

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONOVAN LECKY, :
Petitioner :
 :
v. : No. 3:00cv1397(JBA)
 :
JANET RENO, UNITED STATES :
ATTORNEY GENERAL, ET AL., :
Respondents. :

Ruling on Respondents' Motion to Dismiss [Doc. #14]

On July 25, 2000, petitioner Donovan Lecky filed *pro se* a petition for writ of habeas corpus under 28 U.S.C. § 2241, primarily contending that he is entitled to be considered for discretionary relief from removal under former section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c)(repealed)(1994). Respondents have moved to dismiss the petition, arguing that Second Circuit case law clearly precludes petitioner's eligibility for such discretionary relief because he was convicted after the effective dates of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). For the reasons set forth below, respondents' motion to dismiss [Doc. #14] is GRANTED, and this Court's order of a stay of deportation [Doc. #8] is VACATED.

I. Factual Background

Petitioner is a citizen of Jamaica who was admitted into the United States as a lawful permanent resident on August 8, 1991. On September 17, 1995, Mr. Lecky was arrested and charged with criminal possession of a controlled substance (cocaine) in the third degree in violation of the laws of New York, and, pursuant to a guilty plea, was convicted of the offense on February 21, 1997. On September 13, 1999, the INS commenced removal proceedings against Mr. Lecky based on the New York conviction, and, on September 27, 1999, an immigration judge found petitioner removable based on this conviction. Petitioner requested no relief from removal, and the immigration judge ordered him removed from the United States.

Petitioner subsequently appealed to the Board of Immigration Appeals ("BIA"), requesting consideration for discretionary relief from removal under former INA § 212(c). The BIA dismissed the appeal on the grounds that petitioner waived any opportunity to seek discretionary relief by failing to request it before the immigration judge, and that, notwithstanding the waiver, petitioner was ineligible for such relief since INA § 212(c) had been repealed. Mr. Lecky then

petitioned this Court for a writ of habeas corpus.

II. Analysis

Prior to the enactment of AEDPA and IIRIRA in 1996, lawful permanent resident aliens deemed deportable were, under certain circumstances, eligible to apply for discretionary relief from deportation under former INA § 212(c). See Domond v. INS, 244 F.3d 81, 83-84 (2d Cir. 2001). Section 212(c) was narrowed by AEDPA § 440(d) and repealed altogether by IIRIRA, which substituted a different form of discretionary relief from deportation termed "cancellation of removal." Id. at 84.

In Domond, the Second Circuit held that "an alien subject to removal because of a felony committed prior to the effective dates of [AEDPA] and [IIRIRA], but convicted after those dates was ineligible for discretionary relief pursuant to former section 212(c) of [INA]." Mohammed v. Reno, 309 F.3d 95, 97 (2d Cir. 2002); see Domand, 244 F.3d at 84-86. Subsequent to Domand, the Supreme Court issued its decision in INS v. St. Cyr, 533 U.S. 289 (2001). In light of St. Cyr and the Supreme Court's earlier decision in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), the Second Circuit revisited its holding in Domand, and reaffirmed "that Domond remains binding authority in this Circuit." Mohammed, 309 F.3d at 103.

Accordingly, as Mr. Lecky was arrested and charged on September 17, 1995, with the offense for which he now faces deportation, but not convicted until February 21, 1997 after the enactment of AEDPA and IIRIRA, Mr. Lecky's contention that he is entitled to be considered for discretionary relief under former INA § 212(c) must be rejected.

Mr. Lecky's two remaining arguments also lack merit. First, the elimination of relief under former INA § 212(c) did not violate petitioner's constitutional right to equal protection. See Domond, 244 F.3d at 87-88. Second, as there is no possibility that the Second Circuit would stay Mr. Lecky's final order of removal based on his argument that he is eligible for relief under former INA § 212(c), see Mohammed, 309 F.3d at 102-03, Mr. Lecky's claim that he is being detained under INA § 236(c) in violation of his constitutional rights is moot because, at least as of the entry of this Court's order, any continued detention will be pursuant to INA § 241(a). See 8 U.S.C. § 1231(a)(1)(B); Abimbola v. Ashcroft, No. 01 CV 5568, 2002 WL 2003186, at *7 (E.D.N.Y. Aug. 28, 2002). Further, even assuming petitioner has been detained under INA § 241(a) since February 3, 2000, the date the BIA dismissed petitioner's appeal, such detention is not unlawful under Zadvydas v. Davis, 533 U.S. 678 (2001)

since it is largely due to the stay petitioner sought in connection with his challenge to removal. See e.g., Abimbola, 2002 WL 2003186 at *7; Guner v. Reno, No. 00 Civ. 8802, 2001 WL 940576, at * 2 (S.D.N.Y. Aug. 20, 2001); Copes v. McElroy, No. 98 Civ. 2589, 2001 WL 830673, at *6 (S.D.N.Y. July 23, 2001); and Lawrence v. Reno, No. 00 Civ. 4559, 2001 WL 812242, at *1 (S.D.N.Y. July 18, 2001). Accordingly, petitioner's request for release under Zadvydas must be denied at this time.

III. Conclusion

For the reasons set forth above, respondents' motion to dismiss [Doc. #14] is GRANTED, and this Court's order of a stay of deportation [Doc. #8] is VACATED. 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 6th day of December, 2002.