DUAMUTEF v. IMMIGRATION AND NATURALIZATION SERVICE

2003 | Cited 0 times | E.D. New York | May 14, 2003

ORDER

Petitioner pro se Duaut Duamutef ("Duamutef") filed this petition for habeas relief pursuant to 28 U.S.C. § 2241 and for a writ of mandamus pursuant to 28 U.S.C. § 1361. Duamutef, who is serving a state sentence of fifteen years to life on a murder conviction, was granted "conditional parole for deportation only" ("CPDO") by the state parole board. However, the Immigration and Naturalization Service (the "INS") has not deported him. Duamutef is requesting that the INS be ordered to execute the final order of deportation issued against him. The government has filed a motion opposing the petition and requesting that the action be dismissed.

Background

Duamutef is a Jamaican native who entered the United States on or around January 1, 1980. Declaration of Dione M. Enea ("Enea Decl.") ¶ 3. The INS has no record of Duamutef ever being lawfully inspected or admitted to the United States. Id. In August 1982, Duamutef was arrested in New York and charged with, inter alia, Murder in the Second Degree (N.Y.P.L. § 125.25). Enea Decl., Ex. 1. On or around February 15, 1984, Duamutef was convicted of Murder in the Second Degree after a trial in the Supreme Court of the State of New York, Bronx County. Id. ¶ 4. Duamutef was sentenced to a prison term of fifteen years to life. Id. The Appellate Division affirmed Duamutef's conviction, and his request for leave to appeal to the Court of Appeals was denied. Duamutef Memorandum of Law ("Duamutef Mem."), at 1. Duamutef is presently in the custody of the New York State Department of Correctional Services, imprisoned at the Arthur Kill Correctional Facility. Enea Decl. ¶ 9.

On May 3, 1993, the INS initiated deportation proceedings against Duamutef, alleging that Duamutef was subject to deportation pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1251(a)(1)(B), (a)(2)(A)(iii), as an alien who entered the U.S. without inspection and as an alien who has been convicted of an aggravated felony at any time after entry into the United States. Enea Decl. ¶ 5, Ex. 2. On June 16, 1994, the immigration judge ordered that Duamutef be deported to Jamaica. Id. ¶ 6, Ex. 3. Duamatef waived his right to appeal the decision to the Board of Immigration Appeals, thereby making his deportation order final. Id. The INS filed a detainer against Duamatef, which would prevent his actual release should Duamatef be granted discretionary release by the New York State Division of Parole (the "Parole Board"). Id. ¶ 5.

After Duamutef served his minimum sentence, on June 3, 1997, the Parole Board denied him

discretionary release but granted him a CPDO. Id. ¶ 6; Duamutef Mem., at 1, Ex. A. The Parole Board informed the INS that Duamutef now was available for deportation. Duamutef Mem., at 1-2. The INS, however, did not deport Duamutef nor did it take him into custody. Enea Decl. ¶ 7. The INS is not willing to take custody of Duamutef until it is ready to actually deport him, and it claims that it is still in the process of obtaining travel documents from Jamaica. Id. ¶ 7-8.

The Parole Board revoked Duamutef's CPDO in June 1999 because, as Duamutef put it, the Parole Board "declared that the INS people were not interested in [him]." Id. However, the CPDO was reinstated at Duamutef's third parole hearing on June 27, 2001, when the Parole Board denied Duamutef discretionary release, but once again granted him a CPDO. Enea Decl. ¶ 7; Duamutef Mem., at 3.

Prior to filing this petition, Duamutef initiated several unsuccessful court and administrative proceedings against the state authorities seeking the reinstatement of the CPDO during the period when it was revoked. Duamutef Mem., at 2-4. He also filed a habeas petition in New York State court seeking immediate deportation. Id. The state court denied Duamutef's petition on the ground that the Parole Board did not have the authority to deport Duamutef and that the Parole Board's only duty to the conditional parolee was to notify the INS of his status, which it performed. Id. Duamutef also wrote to numerous federal, state and foreign officials seeking their assistance in spurring the INS to proceed to deport him. Id.

Discussion

(1)

Although the government acknowledges subject matter jurisdiction for Duamutef's mandamus action, it argues that the Court lacks habeas jurisdiction under § 2241. The government claims that Duamutef is not in INS custody because he is being held by the state authorities. Duamutef argues that the existence of the final order of removal and the filing of the INS detainer place him within the custody of the INS.

