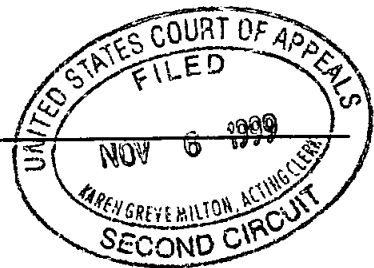


98-4033

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 98-4033



DEBORIS CALCANO-MARTINEZ,

Petitioner,

- against -

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

PETITION FOR REVIEW OF DECISION OF
BOARD OF IMMIGRATION APPEALS

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BRIEF FOR PETITIONER

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PETITIONER'S MEMORANDUM OF LAW

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Ms. Calcano-Martinez received an administratively final order of removal (formerly known as a deportation order) from the Board of Immigration Appeals ("BIA" or "Board") on December 30, 1997. She filed the instant petition for review in this Court on January 29, 1998, within thirty days of the date of the final order of removal. See 8 U.S.C. § 1252(b)(1), Immigration and Nationality Act ("INA") § 242(b)(1) (thirty day deadline to file petition for review).

Federal court jurisdiction to review Ms. Calcano-Martinez's final order of removal is one of the contested issues in this appeal, and is addressed in the opening brief of Khan v. INS, No. 98-4246. Ms. Calcano-Martinez's position is that the rulings of this Court squarely hold that she is constitutionally entitled to judicial review of all her claims, and that the decisions of this Court interpreting the predecessor statute governing review of deportation orders dictate that the proper forum for such review is a district court habeas corpus action pursuant to 28 U.S.C. § 2241. See Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), cert. denied sub

nom. Reno v. Navas, 119 S. Ct 1141 (1999). Hence, she has filed a § 2241 habeas corpus action in the Southern District of New York asserting the same merits claims she raises in the instant petition for review. Calcano-Martinez v. Reno, No. 99 Civ. 10481 (WHP) (S.D.N.Y. 1999). That action remains pending.

However the government has taken the position that, in light of 1996 amendments to the Immigration Act, there is no habeas jurisdiction over cases such as Ms. Calcano-Martinez's and that the only review available to her is by a petition for review in the court of appeals. Accordingly, Ms. Calcano-Martinez has filed the instant petition within the requisite thirty days as a protective matter in the unlikely event that this Court were to find that a petition for review and not a habeas action constitutes the proper vehicle for judicial review.

STATEMENT OF ISSUES

1. Under the permanent IIRIRA jurisdictional amendments, is the proper forum for Ms. Calcano-Martinez to seek review of her statutory retroactivity and constitutional Fifth Amendment claims a district court habeas action or a petition for review in this Court?

2. Are the statutory retroactivity and constitutional Fifth Amendment claims raised by Ms. Calcano-Martinez the type of claims for which review is "constitutionally mandated" under this Court's decision in Henderson?

3. Did the BIA err in finding that the 1996 amendments retroactively eliminated equitable relief for Ms. Calcano-Martinez?

4. Do the 1996 amendments governing eligibility for equitable relief in removal cases under the IIRIRA permanent rules violate due process or equal protection?

STATEMENT OF THE CASE

On April 1, 1997, the Immigration and Naturalization Service (the "Service" or "INS") served Ms. Calcano-Martinez a Notice to Appear ("NTA"), the charging document in removal proceedings. (App. at 63-66.)¹ The Service alleged that on April 24, 1996, Ms. Calcano-Martinez was convicted in New York State Supreme Court, New York County, of attempted criminal sale of a controlled substance in the third degree. The Service charged her with deportability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), which applies to aliens convicted of aggravated felonies; and under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), which applies to aliens convicted of controlled substance offenses. (Id.)

On July 16, 1997, an Immigration Judge ("IJ") found Ms. Calcano-Martinez deportable on both grounds. (App. at 31.) He found that she is ineligible for any form of relief from removal, and he entered an order of removal against her. (App. at 31.)

Ms. Calcano-Martinez filed a timely appeal to the BIA that was received on July 23, 1997. (App. at 25.) She filed the appeal pro se, but she later obtained representation, and her attorney supplemented the notice of appeal on August 14, 1997. (App. at 16-

¹ References to "App." are to the Joint Appendix filed with the Court contemporaneously with this memorandum.

