UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Hinds	:	
	:	
v.	:	**No. 3:03cv503(JBA)**
	:	
Ashcroft	:	

Ruling on Petition Under § 2241 [Doc. #1]

Petitioner Christopher Hinds was convicted of conspiracy to sell marijuana, in violation of Conn. Gen. Stat. §§ 53a-48 and 21a-277(b), on November 6, 1996 in the Connecticut Superior Court. As a result of this conviction, he was served with a Notice to Appear charging that he was subject to removal as an aggravated felon. Specifically, the Notice to Appear asserted that Hinds' conviction for conspiracy to sell marijuana was an aggravated felony under § 101(a)(43)(B) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101(a)(43)(B), which provides that the term aggravated felony includes "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)."

At his removal hearing, Hinds conceded the charge and reserved only his right to appeal the issue of his eligibility for INA § 212(c) relief.[1] On appeal to the BIA, Hinds raised

[1]For a discussion of the retroactivity issues surrounding the repeal of former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), see generally Mohammed v. Reno, 309 F.3d 95, 102-103 (2d Cir. 2002).

only the 212(c) issue. The Board of Immigration Appeals ("BIA") affirmed without opinion the decision of the Immigration Judge ("IJ") that Hinds was not eligible for 212(c) relief. Thereafter, Hinds filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.[2]

In his petition, Hinds has abandoned the 212(c) issue argued before the BIA and has instead raised an entirely new issue: he claims that his conviction for conspiracy to sell marijuana is an aggravated felony by virtue of INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U) (rather than INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), as charged in the Notice to Appear) because subsection (B) (set out above) encompasses the substantive offense of "illicit trafficking" while subsection (U) encompasses "an attempt or conspiracy to commit an offense described in this paragraph." Because his conviction was for conspiracy to sell marijuana rather than for the actual sale of marijuana, Hinds asserts that the correct charge (under subsection (U)) was never specified. He argues that this is both a basis for reversal of the removal order and that it constitutes a per se deprivation of due process.

---

[2]See generally INS v. St. Cyr, 533 U.S. 289 (2001) (§ 2241 provides district court with jurisdiction to hear some challenges to final orders of deportation); see also Simmonds v. INS, 326 F.3d 351, 354 (2d Cir. 2003) ("custody" requirement of § 2241 is satisfied if an alien is subject to a final order of deportation).

The Government argues that Hinds' failure to present this argument to either the IJ or the BIA is fatal to his claim, as he has failed to exhaust his administrative remedies. While the Government asserts that exhaustion is statutorily required by INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) (providing that a court may review a final order of deportation only if "the alien has exhausted all administrative remedies available to the alien as of right"), the Second Circuit has recently held that it is an open question in this Circuit whether exhaustion is statutorily required when an alien's claims are before a court by way of petition for writ of habeas corpus. Beharry v. Ashcroft, 329 F.3d 51, 60-62 (2d Cir. 2003) (relying on St. Cyr). In St. Cyr, the Supreme Court drew a distinction between the INA's references to "review" (or "judicial review"), which the Court read to include only direct review in the form of petitions for review, and habeas corpus jurisdiction, which the Court found to be separate and distinct.[3] Noting that the INA's statutory exhaustion requirement[4] speaks of "review," the Second Circuit in

---

[3]"In the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings . . . . Both §§ 1252(a)(1) and (a)(2)(C) speak of 'judicial review' – that is, full, nonhabeas review. Neither explicitly mentions habeas or 28 U.S.C. § 2241. Accordingly, neither provision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute." St. Cyr, 533 U.S. at 311-313 (citations and footnotes omitted).

[4]While the exhaustion requirement at issue in Beharry was INA § 106(c), 8 U.S.C. § 1105a(c) (now repealed), which was part

Beharry concluded that the question of whether the INA's statutory exhaustion requirement applies is open in this Circuit.[5]

Just as in Beharry, this Court does not need to reach the question of whether INA § 242(d)(1), 8 U.S.C. § 1252(d)(1), requires exhaustion of administrative remedies in the habeas corpus context because regardless of its applicability, Hinds is still subject "to the less stringent judicial exhaustion requirement." Beharry, 329 F.3d at 62 (citations omitted).[6]

---

of the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), the Beharry court noted that the exhaustion requirement applicable here (IIRIRA's permanent rule), is "almost identical." Beharry, 329 F.3d at 57 n.8.

