98–4214

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO 98–4214

SERGIO MADRID,

Petitioner,

- against -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF DECISION OF
BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

BRETZ & COVEN
Kerry William Bretz
Jules Coven
Alan Michael Strauss
Matthew L. Guadagno
305 Broadway, Suite 100
New York, New York 10007
(212) 267-2555

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE 3

FACTS 4

SUMMARY OF ARGUMENT 7

ARGUMENT 10

TABLE OF AUTHORITIES

CASES

Felker v. Turpin, 116 S.Ct 2333 (1996) 8, 9

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) 5, 10-11

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), cert denied sub nom. Reno v. Navas, 119 S. Ct. 1141 (1999) 1, 7, 8, 9

Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996) 7, 9

Jean-Baptiste v. Reno, 144 F.3d 212 (2d Cir. 1998) 7, 9

Mojica v. Reno, 970 F. Supp. 130, 171 (E.D.N.Y. 1997) 10

Pottinger v. Reno, 51 F. Supp. 2d 349, 356-63 (E.D.N.Y. 1999) 10

ADMINISTRATIVE CASES

Matter of Silva, 16 I&N Dec. 26 (BIA 1976) 5

Matter of Marin, 16 I&N Dec. 581 (BIA 1978) 5

STATUTORY AUTHORITIES

Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) (the "AEDPA") 5, 6, 7, 8, 10

AEDPA § 440(d), 110 Stat. at 1277 5

AEDPA §440(f), 110 Stat. at 1278 5

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (September 30, 1996) ("IIRIRA") . 5, 6, 7, 8

IIRIRA § 304(b) 5

Immigration and Nationality Act (INA) § 212(c), 8 U.S.C. § 1182(c) (1994) 3, 4, 5, 7, 10

INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) . . 3, 6

INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) 3, 6

INA § 240A, 8 U.S.C. § 1229(b) (Supp. II 1997) 3, 5

INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) 1

28 U.S.C. § 2241 1,8

REGULATORY AUTHORITIES

8 C.F.R. § 212.3(f)(2) 4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
-----------------------------x
SERGIO MADRID,

Petitioner, 98-4214

- v. -

IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.
-----------------------------x

PETITIONER'S MEMORANDUM OF LAW

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Mr. Madrid received an administratively final order of removal (formerly known as a deportation order) from the Board of Immigration Appeals ("BIA" or "Board") on May 5, 1998. He filed the instant petition for review in this Court on June 4, 1998, within 30 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) (30 day deadline to file petition for review).

Federal court jurisdiction to review Mr. Madrid'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. Mr. Madrid's position is that the rulings of this Court squarely hold that he is constitutionally entitled to judicial review of all his 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, he has filed a § 2241 habeas corpus action in the Southern District of New York asserting the same merits claims he raises in the instant petition for review. Madrid v. Reno, Dkt. No. 99 Civ. 10482 (SAS) (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 Mr. Madrid's and that the only review available to him is by a petition for review in the court of appeals. Accordingly, Mr. Madrid has filed the instant petition within the requisite 30 days as a protective matter in the unlikely event that this Court were 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 Mr. Madrid to seek review of his 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 Mr. Madrid 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 Mr. Madrid?

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 June 11, 1997, the Immigration and Naturalization Service (the "Service" or "INS") issued a Notice to Appear ("NTA"), the charging document in removal proceedings, for Mr. Madrid. (App. at 70-73.)[1] The Service alleged that on September 6, 1994, Mr. Madrid was convicted in the County Court of the State of New York, Rockland County, of criminal sale of a controlled substance in the second degree. The Service charged him 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 October 1, 1997, an Immigration Judge ("IJ") ordered Mr. Madrid removed from the United States. (App. at 35.) In so doing, the IJ found that Mr. Madrid is ineligible for any form of relief from removal based on his criminal conviction. (App. at 34.)

On October 16, 1997, Mr. Madrid filed a timely appeal to the BIA. (App. at 25-27.) On May 5, 1998, the BIA dismissed the appeal and affirmed the removal order. (App. at 2.) It found that he 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). (Id.) First, the Board found that since Mr. Madrid was in removal proceedings, a 212(c) waiver of deportability is not an available

---

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

form of relief. (Id.) The Board also found that because Mr. Madrid had been convicted of an aggravated felony, he is statutorily ineligible for cancellation of removal as a matter of law. (Id.) Mr. Madrid filed a timely petition for review with this Court on June 4, 1998.

FACTS

The Petitioner, Sergio Madrid, was born on July 9, 1972. (App. at 57.) He is a twenty seven year old native and citizen of Mexico. (App. at 57, 71.) He adjusted his status to that of a lawful permanent resident ("LPR") of the United States on December 20, 1989. (App. at 71.)[2] Mr. Madrid was only seventeen when he became an LPR. He has resided lawfully in this country for almost ten years.

On September 6, 1994, Mr. Madrid was convicted in the New York State County Court, County of Rockland, for the offense of criminal sale of a controlled substance in the second degree. (App. at 56.) He received an indeterminate sentence of four years to life, (id.), and he was released from prison on or about February 11, 1998.