22.) On December 30, 1997, the BIA dismissed the appeal and affirmed the removal order. (App. at 2-3.) It found that she is statutorily ineligible as a matter of law for either relief under INA § 212(c), 8 U.S.C. § 1182(c) (1994), or cancellation of removal under INA § 240A, 8 U.S.C. § 1229(b) (Supp. II 1997). (App. at 3.) First, the Board found that Ms. Calcano-Martinez was properly in removal proceedings, and it held that 212(c) relief is not available in removal proceedings. (Id.) The Board also found that because Ms. Calcano-Martinez had been convicted of an aggravated felony, she is statutorily ineligible for cancellation of removal as a matter of law. (Id.) Ms. Calcano-Martinez filed a timely petition for review with this Court on January 29, 1998. M s . Calcano-Martinez has been detained by the INS since on or about June 12, 1997.

FACTS

The Petitioner, Deboris Calcano-Martinez, is a thirty-one-year-old native and citizen of the Dominican Republic. (App. at 56.) She came to live in the United States as a lawful permanent resident ("LPR") on May 3, 1971; she was just three years old. (Id.) She has four U.S. citizen children. (App. at 25.)

Ms. Calcano-Martinez moved to New York City to escape an abusive relationship. (Id.) Unfortunately, she was unable to cope on her own in New York; she could not find work and she could not find help. Consequently, she found herself living in a shelter, (id.), and out of desperation, she began to sell drugs. (Id.) On April 1, 1996, Ms. Calcano-Martinez was arrested in New York City.

(A. 48.) She was charged with attempted criminal sale of a controlled substance in the third degree. (See Indictment, A. 51.) On April 24, 1996, she pleaded guilty; she was sentenced to a term of one to three years imprisonment. (App. at 49, 50.)

When Ms. Calcano-Martinez committed her offense, she was eligible for a waiver of deportability pursuant to INA § 212(c), 8 U.S.C. § 1182(c) (1994). Section 212(c) provided that the Attorney General could, at her discretion, waive inadmissibility for LPRs who had accrued seven years of lawful domicile in the United States. The relief had been extended to certain criminal grounds of deportability by case law. Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (applying section 212(c) in exclusion proceedings but not in deportation proceedings violates due process); Matter of Silva, 16 I&N Dec. 26 (BIA 1976) (BIA adopted Francis on a nationwide basis).

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) (the "AEDPA"). Section 440(d) included language providing that INA section 212(c) relief would no longer be available to aliens deportable by reason of having committed certain enumerated criminal offenses. See AEDPA § 440(d), 110 Stat. at 1277. The statute contained no language indicating that it should apply to criminal conduct that antedated its enactment. Cf. AEDPA §440(f), 110 Stat. at 1278.

Then, on September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110

Stat. 3009-546 (September 30, 1996) ("IIRIRA") was enacted. Subtitle A of Title III of the IIRIRA replaced "exclusion" and "deportation" proceedings with "removal" proceedings. Section 304(b) of the IIRIRA repealed INA section 212(c) and replaced it with INA section 240A, 8 U.S.C. § 1229b (Supp II 1997) ("cancellation of removal"). Under this section, the Attorney General may continue to waive grounds of inadmissibility and deportability, but not for aliens convicted of enumerated criminal conduct. Subtitle A became effective on April 1, 1997.

On April 1, 1997, the INS issued a notice to appear ("NTA") for Ms. Calcano-Martinez. (App. at 63-66.) The NTA is the official charging document that informs an alien that he or she is in removal proceedings and informs the alien of the allegations of fact and charges of inadmissibility or deportability being leveled against him or her. The INS charged Ms. Calcano-Martinez with deportability based on her criminal conviction. (App. at 65)

At Ms. Calcano-Martinez's removal proceeding on July 16, 1997, the IJ found that Ms. Calcano-Martinez was ineligible for any relief from removal and ordered her removed from the United States. (App. at 29, 30-31, 44.) Ms. Calcano-Martinez filed a timely appeal to the BIA pro se that was dated July 17, 1997. (App. at 25-26.) A second notice of appeal dated August 14, 1997 was timely filed by counsel. (App. at 16-17.) On appeal, Ms. Calcano-Martinez argued that the IIRIRA was improperly applied retroactively to deny her a 212(c) waiver of deportability. (App. at 11-14.) The Board dismissed her appeal on December 30, 1997.

(App. at 1-3.)

SUMMARY OF ARGUMENT

Ms. Calcano-Martínez challenges her final order of removal on the ground that the BIA erred, as a matter of pure law, in holding that she was statutorily barred from applying for relief under former Section 212(c), 8 U.S.C. § 1182(c) (1994).

