UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANA ZGOMBIC, Petitioner, v. BRUCE CHADBOURNE, Interim Field Office Director – New England, Bureau of Immigration and Customs Enforcement, and JOHN ASHCROFT, United States Attorney General, Respondents.	: : : : : : : : :	CIVIL ACTION NO. 3:99cv2571 (SRU)

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Ana Zgombic ("Zgombic"), a native of the former Yugoslavia, petitioned this court for habeas corpus relief after she was ordered removed from the United States. In March 2000, this court granted the petition and ordered that the Immigration and Naturalization Service ("INS") allow Zgombic to apply for discretionary section 212(c) relief. Zgombic v. Farquharson, 89 F. Supp. 2d 220 (D. Conn. 2000). That order, however, was vacated by the Second Circuit in 2003. Zgombic v. Farquharson, 2003 WL 21243248 (2d Cir. May 29, 2003). Zgombic has since, with the permission of the court, amended her petition to raise the argument that section 212(c) relief is still available to her and the argument that she is being unlawfully detained. For the reasons set forth below, Zgombic's petition is denied.

I. Facts

The background of this case has already been set out in detail in my prior opinion. Zgombic, 89 F. Supp. 2d 220. The relevant facts, in brief, are as follows.

Zgombic has lived in this country since 1972, when she was 10 years old. She married Edward

Reynolds, a United States citizen, in 1986 and, prior to being taken into custody, lived with him in Great Neck, New York.

In September 1996, Zgombic returned to the United States from a nine-month business trip to China. On her arrival, the INS discovered that she had an outstanding warrant for her arrest arising out of allegedly fraudulent bank transfers. Zgombic was "paroled" into the country and released on bail. A year later, Zgombic was indicted and charged with six counts of bank fraud. In July 1998, she pled guilty to three of those counts and was sentenced to fifteen months' incarceration. Subsequently, the INS issued a Notice to Appear charging that Zgombic was removable because of her 1998 conviction. Just prior to her release from federal custody, the INS issued a Notice of Custody charging that Zgombic was subject to INS detention pursuant to section 236(c) of the Immigration and Naturalization Act ("INA").

After Zgombic's release from federal custody, the INS detained her. Shortly afterwards, an Immigration Judge denied, among other things, her application for section 212(c) relief and ordered her removed . Zgombic petitioned this court for writ of habeas corpus, arguing that her detention without a hearing violated due process and that she was entitled to apply for section 212(c) relief. This court granted Zgombic's petition, concluding that her detention violated her right to procedural due process and that AEDPA and IIRIRA's elimination of section 212(c) relief did not apply to her because her criminal conducted predated the enactment of those statutes. The INS appealed.

While the INS's appeal was pending, a number of things happened. Pursuant to this court's order, Zgombic was granted a detention hearing and the opportunity to apply for section 212(c) relief. As a result of the detention hearing, she was released on a $20,000 bond in March of 2000. In

addition, her section 212(c) application was successful, and she was granted relief from removal.

During this time, there were also several important legal developments. First, the Second Circuit's views on the retroactive application of AEDPA and IIRIRA to section 212(c) became clearer. Specifically, the decisions in Domond v. I.N.S., 244 F.3d 81 (2d Cir. 2001), and Rankine v. Reno, 319 F.3d 93 (2d Cir. 2003), made clear that section 212(c) relief was eliminated for aliens who committed crimes prior to the enactment of AEDPA and IIRIRA but who were not convicted until after enactment of those statutes. Second, the Supreme Court held, in Demore v. Kim, 123 S. Ct. 708 (2003), that mandatory detention under section 236(c) is not, at least in most cases, unconstitutional.

On the strength of these decisions, the Second Circuit vacated this court's order and remanded the case for further proceedings. Zgombic, 2003 WL 21233248. Shortly thereafter, on October 23, 2003, the Board of Immigration Appeals overturned Zgombic's section 212(c) waiver and ordered her removed. On December 8, 2003, the Bureau of Immigration and Customs Enforcement ("BICE," which has succeeded the INS) took Zgombic into custody, pursuant to INA section 241(a), as an alien subject to removal. Zgombic then applied to the BICE for immigration parole under section 212(d)(5) of the INA. On May 7, 2004, her request was denied.[1]

In August 2003, after receiving the Second Circuit's order, respondents filed a motion to dismiss the petition. On December 16, 2003, this court ordered Zgombic's removal stayed pending a decision on her petition. On December 22, 2003, with the permission of the court, Zgombic filed an

[1] Originally, respondents argued that Zgombic's petition must be denied because she had not exhausted her administrative remedies by seeking parole. In light of the fact that Zgombic has now sought and been denied parole, this argument is moot.

amended petition. The respondents opposed the amended petition and, on May 18, 2004, moved to vacate the stay of removal.