Habeas corpus jurisdiction under § 2241 is available only when the petitioner "is in custody in violation of the Constitution or laws or treatises of the Unites States." 28 U.S.C. § 2241(c) (emphasis added). Nonetheless, courts have, under certain conditions, interpreted the habeas custody requirement to include constructive custody even where current physical custody is absent. See Frazier v. Wilkinson, 842 F.2d 42, 44 (2d Cir. 1988).

The government's position — that the filing of a detainer does not create INS custody — is perhaps the prevailing view of the law among courts in this circuit, and certainly so in other circuits. See Roldan v. Racette, 984 F.2d 85, 88 (2d Cir. 1993) (declining to decide the question but recognizing that the "clear majority" of circuits hold that "an INS detainer . . . does not result in present confinement

by the INS"); Santana v. Giambruno, 1998 WL 295666, at *3 (N.D.N.Y. May 28, 1998).

However, when the petitioner is a prisoner subject to a final order of removal, or, of course, to both a detainer and a final order of removal, the habeas custody requirement is met. The Second Circuit, although declining to decide whether a detainer alone establishes INS custody, recently held that a "final order of removal is sufficient, by itself, to establish the requisite [INS] custody." Simmonds v. INS, ___ F.3d ___, 2003 WL 1904414, at *4 (2d Cir. Apr. 21, 2003); cf. Duran v. Reno, 193 F.3d 82, 84 (appointing counsel to argue question of first impression whether final order of removal together with detainer against state prisoner constitute INS custody), vacated as moot, 197 F.3d 63 (2d Cir. 1999); Galaviz-Medina v. Wooten, 27 F.3d 487, 493 (10th Cir. 1994) (finding that detainer plus final order of deportation is sufficient to establish INS custody).

In Simmonds, a state prisoner filed a habeas peitition challenging his final order of removal. The INS argued that because the petitioner was serving a state sentence, he was not in INS custody. The court held that habeas jurisdiction was available because when the subsequent confinement is certain — in that case, because the INS was statutorily required to detain the petitioner after the completion of his sentence — habeas jurisdiction exists in the same way that a prisoner in federal custody, while still serving the federal sentence, may challenge a consecutive state sentence before the commencement of the state sentence. See Simmonds, ___ F.3d ___, 2003 WL 1904414, at *4.

Here, Duamutef is subject to a final order of removal as well a detainer, and, as in Simmonds, his subsequent confinement by the INS is required by statute. However, even under Simmonds, constructive custody is only available insofar that a petitioner is challenging the future confinement; jurisdiction would, therefore, exist to review Duamutef's petition only to the extent it challenges the prospective INS custody. However, Duamutef is neither challenging his final order of removal nor his eventual INS confinement. He is challenging his current confinement — by the state authorities — claiming that his current confinement is the result of INS inaction. Accordingly, to the extent that the INS is not obligated to take immediate custody of Duamutef, his habeas petition must fail on jurisdictional grounds because his current confinement would not be by the INS.

In the end, whether the petition is reviewed as a mandamus or as a habeas, the controlling question remains the same: Does Duamutef have a right to immediate deportation? The answer to this question hinges, in large part, on whether a CPDO is a release or parole in the sense that he is being held merely pending the execution of his final order of removal.

(2)

Mandamus is available "only when the plaintiff has a clear right to the relief sought, the defendant has a clear duty to perform, and no other adequate remedy is available." Hussein v. Ashcroft, 2002 WL 31027604, at *3 (E.D.N.Y. Sep. 12, 2002). A convicted alien is not entitled to immediate deportation before the completion of his prison term. Subject to an exception for nonviolent

offenders, "the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment." 8 U.S.C. § 1231(a)(4)(A); see Thye v. United States, 109 F.3d 127, 128 (2d Cir. 1997).

Duamutef has no right to deportation prior to the completion of his sentence because such early deportation is available only for nonviolent offenders and, in any case, is solely in the discretion of the Attorney General. See id. Moreover, § 1231(a)(4)(D) specifically disallows a private cause of action to compel the Attorney General to deport a convicted alien prior to completion of the sentence. See id.; Loaiza v. Immigration and Naturalization Serv., 1998 WL 863126, at *4 (E.D.N.Y. Dec. 8, 1998) ("The clear language of all these statutes makes evident that an alien inmate has no private right to bring an action to compel the Attorney General, an INS official, or any official of New York State, including the members of the Parole Board, to deport him or her from the United States before the completion of his or her period of incarceration.").

