Domond. See, e.g., Carr v. Reno, No. 01-2270, 2002 WL 24144 (2d Cir. Jan. 4, 2002) (affirming
20 denial of habeas, citing Domond), reh'g denied (2d Cir. Aug. 27, 2003); Hibbert v. Ashcroft, No.
21 02-2281, 2003 WL 21466746 (2d Cir. June 20, 2003) (same). Although these summary affirmances
22 are not themselves precedential authority, see Rules of the United States Court of Appeals for the

1 Second Circuit, § 0.23, they clearly acknowledge the continued precedential effect of Domond.

2 In sum, our decision in Domond remains good law. AEDPA § 440(d) is not
3 impermissibly retroactive as applied to aliens such as Khan who pleaded guilty following AEDPA's
4 effective date, even if the criminal conduct underlying their convictions took place before AEDPA's
5 effective date.

6 We have considered all of Khan's contentions on this appeal and have found them to
7 be without merit. The judgment of the district court is affirmed.