

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

NADEISHA FULLER,
Petitioner,

v.

ALBERTO GONZALES,¹ ET AL.,
Respondents.

CIVIL ACTION NO.
3:04cv2039 (SRU)

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

For the last two years, Nadeisha Fuller, a legal permanent resident of the United States, has been incarcerated by the Bureau of Immigration and Customs Enforcement (“BICE”) pursuant to section 236(c) of the Immigration and Naturalization Act (“the INA”), 8 U.S.C. § 1226(c). The abrogation of an alien’s right to liberty caused by section 236(c) is generally constitutional; when Congress categorically deprives certain aliens of their right to liberty for the brief time necessary to complete removal proceedings, it legitimately furthers the government’s interests in securing aliens’ presence at immigration proceedings and incapacitating dangerous aliens. A detention as inordinately long as Fuller’s, however, is not justified by those government interests. Accordingly, I conclude that the Due Process Clause does not permit Fuller’s continued detention under section 236(c).

I. Background

On February 5, 2002, Fuller entered an *Alford* plea to a charge of second degree assault in violation of Connecticut General Statutes § 53a-60(a). She was sentenced principally to one year

¹ Because John Ashcroft and Tom Ridge, originally named as respondents, are no longer members of the cabinet, Alberto Gonzales, the current Attorney General, and Michael Chertoff, the current Secretary of the Department of Homeland Security, have automatically been substituted as parties. *See* Fed. R. Civ. P. 25(d)(1).

of imprisonment.

On March 31, 2003, Fuller was taken into BICE custody pursuant to section 236(c) on the theory that her conviction under section 53a-60(a) constituted a conviction for an “aggravated felony.” Fuller unsuccessfully sought a bond hearing on the ground that a violation of section 53a-60(a) is not categorically an aggravated felony and therefore she was not properly subject to section 236(c).

On May 7, 2003, at Fuller’s removal hearing, the Immigration Judge rejected Fuller’s argument that she had not been convicted of an aggravated felony and ordered her removed. On September 26, 2003, the Board of Immigration Appeals (“the BIA”) affirmed. On October 9, 2003, Fuller filed an appeal with the Second Circuit along with a request for a stay of removal. On June 23, 2004, the Second Circuit formally stayed Fuller’s removal. Subsequently, the United States Attorney’s Office conceded that the existing record of Fuller’s conviction did not support a finding that she had been convicted of an aggravated felony and asked that her case be remanded to the BIA for development of the record. On September 29, 2004, the Second Circuit vacated Fuller’s order of removal and remanded her case to the BIA.

On October 27, 2004, Fuller again unsuccessfully sought a bond hearing on the ground that she was not properly subject to section 236(c). She has appealed that denial to the BIA.

On December 2, 2004, Fuller filed the present petition with this court.

The BIA has yet to issue a ruling on either: (a) Fuller’s challenge to her removal, which was remanded by the Second Circuit, or (b) Fuller’s appeal from her denial of a bond hearing.

II. Preliminary Issues

A. Jurisdiction

At present, Fuller has three claims: first, she is not removable because she was not convicted of an aggravated felony; second, she is not subject to section 236(c) because she was not convicted of an aggravated felony; and third, even if she is subject to section 236(c), that section is unconstitutional as applied to her.

The first two claims are still before the BIA and are therefore unexhausted. Accordingly, I do not have jurisdiction to consider them. At oral argument, Fuller's counsel suggested that exhaustion of these claims was not required because it would be futile. Though futility is an exception to the exhaustion requirement, *see Howell v. I.N.S.*, 72 F.3d 288, 291 (2d Cir. 1995) (exhaustion not required if administrative appeal would be futile), Fuller has not offered any support for a claim of futility other than the fact that the BIA previously rejected her argument. That alone is insufficient; there is no reason to think the BIA will not give more weight to Fuller's arguments now that those arguments have proven sufficient to secure a remand by the Second Circuit.