Once, however, a prisoner subject to a final order of removal has been "released" from prison, the "removal period" begins and the alien is required to be removed within 90 days. See 8 U.S.C. § 1231(a)(1)(A)-(B). This is true even if the release is in the form of parole or supervised release. See id. at § 1231(a)(4)(A). After the 90-day removal period, although the INS can continue to detain the alien, § 1231 "does not permit the government to detain an alien indefinitely." Powell v. Ashcroft, 194 F. Supp.2d 209, 211 (E.D.N.Y. 2002) (denying habeas relief where alien refused to cooperate in his removal); Zadvydas v. Davis, 533 U.S. 678, 701, 121 S.Ct. 2491, 2504 (2001) (establishing six-month presumption of removal period after which alien must be released if there is no significant likelihood of removal in the reasonably foreseeable future).

Here, Duamutef argues that his state sentence was completed when he was granted the CPDO, which would trigger the removal period. Duamutef claims that, as such, the INS must take custody of him and either remove him or release him pending removal.

(3)

New York law provides several forms of prisoner discharge with different levels of supervision and incarceration. The CPDO is a state statutory creation which provides that

[a]fter the inmate has served his minimum period of imprisonment imposed by the court, . . . if the inmate is subject to deportation by the [INS], in addition to the criteria set forth in paragraph (c), the board may consider, as a factor warranting earlier release, the fact that such inmate will be deported, and may grant parole to such inmate conditioned specifically on his prompt deportation. The board may make such conditional grant of early parole only where it has received from the United States Immigration and Naturalization Service assurance (A) that an order of deportation will be executed or that proceedings will promptly be commenced for the purpose of deportation upon release of the inmate from the custody of the department of correctional services, and (B) that the inmate, if

granted parole pursuant to this paragraph, will not be released from the custody of the United States Immigration and Naturalization Service, unless such release be as a result of deportation without providing the board a reasonable opportunity to arrange for execution of its warrant for the retaking of such parolee.

N.Y. EXEC. LAW § 259-i(2)(d)(i).

Because the CPDO is contingent on the INS accepting custody and deporting the prisoner, until then, the prisoner is still serving the state sentence. See Cuomo v. Barr, 812 F. Supp. 324, 328 (N.D.N.Y. 1993) (noting that the fact that CPDO release is contingent on the INS taking custody of prisoner "is a key distinction that differentiates CPDO from the `parole' envisioned by Congress" and finding that INS had no obligation to take custody of state prisoners subject to a CPDO). Moreover, even if the INS takes custody of the prisoner, but fails to deport him, he is returned to state custody. As such, the CPDO is not a "release" such that it would trigger the removal period.

Here, Duamutef's frustration at the glacial pace of the INS attempts to arrange for his travel documents may be understandable, especially since the delay is certainly not because of Duamutef's lack of effort to facilitate his removal. Indeed, one can question the efficacy and wisdom of what amounts to an almost a six-year delay by the INS to deport a prisoner who is available and wishes to be deported. Nonetheless, the INS is under no obligation to do so.

Nor can Duamutef's status be characterized as the result of unintended bureaucratic limbo. The Parole Board — undoubtably aware that granting Duamutef discretionary release would result in the INS taking custody of Duamutef — has specifically refused to grant Duamutef discretionary release citing his lack of remorse and continued refusal to take responsibility for his crime. As such, Duamutef is still serving his state sentence and is not entitled, whether by mandamus or habeas, to his release or immediate deportation. See Andriianov v. Meisner, 1998 WL 106239, at *4 (N.D.N.Y. Mar. 3, 1998) (finding that the court lacked habeas jurisdiction and that mandamus is not available to compel INS to deport state prisoner subject to CPDO); Okonkwo v. United States, 1996 U.S. Dist. LEXIS 11324, at *7 (N.D.N.Y. Apr. 30, 1996) ("The petitioner in this case cannot by mandamus or any other medium, compel INS to deport him prior to the completion of his custodial sentence.") (inner quotations omitted); Fernandez v. Attorney General, 1994 WL 411922, at *1 n. 1 (W.D.N.Y. Aug. 19, 1994); cf. Guerro v. Senkowski, 2003 WL 1623670, at *3 (N.D.N.Y. Mar. 28, 2003) (Sharpe, Magistrate J.) (recommending dismissal of state prisoner's mandamus action to compel INS to deport him because of lack of INS custody and because petitioner was not entitled to CPDO).

Conclusion

Accordingly, Duamutef's petition is dismissed. The Clerk of the Court is directed to close the case.

SO ORDERED