[5]While Theodoropoulos v. INS, 313 F.3d 732 (2d Cir. 2002), had treated the statutory exhaustion requirement as applicable to a habeas petition, id. at 736-737, the Beharry court noted that "the panel in that case did not discuss or consider the impact of St. Cyr . . . . " 329 F.3d at 60 n.12. Similarly, the Second Circuit in Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003), assumed without discussion of St. Cyr that the reference to "judicial review" in INA § 241(a)(1)(B)(ii), 8 U.S.C. § 1231(a)(1)(B)(ii), encompassed a § 2241 petition. 320 F.3d at 147.

[6]"Two kinds of exhaustion doctrine are currently applied by the courts, and the distinction between them is pivotal. Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. Common law (or "judicial") exhaustion doctrine, in contrast, recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process." Bastek v. Federal Crop Ins. Corp., 145 F.3d 90, 94 (2d Cir. 1998). Hinds' assertion in his reply brief that Beharry stands for the proposition that "the right to habeas continued in the district court regardless of exhaustion," Reply at 2, confuses the distinction between statutory exhaustion (the applicability of which to habeas

Inasmuch as the record undisputedly shows that Hinds did not present his claim to either the IJ or the BIA, the Court cannot entertain it unless one of the exceptions to the judicial exhaustion requirement applies.[7]

"[E]xhaustion of administrative remedies may not be required when (1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question." Beharry, 329 F.3d at 62 (citations and internal quotations omitted). The first and third exceptions (no genuine opportunity for relief and futility) are inapplicable as the INS would undoubtedly have corrected the highly technical deficiency (if, indeed, it was a deficiency[8]) of

---

petitions the Beharry court left as an open question) and judicial exhaustion (with which Beharry required compliance).

[7]While Hinds argues in his reply brief that he has exhausted his administrative remedies "because he has appealed to every administrative court that had jurisdiction to hear his case," Reply at 1, the exhaustion requirement is not satisfied by raising any issue before the administrative agency; instead, the specific issue sought to be presented in the judicial forum must have been exhausted before the agency. See United States v. Gonzalez-Roque, 301 F.3d 39, 46-47 (2d Cir. 2002) (alien who appealed IJ's decision to BIA on the sole ground that 8 U.S.C. § 1433 should prevent his deportation did not exhaust other claims; the Second Circuit was "not persuaded" by the district court's conclusion that "an appeal from an IJ to the BIA, without more, generally suffices to satisfy the exhaustion requirement").

[8]The Government's alternative argument is that the Petition lacks merit because Hinds' conspiracy conviction was a "drug

citing subsection (B) (dealing with substantive drug offenses) rather than subsection (U) (dealing with conspiracies to commit, inter alia, drug offenses), had Hinds raised this claim during the administrative proceedings. Cf. Arango-Aradondo v. INS, 13 F.3d 610, 614 (2d Cir. 1994) ("the BIA can reopen the proceedings and, in appropriate circumstances, allow the petitioner to supplement the record with additional evidence" to correct procedural errors) (citation omitted).

The second exception (immediacy of need for judicial relief as justification for bypass of administrative procedures) does not apply because Hinds did not seek immediate judicial intervention during the pendency of the INS proceedings, and was not even subject to deportation during such pendency. Cf. Howell v. INS, 72 F.3d 288, 293 (2d Cir. 1995).

Finally, the fourth exception (certain substantial constitutional questions) is not satisfied because although Hinds labels his claim a due process violation, his claim is "essentially procedural [such that he] cannot evade BIA review merely by labeling his claim a due process claim." Gonzalez-Roque, 301 F.3d at 48. In Gonzalez-Roque, the Second Circuit held that an alien's assertion that the INS's procedural errors of losing a form and refusing to reopen proceedings rose

---

trafficking crime" under subsection (B). The Court does not reach this contention.

to the level of a due process violation did not excuse the alien's failure to administratively exhaust those claims. The court explained:

> A petitioner cannot obtain [judicial] review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process. "Due process" is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal. While the BIA does not have jurisdiction to adjudicate constitutional issues, procedural errors correctable by the BIA must first be raised with the agency.

Id. (citations, quotations and alterations omitted).

Inasmuch as Hinds has failed to exhaust the sole claim presented in his petition and no exception to the judicial exhaustion requirement applies, the Court lacks subject matter jurisdiction to entertain the petition.[9] The petition [Doc. #1] is DISMISSED for lack of subject matter jurisdiction, the stay of deportation entered March 31, 2003 is DISSOLVED, and 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 19th day of June, 2003.

[9]See Beharry, 329 F.3d at 53 ("because petitioner failed to exhaust his administrative remedies, neither the district court nor this Court has subject matter jurisdiction to consider his claim . . . ").