Pursuant to 8 C.F.R. § 212.3(f)(2), on January 20, 1995, Mr. Madrid acquired seven years of lawful domicile in the United States and became eligible for a waiver of deportability under INA § 212(c). Section 212(c) provided that the Attorney General could, based on discretionary factors such as rehabilitation and hardship

---

[2] The Record does not indicate that on or about January 7, 1988, Mr. Madrid filed an application for status as a temporary resident (INS form I-687). On January 20, 1988, the application was granted. Thus, Mr. Madrid's lawful domicile in the United States begins from January 20, 1988.

to the aliens or their family members, 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); Matter of Marin, 16 I&N Dec. 581 (BIA 1978) (describing factors relevant to 212(c) determinations).

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.

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 II 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 June 11, 1997, the INS issued an NTA against Mr. Madrid. (App. at 70-73.) The NTA was issued almost three years after Mr. Madrid's 1994 conviction. The INS alleged that Mr. Madrid entered the United States in 1971 as a nonimmigrant visitor with authorization to stay in the United States up to six months and that he became a LPR on December 20, 1989. (App. at 71.) The INS further alleged that Mr. Madrid had been convicted in 1994 of criminal sale of a controlled substance. (App. at 71.) The NTA charged him with removability under INA section 237(a)(2)(A)(iii), as having been convicted of an aggravated felony and INA section 237(a)(2)(B)(i), as having been convicted of a law relating to a controlled substance. (App. at 72.)

On August 20, 1997, the first removal hearing was held against Mr. Madrid at the Immigration Court at Downstate Correctional Facility in Fishkill, New York. (App. at 36-40.) At that hearing, the INS served Mr. Madrid with a Form I-261 amending the factual allegations in the NTA. (App. at 38.) The I-261 withdrew the allegation that Mr. Madrid entered the United States in 1971. (App. at 58.) It was replaced with an allegation that Mr. Madrid entered the United States at an unknown date and time. (Id.)

The second and final removal hearing occurred on October 1, 1997. (App. at 41-49.) At that hearing, Mr. Madrid contended that, since his conviction pre-dated the enactment of AEDPA and

IIRIRA, he should have been in deportation proceedings. (App. at 43.) Mr. Madrid also contended that the Service had exercised undue delay in placing him in proceedings, and that he had been prejudiced by this delay. (Id.) The Immigration Judge ("IJ") held that he was powerless to address these arguments. (App. at 44.) Mr. Madrid admitted the factual allegations against him and conceded deportability. (Id.) As relief from deportation, he applied for a waiver of deportability under INA section 212(c). (App. at 45.) The IJ found that 212(c) waivers were not available in removal proceedings and ordered him removed from the United States. (App. at 29, 31-35, 46-47.)

Mr. Madrid filed a timely appeal with the Board. (App. at 25-26.) On May 5, 1998, the Board dismissed his appeal and ordered him deported. (App. at 1-2.) The Board held, as a matter of law, that a waiver under INA section 212(c) is not available under IIRIRA. (Id.)

SUMMARY OF ARGUMENT

Mr. Madrid challenges his final order of removal on the ground that the BIA erred, as a matter of pure law, in holding that he 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, 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 transitioanl 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 Mr. Madrid 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 mandated. Thus, there is no basis for the government to contend that Mr. Madrid can be denied the right to a judicial determination of either his 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 Mr. Madrid's claim. 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 Mr. Madrid.

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

ARGUMENT

This case is one of three consolidated cases before the Court. Mr. Madrid adopts the jurisdictional and merits arguments as set out in Khan v. INS, No. 98-4246. Mr. Madrid notes, however, an additional factor on the merits of his claim: Mr. Madrid pled guilty before AEDPA was enacted. Because the restrictions on § 212(c) relief do not apply to convictions that pre-date their enactment, Mr. Madrid remains eligible for § 212(c) relief. 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.

Moreover, in 1994, the INS began investigating Mr. Madrid to determine whether his conviction rendered him deportable. The INS, however, did not issue an Order to Show Cause against Mr. Madrid. To now apply the new restrictions on § 212(c) relief to Mr. Madrid -- when the INS presumably had decided that he was a low enforcement priority -- would be irrational and arbitrary in violation of Equal Protection and Due Process. See Mojica v. Reno, 970 F. Supp. 130, 171 (E.D.N.Y. 1997); see also, e.g., Francis, 532 F.2d at 273 ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

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 Mr. Madrid's claims. If, however, this Court concludes otherwise, then the Court must exercise jurisdiction over Mr. Madrid'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 Mr. Madrid's case. Were the statutes interpreted otherwise, their application to Mr. Madrid's case would violate due process and equal protection mandates.

Dated: New York, New York
November 5, 1999

Respectfully submitted,

BRETZ & COVEN
Kerry William Bretz, Esq.
Jules Coven, Esq.
Alan Michael Strauss, Esq.
Matthew L. Guadagno, Esq.
305 Broadway, Suite 100
New York, New York 10007
212-267-2555

By: Alan Strauss
Alan Michael Strauss (AMS3993)