By contrast, Fuller's third claim – that section 236(c) is unconstitutional as applied to her – does fall within this court's jurisdiction. Although that claim has not been exhausted, it need not be, because it raises constitutional issues, which the BIA cannot address. *Arango-Aradondo v. I.N.S.*, 13 F.3d 610, 614 (2d Cir. 1994) (BIA does not have authority to adjudicate constitutional issues).

B. Nature of Fuller's Detention

Before turning to the merits of Fuller's constitutional claims, I must address the parties' threshold dispute concerning how long Fuller has been detained pursuant to section 236(c) of the INA.

Section 236(c) states that the "Attorney General shall take into custody any alien who – [among other things,] (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii)" 8 U.S.C. § 1226(c). Section 237(a)(2)(A)(iii) states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Section 236(c), therefore, provides the default rule under which aliens convicted of aggravated felonies are held. Nevertheless, once an alien is subject to a final order of removal, the statute under which the alien is held changes. Section 241(a) of the INA states "when an alien is ordered removed, the Attorney General shall remove the alien from the United States" and "[d]uring the removal period, the Attorney General shall detain the alien." Accordingly, once an alien enters the "removal period," that alien is no longer held under the authority of section 236(c) but rather under the authority of section 241(a).

Fuller contends she has been held under section 236(c) since she was first taken into BICE custody on March 31, 2003, over two years ago. The government disagrees, arguing that, from the time Fuller's removal order became administratively final – September 26, 2003 – until the Second Circuit vacated that order – September 29, 2004, Fuller was not held under section 236(c), but rather under section 241(a) as an alien subject to a final order of removal. Accordingly, argues the government, Fuller has only been continuously confined under section 236(c) since late September 2004, that is, for approximately six months.

The government's argument is contrary to the language of section 241(a). An alien is only detained under section 241(a) during "the removal period." 8 U.S.C. § 1231(a)(2).

The removal period begins on *the latest* of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

8 U.S.C. § 1231(a)(1)(B) (emphasis supplied). Accordingly, because Fuller's order was judicially reviewed, and the Second Circuit did issue a stay of removal, Fuller's "removal period" could not have begun before the Second Circuit issued its ruling. Of course, when the Second Circuit issued its ruling, it vacated Fuller's removal order, and therefore the removal period did not begin then either. In short, Fuller's removal period has never begun and, consequently, Fuller has never been detained under section 241(a). *See Martinez-Jaramillo v. Thompson*, 120 Fed. Appx. 714, 717 (9th Cir. 2005) (holding government's argument that section 241(a) applied after BIA dismissed appeal, despite stay of removal, was "simply inconsistent with the language of the statute").

At oral argument, the government asserted that two cases in this Circuit stand for the proposition that the issuance of a stay does not delay the start of the removal period (despite the clear language of the statute). The two cases cited by the government say nothing of the kind. In *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003), the Second Circuit explicitly affirmed that, "where a court issues a stay pending its review of an administrative removal order, the alien continues to be detained under § 236 until the court renders its decision." The court then went on to conclude that merely filing a habeas petition does not prevent the application of section

241(a), and, even if it did, the Second Circuit's final disposition of the appeal of Wang's petition caused section 241(a) to take effect. *Id.* In *Chimbo v. Secretary of the Department of Homeland Security*, 2004 WL 2713154, *7 (D. Conn. Nov. 18, 2004), Judge Kravitz followed *Wang* in concluding that Chimbo's filing of a habeas petition did not make section 241(a) inapplicable.

Fuller's situation is different than either Wang's or Chimbo's. Fuller filed a timely appeal of the BIA's dismissal and was granted a formal stay of her removal order. Her case, in other words, is a textbook example of the application of section 241(a)(1)(B)(ii). Accordingly, her removal period never began, and she has – for the past two years – been detained under section 236(c).

III. Due Process Claim

I now turn to the main question – whether Fuller's detention for more than two years under section 236(c) is constitutionally permissible.

