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United States District Court,
D. Colorado.

Thomas Jesse BELGRAVE, individually and on behalf of all other persons similarly situated,
Petitioner,
v.
Joseph GREENE, District Director, United States Immigration and Naturalization Service, Denver, Colorado, Respondent.

No. Civ.A. 00–B–1523. | Dec. 5, 2000.

Attorneys and Law Firms

Michael E. Hegarty, United States Attorney's Office, Denver, CO, for Respondent.

Michael Ross Mortland, Colorado Rural Lega Services, Inc., Durango, CO, for Petitioner.

Opinion

MEMORANDUM OPINION AND ORDER

BABCOCK, Chief J.

***1** Thomas Jesse Belgrave filed an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He asks that I certify the habeas petition as a class action, issue a writ of habeas corpus declaring 8 U.S.C. § 1226(c), Immigration and Nationality Act (INA) §§ 236(c), unconstitutional as applied to the class, grant declaratory relief to the class, and issue a permanent injunction requiring that Mr. Belgrave be granted an individualized bond hearing by the Immigration and Naturalization Service (INS). The proposed class is defined as "any and all non-citizens held by Respondent in mandatory detention without an opportunity for an individualized bond hearing pursuant to 8 U.S.C. § 1226(c)." INS filed a response addressing the class certification issue in the amended petition. The issue has been adequately briefed and orally argued. For the reasons set forth below, I deny Mr. Belgrave's motion for class certification.

I. Background

Mr. Belgrave is a Panamanian national who entered the United States legally in 1971 at the age of 7. He has lived in the United States continuously since then. He has relatives in the United States, some of whom have achieved permanent resident status and others of whom have become United States citizens. Mr. Belgrave also has three children, all of whom are United States citizens.

Mr. Belgrave has a criminal record consisting of four convictions in El Paso County, Colorado. In 1997 he pled guilty to domestic violence-related harassment in violation of Colo.Rev.Stat. § 18–9–111. The police report indicates that he shoved, punched, and threatened his ex-girlfriend after she refused to have sex with him. He was sentenced to thirty days in jail and twelve months probation. The sentence was deferred for twenty-four months. In 1998 Mr. Belgrave pled guilty to menacing in violation of Colo.Rev.Stat. § 18–3–206, in return for the dismissal of three other burglary-related charges. He was sentenced to two years probation. In 1999 Mr. Belgrave pled guilty to criminal attempt to possess a Schedule II controlled substance (cocaine) in violation of Colo.Rev.Stat. § 18–2–101(4). He was again sentenced to two years probation. Finally, in 2000 Mr. Belgrave pled guilty to possession of a Schedule II controlled substance (cocaine) in violation of Colo.Rev.Stat. § 18–18–405(2)(a)(I). He was sentenced to three years probation.

In March 2000, INS took custody of Mr. Belgrave and began removal proceedings. It charged that the domestic violence and drug convictions required his removal pursuant to 8 U.S.C. § 1227(a)(2)(B)(i) (alien convicted of a controlled substance offense), 8 U.S.C. § 1227(a)(2)(A)(iii) (alien convicted of an aggravated felony), and 8 U.S.C. § 1227(a)(2)(E)(i) (alien convicted of a crime of domestic violence). Mr. Belgrave denied both the charges of removability and the underlying criminal convictions. He has pursued remedies in both the immigration court and through a collateral attack on the criminal convictions.

***2** Mr. Belgrave requested bond pending a final order of removal. The Immigration Judge denied bond pursuant to 8 U.S.C. § 1226(c), which requires mandatory detention without a bond hearing for certain non-citizens with criminal convictions. That provision, which became effective October 9, 1998, requires the Attorney General to take into custody any alien who is deportable "by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D), [or] is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year...." 8 U.S.C. § 1226(c)(1)(B)-)(C). It allows release of such aliens only if the Attorney General finds release necessary to protect a witness, a potential witness, person cooperating with an

investigation, or an immediate family member or close associate of those persons. Additionally, the Attorney General must be satisfied that the "alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U . S.C. § 1226(c)(2).

In 1998 I found the mandatory detention provision of 8 U.S.C. § 1226(c) unconstitutional as violative of due process. *See Martinez v. Greene,* 28 F.Supp.2d 1275 (D.Colo.1998). Since that time a national split has developed regarding the constitutionality of § 1226(c). *See e.g., Parra v. Perryman,* 172 F.3d 954 (7th Cir.1999) (holding § 1226(c) constitutional); *Okeke v. Pasquarell,* 80 F.Supp.2d 635 (W.D.Tx.2000) (same); *Reyes v. Underdown,* 73 F.Supp.2d 653 (W.D.La.1999) (same); *Sierra–Tapia v. Reno,* NO. 99–CV–986 TW(RBB), 1999 WL 803898 (S.D.Ca. Sept.30, 1999) (same); *Diaz–Zaldierna v. Fasano,* 43 F.Supp.2d 1114 (S.D.Ca.1999) (same); *Chukwuezi v. Reno,* No. Civ. A. 3:CV–99–2020, 2000 WL 1372883 (M.D.Pa. May 16, 2000) (finding § 1226(c) unconstitutional); *Bouayad v. Holmes,* 74 F.Supp.2d 471 (E.D.Pa.1999) (same); *Van Eeton v. Beebe,* 49 F.Supp.2d 1186 (D.Or.1999) (same). Notices of appeal have been filed in the Second and Ninth Circuits. *See Zgombic v. Farguharson,* No. 00–6165 (2d Cir.); *Ban v. DeMore,* No. 99–15394 (9th Cir).

Because the Tenth Circuit has not yet ruled on the issue, a split has also developed within the United States District Court for the District of Colorado. *See Martinez v. Greene,* 28 F.Supp.2d 1275 (D.Colo.1998) (Judge Babcock finding § 1226(c) unconstitutional); *Son Vo v. Greene,* 109 F.Supp.2d 1281 (D.Colo.2000) (Judge Kane finding same); *Kruger v. Greene,* No. 00–WM–444 (D.Colo.2000) (Judge Miller finding same); *Baca v. Greene,* No. 99–M–1781 (D.Colo.1999) (Judge Matsch finding § 1226(c) constitutional); *Sanchez v. Greene,* No. 99–N–2195 (D.Colo.1999) (Judge Nottingham finding same); *Her v. Greene,* No. 00–S–239 (D.Colo.2000) (Judge Sparr finding same). The government has filed notices of appeal regarding Judge Miller's rulings in *Kruger* and *Sosa v. Greene,* 00–WM–640 (D.Colo.2000). Although the Tenth Circuit has accepted those cases, *see Kruger v. Greene,* No. 00–1343 (10th Cir.); *Sosa v. Greene,* No. 00–1339 (10th Cir.), no ruling has yet been issued.

***3** On August 2, 2000 Mr. Belgrave petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He initially sought a writ declaring § 1226(c) unconstitutional as applied to his case, and an individualized bond hearing. The case was assigned to me via random assignment. Mr. Belgrave then moved to certify the case as a class action and for a temporary restraining order. On September 18, 2000 I granted Mr. Belgrave's motion for a temporary restraining order, and ordered that he be provided an individualized bond hearing within 72 hours pursuant to *Martinez v. Greene,* 28 F.Supp.2d 1275 (D.Colo.1998). I also permitted Mr. Belgrave to amend his petition. He did so on September 20, 2000. The amended application for writ of habeas corpus asks that I certify the habeas petition as a class action and grant declaratory relief to the class, issue a writ of habeas corpus declaring 8 U.S.C. § 1226(c) unconstitutional as applied to the class, and issue a permanent injunction requiring that Mr. Belgrave be granted an individualized bond hearing.

II. Class Certification

At this stage, I address only the issue of class certification. INS argues that certification is not appropriate because I lack jurisdiction to grant class-wide relief, class actions are not appropriate in the habeas context, and the requirements of Rule 23 are not met. I address each argument in turn.

A. Statutory Prohibitions Against Class–Based Injunctive Relief

As a preliminary matter, INS argues that I lack jurisdiction to grant class-wide injunctive relief from § 1226(c). It cites 8 U.S.C. § 1252(f), which states:

> "Limit on injunctive relief ... Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."

This provision has been read to bar class action suits to address the constitutionality of § 1226(c). "By its plain terms, and even by its title, that provision ... prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–1231, but specifies that this ban does not extend to individual cases." *Reno v. American–Arab Anti–Discrimination Comm.,* 525 U.S. 471, 481–82, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). *See also Van Dinh v. Reno,* 197 F.3d 427, 433 (10th Cir.1999) (" § 1252(f) forecloses jurisdiction to grant class-wide

injunctive relief to restrain operation of §§ 1221–31 by any court other than the Supreme Court.")

Mr. Belgrave recognizes the potential conflict between his request for class certification and § 1252(f). He argues, however, that the statutory prohibition outlined in that section is not applicable to his suit. First he argues that § 1252(f) should not apply when the petitioner has invoked habeas corpus relief under 28 U.S.C. § 2241 and alleged a constitutional violation. I disagree.

***4** The right of habeas corpus is guaranteed in the United States Constitution. *See* U.S. CONST. art. 1, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). Section 2241 habeas jurisdiction over detention of aliens dates back to at least the Nineteenth Century and has been expressly recognized by the United States Supreme Court and the Tenth Circuit. *See United States v. Jung Ah Lung,* 124 U.S. 621, 627–28, 8 S.Ct. 663, 31 L.Ed. 591 (1888); *Sandoval v. Reno,* 166 F.3d 225, 233–34 (3d Cir.1999) (tracing history of relevant habeas jurisdiction in the Twentieth Century); *Jurado–Gutierrez v. Greene,* 190 F.3d 1135, 1146 (10th Cir.1999) (citing § 2241's longevity as one reason that it withstood the Illegal Immigration Reform and Immigration Responsibility Act of 1996). The Tenth Circuit has held that there remains an independent, alternative right to habeas review in immigration cases under 28 U.S .C. § 2241, notwithstanding the sweeping changes made by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA). *See Jurado–Gutierrez,* 190 F.3d at 1145–47 (holding that statutes which limited judicial "review" did not abrogate the right to collateral habeas corpus petitions).

However, § 1252(f) does not bar an immigrant from seeking habeas relief. Nor does it prevent that detainee from challenging the constitutionality of § 1226(c). It simply requires that those challenges be brought on a case-by-case basis by an "individual alien against whom proceedings ... have been initiated." *See id.* In effect, it limits the availability of representative actions, not the right to seek habeas corpus relief. Unlike the right to seek habeas corpus relief, there is no "right" to a class action. Rather, it is a procedural device controlled by Fed.R.Civ.P. 23, with trial court discretion to grant or deny motions to certify a class. Further, Congress may restrict the availability of class actions. *See Dolan v. Project Const. Corp.,* 725 F.2d 1263 (10th Cir.1984) (discussing Congressional limitations on representative suits under the Fair Labor Standards Act), *rev'd on other grounds sub nom. Hoffmann–La Roche Inc. v. Sperling,* 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989); *Walker v. Mountain States Tel. & Tel. Co.,* 112 F.R.D. 44, 26 (D.Colo.1986) (discussing Congressional limitations on representative suits under the Age Discrimination in Employment Act). Because § 1252(f) abrogates the right to class-action suits, but not the right to habeas petitions or constitutional challenges, there is no conflict with § 2241.

Mr. Belgrave next argues that because § 1252(f) specifically forbids only class injunctive relief, declaratory relief is not prohibited. He asserts that because he has requested injunctive relief for himself and declaratory relief for the class, the class-wide suit passes statutory muster. I disagree.

Declaratory judgments and injunctions are distinct legal concepts. While a declaratory judgment states the rights or legal position of the parties without awarding consequential relief, an injunction directs a party to act or refrain from acting. *See* BLACK'S LAW DICTIONARY 368, 705 (5th ed.1979). While Mr. Belgrave's requested injunctive relief would require INS to hold an individualized bond hearing for him, the requested declaratory relief would hold § 1226(c) unconstitutional as it applies to all class members.

***5** In this case, however, the declaratory relief sought is indistinguishable from prohibited class-wide injunctive relief. Section 1226(c) would become unenforceable upon a declaration that it is unconstitutional. Without § 1226(c), INS would revert back to the statute in effect before passage of § 1226(c). Thus, the INS would apply the Transition Period Custody Rules, § 303(b)(3) of the IIRIRA. That section provided Immigration Court bond hearings to aliens with criminal convictions, and allowed the alien the right to demonstrate legal entry into the United States and the right to show that the alien did not present a substantial risk of flight or threat to persons or property. If the alien met these bond criteria, the Immigration Court could, as a matter of discretion, set bond pending final administrative action on the case. *See, e.g., Matter of Noble,* Int. Dec. 1331 (BIA 1997). As a result, those members of the class who received a declaratory judgment would receive a bond hearing identical to the one received by Mr. Belgrave via injunctive relief. To grant the class declaratory but not injunctive relief would end-run the statute and the scheme that Congress envisioned.

Several courts have addressed the application of § 1252(f) to suits ostensibly brought for non-injunctive relief. These courts, citing § 1252(f), have not granted relief which would effectively enjoin the INS, even if brought under another name. *See Andreiu v. Reno,* 223 F.3d 1111, 1115–22 (9th Cir.2000) ("subsection (f)'s provisions were designed by Congress to prevent courts ... from granting classwide *injunctive and declaratory relief* as a result of the new IIRIRA procedures pursuant to paragraph (f)(1), while preserving the ability of courts of appeals to grant injunctive relief in individual cases through paragraph (f)(2)....We therefore hold that section 1252(f)(2)'s limit

on the power of courts to "enjoin" the removal of an alien clearly applies to the stay of a removal order pending resolution of a petition for review.") (emphasis added); *Song v. Immigration and Naturalization Serv.,* 82 F.Supp.2d 1121, 1130 (C.D.Ca.2000) (holding in habeas proceeding that "[b]y its terms, the IIRIRA standard [under section 1252(f)(2)] clearly applies because Petitioner seeks a stay of deportation."); *Hypolite v. Blackman,* 57 F.Supp.2d 128, 132 (M.D.Pa.1999) (same); *Naidoo v. Immigration and Naturalization Serv. .,* 39 F.Supp.2d 755, 762 (W.D.La.1999) (same). I hold that 8 U.S .C. § 1252(f) is a jurisdictional bar to the class certification sought by Mr. Belgrave in this case.

B. Applicability of Rule 23 to Petitions for Habeas Corpus

Even if I were to hold, however, that § 1252(f) does not act as a jurisdictional bar to the class certification sought here, class certification is improper in this habeas corpus case. INS argues that Rule 23 class actions are generally unavailable in the habeas corpus context, and this suit does not fall within the narrow exceptions to that rule. I agree.

***6** "Rule 23 class actions are technically inapplicable to habeas corpus proceedings. The court may, however, apply an analogous procedure by reference to Rule 23 in proper circumstances." *Napier v. Gertrude,* 542 F.2d 825, 827 n. 2 (10th Cir.1976) (adopting, without holding proper, the analogous procedure used in the Second and Seventh Circuits and citing with approval *Bijeol v. Benson,* 513 F.2d 965 (7th Cir.1975); *United States ex rel. Sero v. Preiser,* 506 F.2d 1115 (2d Cir.1974), *cert. denied,* 421 U.S. 921, 95 S.Ct. 1587, 43 L.Ed.2d 789)). A representative suit similar to a class action may be brought in the habeas context in appropriate circumstances. These circumstances vary slightly by circuit. The Court in *Bijeol* found that such actions are limited to cases where there is no genuine issue of fact, the issue of law presented is identical as to all members, the issue of law has been definitively adjudicated for the circuit, and the number of potential petitioners is too great for joinder of all to be practical. *See Bijeol,* 513 F.2d at 968 (citing above factors). Similarly, but not identically, the Court in *Sero* found a representative action appropriate where the same legal issue applied to all members; age, competency, and literacy of jailed juvenile petitioners made individual relief unlikely; and class made up of more than 500 members met the practicality and other requirements of Rule 23.

Mr. Belgrave's proposed class does not pass either Circuit's analysis. *Bijeol* requires that the issue of law be definitively adjudicated for the circuit. Here, as discussed, there is a split of opinion as to the constitutionality of § 1226(c) throughout the federal judiciary, and the Tenth Circuit has not yet issued its opinion. Similarly, the Second Circuit in *Sero* found that the representative action was appropriate after conclusively finding the issue of law in favor of the juvenile petitioners. *See Sero,* 506 F.2d at 1120. Additionally, the trial judge in *Sero* allowed the class claims to go forward addressing only one "relatively uncomplicated" equal protection claim. *See id.* Thus, *Sero* also supports the conclusion that representative habeas corpus actions are inappropriate where, as here, the District Court is divided on an issue and there is no definitive decision from the Circuit.

C. Rule 23(a) Analysis

Even if I had jurisdiction to order appropriate class relief, I still wouldn't certify a Rule 23 class. INS argues that regardless of Rule 23 qualification, the nature of the constitutional challenge presented here is such that I should exercise my discretion in refusing to certify the class at this time. I agree.

The relief requested by Mr. Belgrave on behalf of the class, if granted, would allow every immigrant detainee in Colorado who seeks habeas relief from § 1226(c) to avoid the random assignment of cases practiced in this Court. Under Mr. Belgrave's plan, that immigrant could join the class action in my courtroom, successfully avoiding those judges who have found § 1226(c) constitutional. While this may be ideal for those detainees who believe that they have been subjected to an unconstitutional statute, it represents an unacceptable shift of power within the federal judiciary. Mr. Belgrave asks in essence that I elevate *Martinez v. Greene* to the law of this District, ignoring and abrogating equally knowledgeable and considered judgments of my fellow judges. It is for the Tenth Circuit to decide the constitutionality of § 1226(c) as the law of this Circuit binding on this District. I will not usurp this role. To do so may encourage other judges to do the same when a difference of opinion develops within this District.

***7** Further, rather than conserve judicial resources, a class action at this stage would be wasteful. The parties and I would have to contend with the administrative work involved in any class action. Meanwhile, the Tenth Circuit is considering the constitutionality of § 1226(c), presenting a solid argument for a stay pending the outcome of *Kruger v. Greene,* No. 00–1343 (10th Cir.) and *Sosa v. Greene,* No. 00–1339 (10th Cir.). If the Tenth Circuit affirms Judge Miller, all detainees will be granted a bond hearing regardless of their status as class members. If the Circuit panel reverses, no bond hearings will be available. Regardless of the outcome, the class will have been collected to no avail.

Accordingly, IT IS ORDERED that:

1. Petitioner's amended application for writ of habeas corpus is DENIED insofar as it requests class certification.

Dated: December *4,* 2000 in Denver, Colorado.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Memorandum Opinion & Order* was served on *December 5,* 2000, by: