

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LAILUMA SATARI, :
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 Petitioner, :
 :
 V. : CASE NO. 3:04CV172 (RNC)
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 JOHN ASHCROFT, Attorney :
 General of the United States, :
 :
 Defendant. :

RULING AND ORDER

Petitioner Lailuma Satari has been ordered removed from the United States to Afghanistan. She has asked the Board of Immigration Appeals to reopen her removal proceeding to reconsider her application for asylum, but the BIA has denied the motion to reopen. She brings this action pursuant to 28 U.S.C.

§ 2241 claiming that the BIA is required to reopen the proceeding because conditions in Afghanistan have worsened since the BIA affirmed the denial of her application for asylum. She seeks an order directing the BIA to reopen the proceeding, plus a stay of her removal pending reconsideration of her asylum application by the BIA. This court lacks jurisdiction under § 2241 to review the BIA's denial of the motion to reopen, so the request for an order requiring it to reopen the proceeding must be denied. Petitioner's request for a stay presents a somewhat more difficult question. The Ninth Circuit

recently ordered the BIA to reopen a removal proceeding involving a female immigrant who fled Afghanistan in 1993 and feared persecution if she were removed to that embattled country, mainly because of her adoption of Western customs. See Seving v. Ashcroft, No.02-73355, 2004 WL 68683, *2 (9th Cir. Jan. 15, 2004); but see Shah v. Ashcroft, No.02-3440, 2003 WL 21960986, *4-5 (3d Cir. Aug. 18, 2003) (declining to overturn BIA's refusal to grant asylum to male immigrant from Afghanistan who claimed he would be in danger if he were removed due to poor human rights situation and ongoing fighting). The Ninth Circuit's decision provides reason to believe that petitioner may have a realistic chance of obtaining similar relief. Accordingly, her request for a stay pending reconsideration of her application by the BIA is denied but her removal will be stayed for 30 days to give her an opportunity to seek relief, including a further stay, from the Court of Appeals.

Background

Petitioner left Afghanistan in September 1991. She lived for a period of time in Iran and later India, then entered the United States under a visa in June 1993, intending to marry an American citizen. Removal proceedings were instituted after her fiancé visa expired. She conceded her removability but sought to avoid removal through applications for political asylum, withholding of removal, and protection under the United Nations Convention Against Torture,

claiming that if she were removed to Afghanistan she would be harmed by the Taliban.

On March 7, 2002, an immigration judge rendered an oral decision denying petitioner's requests for relief from removal. The judge found that petitioner is an educated woman, and he credited her testimony concerning her personal history, which includes a particularly vicious assault she suffered in Afghanistan as a result of her brother's affiliation with the Soviet-backed regime that held power at the time.¹ Though the judge found petitioner to be a credible witness, he concluded that her application for asylum should be denied, essentially because the Taliban government was no longer in power in Afghanistan and had been replaced by a coalition government backed by the United States, thus rendering her fear of persecution unreasonable in the judge's opinion. Since petitioner's requests for withholding of removal and protection under CAT required her to make a stronger showing than a well-founded fear of persecution, they too were denied.

On September 30, 2003, the BIA affirmed the immigration judge's decision. On December 10, 2003, petitioner filed a motion to reopen with the BIA, contending that evidence of worsening conditions in Afghanistan justified reconsideration of her request for asylum. On

¹ Petitioner's brother has been given asylum in the Netherlands.

February 5, 2004, the BIA denied the motion to reopen in a one paragraph per curiam opinion. The Board stated that petitioner had failed to sustain her "heavy burden" of proving that, if the proceeding were reopened, new evidence would likely change the result. The Board also stated that petitioner had failed to establish prima facie eligibility for relief.

Discussion

A person may file a motion to reopen an asylum proceeding on the basis of evidence of changed conditions. See 8 U.S.C. § 1229a(c)(6)(C)(ii); see also 8 U.S.C. §1158(a)(2)(D). The BIA's decision to deny a motion to reopen is discretionary. See INS v. Doherty, 502 U.S. 314, 322-23 (1992). Such decisions are subject to appellate review. See Guan v. Bd. of Immigration Appeals, 345 F.3d 47, 48 (2d Cir. 2003) (per curiam). But they are not subject to attack in the district court. See Hernandez-Osoria v. Ashcroft, 01CIV5545, 2002 WL 193574, at *5 (S.D.N.Y. Feb. 7, 2002) (district court lacks jurisdiction to consider habeas petitions challenging BIA denial of motion to reopen). Nor does this court have authority to make factual findings regarding changed conditions in Afghanistan and, on the basis of such findings, order the BIA to reopen an asylum proceeding. See Najjar v. Ashcroft, 257 F.3d 1262, 1281 n.8 (11th Cir. 2001); Elahi v. Ashcroft, No.3:02CV0789, 2002 WL 31433290, at *4 (D. Conn. 2002). Thus, petitioner can obtain judicial relief from

the BIA's refusal to reopen her proceeding only from the Court of Appeals.

Because this court has no authority to review the BIA's denial of petitioner's motion to reopen, petitioner's request for a stay pending reconsideration of her asylum application by the BIA cannot be granted. As discussed above, however, the Ninth Circuit recently directed the BIA to reconsider an asylum claim presented by a female facing removal to Afghanistan. In light of the Ninth Circuit's decision, there is a real possibility that petitioner may be able to obtain similar relief from the Second Circuit, not necessarily in connection with appellate review of this order, but perhaps by filing a petition in the Court of Appeals, as was done in the Ninth Circuit case. See Seving, 2004 WL 68683 at *1.² Balancing the interests at stake, petitioner's removal will be stayed for a period of 30 days to enable her to seek relief from the Second Circuit.

Accordingly, petitioner's request for an order directing the BIA to grant her motion to reopen is hereby denied, and her removal to Afghanistan is hereby stayed for a period of 30 days or until further order of the Second Circuit. The Clerk may close the file.

So Ordered.

² The record does not disclose whether petitioner's counsel has filed a petition in the Court of Appeals challenging the BIA's denial of her motion to reopen, as the applicable standard of care would seem to require.

Dated at Hartford, Connecticut this 27th day of February 2004.

Robert N. Chatigny
United States District Judge