UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Rainford MCKENIZIE, petitioner	:	
v.	:	**No. 3:04cv0067 (JBA)**
Department of Homeland Security, respondent.	:	

Ruling on Petition for Writ of Habeus Corpus Pursuant to 28 U.S.C. § 2241 [Doc. #1]

Rainford McKenzie seeks relief from a final order of removal entered February 21, 2003. For the reasons set forth below, his petition [Doc. #1] is DENIED.

I. Background

McKenzie, a native and citizen of Jamaica, was born in Jamaica on March 13, 1967, and was lawfully admitted to the United States at New York, New York on July 29, 1987. On July 20, 1998, in Superior Court in Bridgeport, Connecticut, he pled guilty to and was convicted of the offense of violating a protective order in violation of Conn. Gen. Stat. § 53a-110b. On February 21, 2003, an IJ ordered him removed on the grounds of that conviction pursuant to 8 U.S.C. § 1227(a)(2)(E)(ii), and, after weighing various factors, including criminal history and rehabilitation, denied cancellation of removal. The BIA rejected McKenzie's arguments on appeal and dismissed it on October 23, 2003.

In the petition under review, filed January 14, 2004, McKenzie raises two objections to his final order of removal. First, he asserts that immigration officials did not inform him of his right to contact the consular or diplomatic officers of Jamaica in violation of Article 36 of the Vienna Convention. He concedes that he failed to raise this issue before either the IJ or on appeal to the BIA. Second, he asserts that the conviction supporting his removal order is invalid as his guilty plea was not knowing and intelligent.

II. Discussion

A. Jamaican Consular or Diplomatic Officers

The Court lacks subject matter jurisdiction to address the merits of McKenzie's complaint that he was not notified of his privilege to communicate with the consular or diplomatic officials of Jamaica after being detained in removal proceedings. As relevant here, Article 36 of the Vienna Convention on Consular Relations provides that United States immigration authorities shall, without delay, inform a detained foreign national of his right to have the consular post of his state notified of his detention in removal proceedings. See Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77,

T.I.A.S. No. 6820 (ratified Nov. 24, 1969).[1] The Immigration and Naturalization Service issued regulations to ensure compliance with this provision, which state,

> (e) Privilege of communication. Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal. ... Jamaica ...

8 C.F.R. § 236.1(e); see also and generally U.S. v. De La Pava, 268 F.3d 157, 163-66 (2d Cir. 2001); see also id. at 167 (Sack, J., concurring). 8 U.S.C. § 1252(d) provides,

> (d) Review of final orders
>
> A court may review a final order of removal only if--
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right, and
> (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents

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[1] With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

> grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

This statutory exhaustion requirement is mandatory and seeks to ensure that the Bureau of Customs and Immigration Enforcement has a full opportunity to construe and apply immigration laws and implementing regulations before the same issues of construction and application are submitted for review by a federal court. See Theodoropoulos v. INS, 358 F.3d 162, 169-74 (2d Cir. 2004). Accordingly, petitioner's failure to seek administrative relief as a result of the immigration authorities' alleged failure to comply with 8 C.F.R. § 236.1(e) precludes this Court from addressing the claim. See also Waldron v. INS, 17 F.3d 511, 514-19 and n.7 (2d Cir. 1994)(concluding that INS' violation of former 8 C.F.R. § 242.2(g), identical to current 8 C.F.R. § 236.1(e) save minor differences not relevant here, properly before appellate court because raised before and addressed by BIA on the merits, and discussing consequence of violation); Douglas v. INS, 28 F.3d 241, 245-46 (2d Cir. 1994)(same).

B. Collateral Attack of State Court Conviction

The Court cannot consider McKenzie's attack on his guilty plea because he is barred from challenging in a habeas proceeding under 28 U.S.C. § 2241 the constitutionality of the state conviction supporting his removal. This Court has on two prior

occasions denied petitions for writs of habeas corpus in analogous circumstances. See Plummer v. Ashcroft, 258 F.Supp.2d 43, 45-46 (D. Conn. 2003); Johnson v. INS, 3:03CV96, 2003 WL 151381 (D. Conn. Jan. 21, 2003).

McKenzie was ordered removed under 8 U.S.C. § 1227(a)(2)(E)(ii) as a result of "engag[ing] in conduct that violates the portion of a protective order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued...." The requisite conduct was found by the IJ and affirmed by the BIA based in critical part on petitioner's conviction for a violation of Conn. Gen. Stat. 53a-110b. McKenzie does not contest the fact that that conviction is one defined in 8 U.S.C. § 1101(a)(48), namely, petitioner entered a plea of guilty and a judge imposed "some form of punishment, penalty, or restraint on [his] liberty." 8 U.S.C. § 1101(a)(48)(A)(ii). Thus, the conviction is presumptively valid and may be used by the immigration authorities as a basis for an order of removal until set aside on direct or collateral review, see Custis v. U.S., 511 U.S. 485, 497 (1994)(prior state conviction not set aside on direct or collateral review as of the time of sentencing is presumptively valid and may be used to enhance federal sentence); Contreras v. Schiltgen, 122 F.3d 30 (9th Cir. 1997) rehearing granted, 151 F.3d 906 (9th Cir.

1998)(immigration authorities may rely on state conviction as a lawful basis for detention and deportation until conviction overturned in a collateral action), and, except in rare circumstances not applicable here, cannot be subject to collateral attack under 28 U.S.C. § 2241. See id.; see also Daniels v. U.S., 532 U.S. 374, 382 (2001); Broomes v. Ashcroft, 358 F.3d 1251, 1255 (10th Cir. 2004); Drakes v. INS, 330 F.3d 600 (3rd Cir. 2003).[2]

III. Conclusion

For the foregoing reasons, McKenzie's petition [Doc. #1] is DENIED. The clerk is directed to close this case.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 23rd day of April, 2004.

[2] The record suggests that McKenzie never directly appealed his 1998 conviction. In addition, McKenzie neither claims he did so or that a direct appeal is still pending. Accordingly, even if the Second Circuit's pre-§1101(a)(48) "finality" test remains good law, see Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991); Marino v. INS, 537 F.2d 686, 691-92 (2d Cir. 1976), McKenzie's conviction is a proper basis for an order of removal.