In Henderson v. INS, Jean-Baptiste v. Reno, and Hincapie-Nieto v. INS, In Henderson v. INS, Jean-Baptiste v. Reno, 144 F.3d 212 (2d Cir. 1998), and Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996), this Court examined the effect of some of the new jurisdictional provisions enacted by AEDPA and IIRIRA. It concluded that those provisions completely eliminated any jurisdictional basis for immigrants deportable on one of the enumerated criminal grounds to challenge the denial of relief from deportation in the court of appeals by a petition for review. However, the cases also establish that none of the provisions of AEDPA or IIRIRA's transitional rules were sufficient to repeal the district courts' historic habeas corpus jurisdiction under 28 U.S.C. § 2241. This Court's conclusion represents the almost unanimous view of the courts of appeals, nine of which have now held that habeas corpus review remains available to immigrants who are barred from obtaining review directly in the court of appeals because of a criminal conviction.

In holding that habeas corpus was not precluded, the Court considered -- and rejected -- the government's contentions that

various provisions enacted by AEDPA or IIRIRA's transitional rules were sufficient to repeal habeas corpus jurisdiction under § 2241 under the express repeal rule of Felker v. Turpin, 116 S.Ct 2333 (1996). Therefore, the government cannot rely on any of the provisions of AEDPA or IIRIRA's transitional rules applicable in those earlier cases to contend that habeas corpus is repealed.

Most importantly, in Henderson v. INS, this Court definitively resolved the question left open in the earlier two decisions: what is the scope of review available in the habeas corpus action that remains available? Henderson resolved that issue by considering the scope of habeas corpus for immigrants "mandated by the Constitution." It held that, at a minimum, an immigrant subject to deportation is entitled to review of constitutional and certain statutory claims of general applicability involving questions of "pure law." Henderson, 157 F.3d at 120-22.

The claims that Ms. Calcano-Martinez brings in this case are identical for jurisdictional purposes to the claims that Henderson held must be reviewable in some court as a matter of "constitutional mandate." Thus, there is no basis for the government to contend that Ms. Calcano-Martinez can be denied the right to a judicial determination of either her statutory or constitutional claims.

Furthermore, the language from the prior transitional rules that Hincapie-Nieto, Jean-Baptiste and Henderson held were not sufficient to repeal habeas corpus are materially

indistinguishable from the limitations on judicial review codified in the permanent judicial review provisions that govern here. None of the additional permanent jurisdictional provisions provide a repeal of habeas corpus under the standards of Felker and this Court's prior decisions. Therefore, like before, habeas corpus remains available.

In the event the Court were not to follow its prior precedents finding habeas corpus jurisdiction, then the prohibition on direct review would have to be construed to permit review in the court of appeals of all of Ms. Calcano-Martinez's claims. Alternatively, if both direct review and habeas corpus are foreclosed, then under Henderson, the statute must be held unconstitutional insofar as it precludes review of either the statutory or constitutional claims raised by Ms. Calcano-Martinez.

Ms. Calcano-Martinez remains eligible for § 212(c) relief, as the recent restrictions on § 212(c) do not apply retroactively to Ms. Calcano-Martinez's case. Congress intended that the new restrictions apply prospectively only, and, in any event, applying them to Ms. Calcano-Martinez would have an impermissible retroactive effect. Finally, applying the new restrictions to Ms. Calcano-Martinez's case would violate both Due Process and Equal Protection.

ARGUMENT

This case is one of three consolidated cases before the Court. Ms. Calcano-Martinez adopts the jurisdictional and merits

arguments as set out in Khan v. INS, No. 98-4246. Ms. Calcano-Martinez notes, however, an additional factor on the merits of her claim: Ms. Calcano-Martinez pled guilty on the day that the President signed AEDPA into law. Because the restrictions on § 212(c) relief do not apply to a conviction entered on the date AEDPA was signed into law, Ms. Calcano-Martinez remains eligible for § 212(c) relief. See Pottinger v. Reno, 51 F. Supp. 2d 349, 356-63 (E.D.N.Y. 1999); see generally Amicus Brief of New York State Defenders Association.

CONCLUSION

For the reasons stated in the Brief for Khan v. Reno, No. 98-4246, and for the reasons stated above, this Court should find that the district courts have jurisdiction to review Ms. Calcano-Martinez's claims. If, however, this Court concludes otherwise, then the Court must exercise jurisdiction over Ms. Calcano-Martinez's statutory and constitutional claims. With regard to the statutory claims, the text of the IIRIRA, as well as the Supreme Court's judicial default rules as explicated in the merits argument for Khan v. INS, 98-4246, compel the conclusion that AEDPA § 440(d) and IIRIRA § 304(b) may not be applied retroactively to Ms. Calcano-Martinez's case. Were the statutes interpreted otherwise, their application to Ms. Calcano-

Martinez's case would violate due process and equal protection mandates.

Dated: New York, New York
November 5, 1999

Respectfully submitted,

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