II. Discussion

Zgombic's amended petition raises three claims. First, and foremost, she argues that she is still eligible for section 212(c) relief because she was placed in deportation proceedings upon her return to the United States in 1996, prior to the enactment of AEDPA and IIRIRA. Second, she argues that, because she is eligible for section 212(c) relief and has previously been granted that relief, she is not in fact subject to removal and so should not be detained under section 241(a)(6). Third, she argues that the INS's determination that she was an "arriving alien" after her return from China violated her right to equal protection because, as a result of that determination, she is subject to different treatment than other legal permanent residents.

A. Section 212(c)

In her first petition, Zgombic argued that she was eligible for section 212(c) relief despite AEDPA and IIRIRA's elimination of that relief, because her criminal conduct predated the enactment of those statutes. That argument was rejected by the Second Circuit.

Zgombic now argues that she is nevertheless still eligible for section 212(c) relief because she was placed in deportation proceedings upon her return from China in 1996.

IIRIRA makes clear that its elimination of section 212(c) relief does not apply to aliens whose deportation proceedings commenced prior to April 1, 1997. IIRIRA § 309(a). Similarly, AEDPA § 440(d) – making aggravated felons ineligible for section 212(c) relief – does not apply to aliens whose

deportation proceedings commenced prior to April 24, 1996[2] – the date of AEDPA's enactment. Henderson v. I.N.S., 157 F.3d 106, 129 (2d Cir. 1998). None of this aids Zgombic's petition.

Zgombic was not placed into deportation proceedings when she was paroled into the country in 1996. Deportation proceedings commence when the charging documents are filed with the immigration court. 8 C.F.R. § 1003.14 ("proceedings before an Immigration Judge commence[] when a charging document is filed with the Immigration Court by the Service"). There is no evidence in this case that the INS filed charging documents when Zgombic entered the country.[3] Neither is there any authority that supports the conclusion that deportation proceedings commence solely by virtue of the fact that an alien is paroled into the country. Moreover, as a practical matter, Zgombic's deportation proceedings could not have commenced when she entered the country. Zgombic only became deportable *after* she was convicted of an aggravated felony, see 8 U.S.C. § 1227(a)(2)(iii) (making deportable "alien who is *convicted* of an aggravated felony") (emphasis supplied), an event that did not occur until 1998. It is difficult to see how her deportation proceedings could have commenced on a date when she was not even arguably deportable.

Zgombic also appears to argue that, even if she was not actually placed in deportation proceedings upon her reentry, she believed she was, and this fact alone makes AEDPA and IIRIRA's

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[2] Though there is no need to reach the issue, it appears that Zgombic entered the country in June of 1996, *after* AEDPA's effective date. This would appear to make her ineligible for relief under AEDPA even had her deportation proceedings commenced upon her reentry.

[3] Arguably proceedings commence when the alien is served with the charging document (as opposed to when it is filed). See Thom v. Ashcroft, 2004 WL 1172966, *5 n.9 (May 27, 2004) (noting the question whether filing or service is the critical date is an open one in this circuit). This distinction does not avail Zgombic for there is no evidence she was, or even could have been, served with a charging document at the time of her reentry.

application to her case impermissibly retroactive. Even after this circuit's ruling in Rankine, there is still room for an alien to argue that, despite AEDPA and IIRIRA not applying retroactively to the event of conviction, the statutes may still apply retroactively to some actions taken in reasonable reliance on the availability of section 212(c) relief. See Restrepo v. McElroy, 2004 WL 652802 (2d Cir. Apr. 1, 2004) (holding AEDPA and IIRIRA might have impermissible effect on alien's decision not to affirmatively seek section 212(c) relief). Zgombic argues that she relied on section 212(c) availability when she pled guilty in 1998 because, believing her immigration proceedings had commenced in 1996, she thought that section 212(c) relief was available to her even if she pled guilty. Even if that was her belief in pleading guilty, Zgombic cannot be said to have *reasonably* relied on the availability of section 212(c) relief. See Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994) (retroactivity analysis to be guided by considerations of "fair notice, *reasonable* reliance, and settled expectations") (emphasis supplied). As just noted, there is simply no authority whatsoever to support the proposition that an alien is placed in deportation proceedings by being paroled into the country.

