

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WEN HONG YE :
 :
 v. : Case No. 3:00 cv 2464 (SRU)
 :
 IMMIGRATION AND :
 NATURALIZATION SERVICE, ET AL :

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Pro se petitioner, Wen Hong Ye, filed this action seeking a writ of habeas corpus. On May 16, 1996, an immigration judge found Ye deportable and ineligible for relief from deportation under section 212(c) of the Immigration and Nationality Act (“INA”). Ye challenges the decision on the grounds that the immigration judge’s decision was based on an improper application of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), and that she is eligible for discretionary relief from deportation under section 212(c) of the INA.

BACKGROUND

Ye is a native and citizen of China. She was admitted to the United States as an immigrant in April 1992. On December 9, 1993, Ye was found guilty, after a jury trial, of four counts of federal narcotics violations. Ye was sentenced to ten years’ imprisonment on each count, with the sentences to run concurrently. As a result of those convictions, the INS commenced deportation proceedings against Ye on May 26, 1994.

On November 30, 1995, an immigration judge found Ye deportable because of her conviction for an aggravated felony and conviction for a crime relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana. See 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1227(a)(2)(B)(i) (formerly 8 U.S.C. §§ 1251(a)(2)(A)(iii), 1251(a)(2)(B)(i)). Ye appealed the immigration judge's decision to the Board of Immigration Appeals ("BIA"). The BIA remanded the case to the immigration judge because the INS had failed to include a transcript of the hearing before the immigration judge, rendering the record incomplete. On remand, in May 1996, the immigration judge again found Ye deportable because of her drug convictions. The immigration judge further held that Ye was ineligible to apply for asylum under sections 208 and 243(h) of the INA, which prohibits asylum grants to aliens convicted of aggravated felonies. The immigration judge again concluded that Ye was ineligible for a discretionary waiver of deportation under section 212(c) of the INA. The immigration judge certified her decision to the BIA.

In July 2002, Ye moved to reopen and withhold removal pursuant to the Convention Against Torture ("CAT"), a treaty to which the United States is a signatory. No action has been taken on that motion. On December 26, 2000, Ye filed this petition for writ of habeas corpus, arguing that her deportation order is improper because it was based on a retroactive application of the AEDPA. Ye contends that her conviction was entered prior to the enactment of the AEDPA, and that the AEDPA is not intended to be applied retroactively. Therefore, she argues, she is entitled to discretionary relief under section 212(c) of the INA, which was in effect at the time of her conviction.

DISCUSSION

The government argues that the court lacks jurisdiction to hear Ye's claim because she did not appeal the immigration judge's ruling on remand to the BIA. "The doctrine of exhaustion of administrative remedies requires a party to pursue all possible relief within the deciding agency before seeking federal judicial review of an unfavorable administrative decision." Theodoropoulos v. INS, 313 F.3d 732, 736 (2d Cir. 2002). Ye's failure to appeal the decision of the immigration judge to the BIA constitutes a failure to exhaust administrative remedies. However, "[a] petitioner may avoid even statutorily established administrative exhaustion requirements when, inter alia, 'a plaintiff has raised a substantial constitutional question.'" Id. at 737 (quoting Able v. United States, 88 F.3d 1280, 1288 (2d Cir. 1996)). Ye contends that the deportation order was improper because the immigration judge improperly applied the AEDPA retroactively. Because the AEDPA had not been enacted at the time of her conviction, Ye argues, the immigration judge should not have applied its provisions, and instead, should have considered a discretionary waiver of deportation under section 212(c) of the INA.

Ye's argument echoes the Supreme Court's concerns regarding the retroactivity of the AEDPA in INS v. St. Cyr, 533 U.S. 289 (2001). In that case, the Court held that section 212(c) relief "remains available for aliens ... whose convictions were obtained through plea agreements and who, notwithstanding those convictions would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." Id. at 326. Although it concluded that plea agreements warranted distinct treatment under the new laws because they "involve a quid pro quo between a criminal defendant and the government," the Court did not explicitly address whether section 212(c) relief would be limited to plea agreements, or whether section 212(c) relief, and the concomitant constitutional question

exemption, would be extended to convictions resulting from jury trials. Id. at 321.

The Second Circuit took up this question in Theodoropoulos. Guided by the Supreme Court's rationale in St. Cyr, the Second Circuit held that convictions resulting from plea agreements were distinct from those resulting from jury trials. In cases of the former, "pleading alien defendants were 'acutely aware of the immigration consequences of their convictions,'" and "preserving the possibility of [section 212(c)] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." 313 F.3d at 739 (quoting St. Cyr, 533 U.S. at 322-23). Conversely, "[t]he decision to seek trial by jury may have represented an expectation of defeating any possibility of removal rather than demonstrating a reliance on the potential of discretionary relief." Id. at 739-40. Accordingly, the Second Circuit held that a petitioner convicted after a jury trial was ineligible for section 212(c) relief, as well as relief from the administrative exhaustion requirements of 8 U.S.C. § 1252(d), because such a conviction did not raise the type of substantial constitutional consideration identified in St. Cyr.

Like Theodoropoulos, Ye failed to exhaust the available administrative remedies before seeking federal habeas relief and was convicted following a jury trial. The Second Circuit's ruling in Theodoropoulos controls the result in this case. Because Ye's conviction resulted from a jury trial, her claim does not pose a constitutional question of the type contemplated by St. Cyr, and thus is insufficient to warrant an exemption from the exhaustion requirement. In light of Ye's failure to exhaust administrative remedies, this court lacks jurisdiction to review her habeas petition.

CONCLUSION

For the reasons discussed above, this court lacks jurisdiction to hear Ye's habeas petition.

Accordingly, Ye's petition is DISMISSED. The clerk shall close the file.

SO ORDERED this _____ day of March 2003 at Bridgeport, Connecticut.

Stefan R. Underhill
United States District Judge