A. Aliens' Due Process Rights

“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” *Reno v. Flores*, 507 U.S. 292, 306 (1993). “Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Nevertheless, the right is not absolute. The Supreme Court has recognized “detention during deportation proceedings as a constitutionally valid aspect of the deportation process.” *Demore v. Kim*, 538 U.S. 510, 523 (2003). That being said, Congress's ability to abrogate aliens' right to liberty is not absolute. Any congressional limitation on the right must bear at least some relation to a legitimate governmental purpose (to meet substantive due process limitations), and the

application of that abrogation in a particular case must be subject to adequate procedural protection (to meet procedural due process limitations).

For example, in *Zadvydas*, the Supreme Court dealt with the due process implications of section 241(a)'s mandatory detention of aliens subject to final orders of removal. The Court recognized the existence of aliens' due process rights, but also recognized Congress's authority to severely limit those rights. Nevertheless, the Court held that a serious constitutional problem would arise if Congress limited aliens' liberty without reasonable justification and adequate procedural protections. Specifically, the Court concluded that, if the statute allowed for detention when there was no possibility of removal, then there would be substantive due process concerns because, in such a circumstance, (a) the need for detention to ensure presence at future removal proceedings was "weak or nonexistent," and (b) the need to protect the community was insufficient to allow indefinite detention. *Zadvydas*, 533 U.S. at 690-92. The Court also concluded that, even if protecting the community was a sufficient justification for the statute, the statute still ran the risk of failing to provide sufficient procedural guarantees that it would only cover those who were, in fact, a danger to the community. *Id.* at 692. Ultimately the Court found none of these problems present, because it read the statute only to permit detention for the amount of time reasonably necessary to bring about an alien's removal. *Id.* at 689.

Kim also provides a good example of due process analysis in the immigration context. There the Court again acknowledged that aliens have due process rights and that Congress may abrogate those rights, subject to substantive and procedural limitations. The Court addressed the question whether it was permissible, as a matter of substantive due process, for Congress to abrogate the rights of the various classes of aliens enumerated in section 236(c) by detaining

them for the short period of time necessary to complete their removal proceedings. *Kim*, 538 U.S. at 513. The Court answered that question in the affirmative, concluding that, unlike detention of the class of aliens at issue in *Zadvydas*, detention of aliens covered by section 236(c) was reasonably related to a legitimate government purpose. Specifically, the Court concluded that Congress was permitted to use categorical detention of those aliens as a reasonable means for securing their presence at removal proceedings and for protecting the community. *Id.* Moreover, the Court concluded that, unlike the detention in *Zadvydas*, the detention contemplated by Congress under section 236(c) was not only far from indefinite but relatively short – on average less than ninety days. *Id.* at 529 The Court did not address the procedural due process question, i.e., whether there were adequate procedures in place² for determining whether an alien fell within section 236(c)'s categorical sweep. *Id.* at 514 n.3

In short, both *Zadvydas* and *Kim* upheld the same fundamental principles. Both recognized an alien's right to due process in deportation proceedings, in particular a right to liberty; both recognized Congress's considerable authority to abrogate that right; and both recognized that Congress's authority allows it to impose reasonable restraints on liberty in order to further its goals of securing attendance at removal proceedings and protecting the community. *Zadvydas* went on to indicate that, under section 241(a), a lengthy detention that did not clearly relate to both those goals would exceed the Constitution's bounds, while *Kim* held that, under section 236(c), a short detention that was clearly related to those goals did not exceed the Constitution's bounds.

² An alien is currently given the opportunity to establish the inapplicability of section 236(c) through a so-called *Joseph* hearing. *See Matter of Joseph*, 22 I & N Dec. 799 (BIA 1999).

B. Section 236(c) as Applied to Fuller

Though both *Zadvydas* and *Kim* are instructive, neither addresses the question presented by this case, namely, whether Fuller’s extremely lengthy detention under section 236(c) constitutes a permissible infringement of her constitutionally protected right to liberty.³

Kim held that it was permissible to detain aliens under section 236(c) for the *short time* necessary to complete removal proceedings. *Kim* did not address the permissibility of a multi-year detention. On the contrary, in his concurring opinion in *Kim*, Justice Kennedy identified that as an open question. *Kim*, 538 U.S. at 532 (Kennedy, J concurring) (alien “could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified”).