For these reasons, Zgombic is not eligible for section 212(c) relief.

B. Other Claims

In light of my ruling on the section 212(c) question, the other claims made by Zgombic find no purchase. Her claim that she was unlawfully detained under section 241(a)(6) is premised on the argument that she is not subject to an order of removal because she is eligible for, and has been granted, section 212(c) relief.[4] The premise being removed, the claim fails. Similarly, her equal

[4] To the extent Zgombic argues that her section 241(a)(6) detention is still unconstitutional even accepting the appropriateness of her final order of removal, that argument is foreclosed by Zadvydaz v.

protection claim depends on her showing that she was treated differently than other legal permanent residents. In light of my ruling on the section 212(c) issue, Zgombic's detention is properly governed by section 241(a), and that section applies equally to all removable aliens regardless of whether or not they have been designated "arriving aliens." Consequently, Zgombic can make no claim of disparate treatment.

For these reasons, none of Zgombic's other claims provide a ground for relief.

C. Stay of Removal

Zgombic's case is effectively at an end. Despite admirable efforts on the part of her counsel, and despite the compelling facts of her case, this circuit's law leads to the inevitable conclusion that she is removable. Though there may very well be an appeal, it is not likely to meet with success. Accordingly, I see no grounds for maintaining the stay of removal currently in place.

III. Conclusion

Some final words are appropriate. This case plainly illustrates the tragedy that has befallen many as a result of the elimination of all discretionary relief from removal. Ana Zgombic lived 32 of her 42 years in the United States and must now "return" to a region she left as a child and to a country that did not even exist at that time. Her American husband will now face the prospect of either separation from his wife of almost 20 years or life with her in a country he has never known. Ms. Zgombic

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Davis, 533 U.S. 678 (2001). Zadvydaz held that a pre-removal detention of six months was presumptively reasonable and that, after six months, an alien could attempt to show that there was no significant likelihood of removal. Id. at 701. Zgombic has been detained less than six months. Even if her detention exceeded six months, her argument for why there is no likelihood of removal – viz., that she is eligible for section 212(c) relief – is without merit.

committed a non-violent, financial crime for which she was sentenced to little more than a year in prison. She was actually granted section 212(c) relief when permitted to apply. Sadly, under the current law, none of this matters.

Sadly, too, the BICE apparently was unable, or unwilling, to allow Ms. Zgombic to spend her final months in this country with her family. Before her section 212(c) relief application was granted, Ms. Zgombic was released by an Immigration Judge following a bond hearing. After her section 212(c) waiver was granted, Ms. Zgombic lived freely in this country for three years, including nearly seven months after the Second Circuit had made fairly clear that her relief would be rescinded. At no time, to my knowledge, did Ms. Zgombic do anything other than give the BICE her full cooperation. There was certainly not the slightest hint that she was a flight risk or a danger to the community. Nevertheless, almost as soon as her removal order was made final, the BICE demanded her immediate surrender (which she promptly tendered) and has held her in detention, away from her family, ever since. Even after her removal was stayed by court order, Ms. Zgombic remained jailed, again without any suggestion that she would flee if released. No one could question that even a brief time with family can be of the greatest importance and value. Depriving Ms. Zgombic of those precious moments, under the circumstances of her case, was pointless and unfortunate.

For the reasons set forth above, the Amended Petition (doc. # 41) is DENIED. The respondents' Motion to Vacate the Stay of Removal (doc. # 47) is GRANTED, however, in order to allow the petitioner an opportunity to seek a stay from the Second Circuit, the Order currently staying her deportation (doc. # 40) will remain in effect until June 21, 2004. In addition, the respondents' earlier Motion to Dismiss (doc. # 24), which is still pending, is DENIED as moot.

The clerk shall close the file.

It is so ordered.

Dated at Bridgeport, Connecticut, this 4th day of June 2004.

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