Although *Kim* held that the desire to ensure an alien’s presence at future proceedings and the desire to protect the community provide sufficient justification for a short mandatory detention, the sufficiency of that justification decreases as the length of incarceration increases. When Congress imposed mandatory detention through section 236(c), it was effectively saying that the risk that some aliens within section 236(c)’s enumerated categories will either not show up for future proceedings or prove dangerous to the community justifies detaining all aliens in that category, even those who do not actually pose either risk. In other words, Congress found that it is necessary to briefly detain even those aliens who pose absolutely no risk at all in order to avoid the risks posed by other aliens.

³ This case does not present the procedural due process question left unanswered by *Kim*, namely, whether for those cases in which section 236(c) is constitutional there are adequate procedural mechanisms in place for determining whether a particular alien falls within the class of aliens enumerated in section 236(c). In other words, Fuller does not question the constitutional adequacy of her *Joseph* hearing.

Aliens who fall under section 236(c) are completely deprived of all liberty without any hearing. Of course, they are given a hearing to determine whether they are in fact aliens covered by section 236(c), i.e., a *Joseph* hearing, but, once they are found to fall within section 236(c)'s boundaries, they are immediately and unconditionally stripped of their liberty. Although the Supreme Court held such extreme deprivation is justifiable when it is only for a short period of time, there is nothing to suggest that the Court would have held such deprivation appropriate for the unusually lengthy period of time at issue here.

The length of Fuller's detention is sixteen times that of the average ninety-day detention discussed in *Kim* and five times the five-month detention that *Kim* indicated applied in the "minority of cases." 530 U.S. at 529-30. The length of Fuller's immigration detention is more than twice the amount of time she served for her underlying criminal conviction. Moreover, there is no indication that Fuller's section 236(c) detention is anywhere near over. The BIA has only recently ordered briefing in her case, and, because the government is arguing that more evidence must be taken in Fuller's case, it is likely that the most the BIA will do is remand the case to the Immigration Judge.⁴ I do not suggest that Fuller's section 236(c) detention is "potentially permanent," see *Zadvydus*, 533 U.S. at 691, but I think it fair to say that its end is not

⁴ In this connection, I note that Fuller's underlying argument for why she is not removable appears highly meritorious. That issue is, of course, not before me, but the fact that the resolution of such a strong claim could not be completed in over two years heightens my concern that Fuller's section 236(c) detention is far from over. In addition, the strength of Fuller's claim distinguishes the facts of her case from the facts of *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991), where the record indicated that the petitioner was seeking to delay his own proceedings. Unlike *Doherty*, Fuller appears anxious to expedite her proceedings because she is confident they will result in her release. (*Doherty* is distinguishable on other grounds as well; for example the petitioner there had been subject to "consistent administrative and judicial findings" that he presented "an exceptionally poor bail risk." *Id.* at 211.)

within the “reasonably foreseeable future,” *see id.* at 701 (“And for detention to remain reasonable, as the period of . . . confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.”).

Lengthy detentions like Fuller’s were not contemplated by the majority in *Kim*; they were, however, a cause of concern to the Court in *Zadvydas* and to Justice Kennedy in his *Kim* concurrence. Under all the circumstances, I conclude that Fuller’s detention under section 236(c) is unconstitutional. In reaching this conclusion, I am mindful of the fact that substantive due process claims are rarely granted, but this case – involving a detention already exceeding two years, with no prospect of a timely conclusion – presents exceptional circumstances. BICE may no longer detain Fuller under section 236(c).

IV. Conclusion

Fuller’s petition for writ of habeas corpus (doc. # 1) is GRANTED. Respondents are ordered to hold a bond hearing for her no later than April 21, 2005 and to report the outcome of that hearing to the court by April 22, 2005.

It is so ordered.

Dated at Bridgeport, Connecticut, this 8th day of April 2005.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge