1989 WL 39684
United States District Court, S.D. New York.

Jorge GIRALDO–HERNANDEZ, Petitioner,
v.
NEW YORK DISTRICT DIRECTOR OF the U.S. IMMIGRATION & NATURALIZATION SERVICE, Respondent.

No. 89 CIV. 2055 (CSH). | April 18, 1989.

Attorneys and Law Firms

Linda Atlas, Brooklyn, N.Y., for petitioner.

Benito Romano, United States Attorney, Southern District of New York (Timothy MacFall, Special Assistant United States Attorney, of counsel), for respondent.

Opinion

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

***1** In this case arising under the immigration laws, I am asked by plaintiff-petitioner Jorge Giraldo–Hernandez to direct the Immigration and Naturalization Service (INS) to render a written final order on his motion to reopen a deportation order, and to stay his deportation pending that agency action. The INS opposes that or other relief, and cross-moves to dismiss the complaint.

Background

The facts as developed by the helpful briefs and oral arguments of counsel are not in dispute. Petitioner is a native of Colombia. He first entered the United States during 1980 without INS inspection. Petitioner was deported, but in January 1983 again entered the United States without inspection. In September, 1983 petitioner married Lourdes Maria Exposito, a lawful permanent resident of the United States. Following appropriate proceedings to classify petitioner as the spouse of an alien lawfully admitted for permanent residence, petitioner re-entered the United States on January 30, 1985, this time as a alien lawfully admitted for permanent residence.

On April 26, 1985, three months after his entry as a permanent resident, petitioner was arrested in Westchester County on a state charge of criminal sale of narcotics. Upon an indictment lodged in the County Court, Westchester County, petitioner pleaded guilty on August 15, 1985 to criminal sale of a controlled substance in the second degree. On September 12, 1985 he was sentenced to three years to life in prison.

Conviction of a crime involving a controlled substance renders an alien deportable under Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(11). Accordingly, the INS lodged a detainer with officials at the state prison where petitioner was incarcerated.

The INS followed up on that detainer by bringing on a deportation hearing by order to show cause while petitioner was still in state custody. After the hearing, the Immigration Judge held in an order dated November 18, 1987 that petitioner did not appear eligible for any relief from deportation and ordered him deported to Colombia. Petitioner appealed from that order to the Board of Immigration Appeals (BIA), on the ground that the Immigration Judge had not granted him an adjournment to obtain counsel and had denied him the opportunity to seek any form of relief from deportation which may have been available to him. While that appeal was pending, petitioner was released from state custody into the custody of INS. Bond was set in the amount of $10,000, which petitioner posted. The BIA rejected petitioner's appeal in a final order dated May 26, 1988.

On June 6, 1988, the INS served a warrant of deportation on petitioner, and on June 13 a notice directing petitioner to surrender to INS custody for deportation to Colombia. On June 14, 1988, petitioner filed a motion to reopen his deportation proceedings and requested a stay of deportation pending a decision on that motion. The basis for petitioner's motion was the *sua sponte* action of the New York State Parole Board in granting to petitioner a Certificate of Relief from Civil Disabilities. That action, petitioner contends, has the effect of relieving him from deportability.

***2** On June 29, 1988 petitioner filed a petition with the United States Court of Appeals for the Second Circuit for review of the BIA's rejection of his previously stated due process grounds (not including the Parole Board's certificate). On August 19, 1988 a stipulation discontinuing the petition for review with prejudice was filed in the Court of Appeals, with the result that the BIA's decision became a final order of deportation.

On March 10, 1989 the INS again sent a notice to petitioner directing him to surrender to the custody of INS for deportation to Colombia. The designated date of surrender was March 27. Counsel for petitioner made a

motion before the Immigration Judge to reopen the deportation proceeding because of the Certificate of Relief from Civil Disabilities, and for a stay of deportation during consideration of the motion to reopen. The Immigration Judge immediately referred the matter to the BIA, on the view that the case was properly pending before that body. On March 23, 1989, in a telephone conversation with petitioner's counsel, a spokesperson for the BIA denied a stay of deportation. Petitioner then filed a request for a stay with the District Director of INS. The District Director denied that stay in a letter dated March 27, 1989. On that date petitioner filed the captioned action in this Court.

The parties agree that the BIA, while it has denied petitioner a stay of deportation, has not yet ruled on petitioner's motion to reopen deportation proceedings based upon his Certificate of Relief from Civil Disabilities. The parties also agree that if petitioner is deported, even against his will, that deportation is treated under the regulatory scheme as a withdrawal of the pending appeal before the BIA, so that the initial decision becomes final, and the BIA will never issue a decision and final order in respect of that appeal.[1]

Lastly, the parties agree that a petition for review to the Court of Appeals lies only from a final order of the BIA.[2] The practical consequences are that deportation of petitioner at this time would not only terminate his BIA appeal, but also foreclose petitioner from seeking judicial review of petitioner's claim that his Certificate of Relief from Civil Disabilities has the effect of relieving him from deportability.

Petitioner contends here that the refusal of INS to grant a stay of deportation in these particular circumstances constitutes an abuse of discretion.

Discussion

Petitioner places primary reliance upon *Rehman v. Immigration and Naturalization Service,* 544 F.2d 71 (1976). Rehman was a native and citizen of Pakistan who entered the United States as a nonimmigrant student authorized to remain for some fifteen months. Upon his arrival at the airport he was found to be in possession of hashish. He pleaded guilty to a New York state charge of criminal possession of a controlled substance in the seventh degree. This is a charge of simple knowing possession, and at the time was New York's lowest grade drug offense. Rehman was 22 years old, a graduate at Syracuse University, with good character references. The state court judge sentenced him to a conditional discharge for one year, fined him $100, and at the same time granted him a temporary "Certificate of Relief from Disabilities", to become final a year later.

***3** While that temporary certificate was still in effect, INS commenced deportation proceedings against Rehman, on the theory that he was deportable under 8 U.S.C. § 1251(a)(11) by virtue of his conviction in a New York court for illegal possession of marijuana. A divided panel of the Second Circuit held that because Rehman's conviction of possession in the state court was accompanied by a Certificate of Relief from Disabilities, and full expungement of a federal conviction would have been available in an analogous case, Rehman was not "convicted" within the meaning of the immigration statute. Accordingly the Court of Appeals set the deportation order aside. Judge Lumbard wrote the court's opinion; Judge Mansfield concurred in a separate opinion; and Judge Mulligan dissented.

In the case at bar, petitioner Giraldo–Hernandez argues that *Rehman* constitutes controlling authority for the proposition that a New York state Certificate of Relief from Civil Disabilities puts an end to his "convicted" status, so that he is not deportable as a matter of law.

The INS seeks to distinguish *Rehman.* I do not understand the INS to make a point of the difference between the certificate awarded Rehman by the state court acting *sua sponte,* and a comparable certificate issued by the state Board of Parole in the case at bar; nor do I perceive a distinction in principle. Rather, the INS first stresses the differences in the circumstances of the two individuals. Rehman was a young man, and his drug offense minor in nature. Giraldo–Hernandez is older, and the nature of his crime significantly more severe.

Secondly, the INS correctly observes that the federal laws available for expungement of convictions in existence when *Rehman* was decided have been done away with by more recent federal sentencing statutes. Judge Lumbard wrote in *Rehman* that the issue of whether a defendant has been "convicted" for purposes of § 1251(a)(11) must be interpreted "in accordance with Congressional intent." 554 F.2d at 73. In that regard, Judge Lumbard looked to then-existing provisions of federal law, which provided for probation in cases of first offenders guilty of simple possession, and also permitted individuals of Rehman's age to be sentenced under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005–26, which in turn allowed for expungement of the conviction after satisfactory completion of probation. Judge Lumbard concluded: "There is no sound reason why state policies should not be accorded the same respect as federal leniency policies would receive under the same circumstances." *Id.* at 74–75. Judge Mansfield, concurring, said that in view of the state court's simultaneous issuance of the certificate to Rehman, he never stood "convicted" and accordingly could not be deported under § 1251(a)(11). He added that this interpretation of the term "convicted ... is in keeping

with Congress' more recently annunciated policy of reducing hardships and sanctions imposed upon youthful offenders." *Id.* at 76.

***4** In the case at bar, the INS is correct in arguing that those lenient federal policies have been repealed; and youthful treatment would not have applied to Giraldo–Hernandez in any event (he was born in 1955).

Nevertheless, it is not entirely clear that the Second Circuit would refuse to apply the result in *Rehman* to the case at bar. The Court of Appeals would apply *Rehman* to petitioner's advantage, arguably at least, if it focused upon the legal effect of the certificate, rather than the particular circumstances under which it was issued.

It is not for this Court to predict what the Second Circuit would do with this case if asked to consider it. Nor, with due respect, are the predictions of the District Director or the BIA entitled to controlling effect. The present petitioner's reliance upon *Rehman* can hardly be shrugged off as frivolous. On the contrary, *Rehman* generates a substantial question in the case at bar: a question which, if resolved in petitioner's favor, would prevent his deportation by INS. And yet INS, in advance of a BIA final order, proposes to deport petitioner, thereby terminating the BIA appeal and preventing petitioner from ever addressing his argument to the Second Circuit.

I accept that judicial review of the District Director's discretionary refusal to stay petitioner's deportation is limited to whether that discretion was abused, a criterion which is met only if a court can fairly characterize the decision "to be so wanting in rationality as to be an abuse of the discretion which Congress vested" in the INS authorities. *Wong Wing Hang v. Immigration & Naturalization Service,* 360 F.2d 715, 719 (2d Cir.1966).

On the particular circumstances in this case, I conclude without difficulty that the District Director's denial of a stay of deportation is irrational and constitutes an abuse of discretion. That denial is "rational" enough if motivated by the INS's desire to deprive Geraldo–Hernandez of judicial review; but that is not a rationality which may fairly be characterized as falling within the discretion Congress vested in the agency. I cannot accept that Congress contemplated discretionary denial of stays of deportation as a stratagem by which aliens may be foreclosed from obtaining judicial review of substantial and controlling issues of law.[3]

In reaching this conclusion, this Court does not open floodgates to stays of deportation orders. Each case turns upon its own facts; and the facts at bar are rather special. All I hold today is that where an alien can point to recent appellate authority arguably applicable to him which, if applied, would forbid his deportation, the INS abuses its discretion by denying a stay and thus precluding a petition to the Court of Appeals.[4] I would not suppose that these particular circumstances would arise too often.

For the foregoing reasons, the District Director and those acting in concert with him are enjoined from deporting petitioner Geraldo–Hernandez. This injunction will remain in effect until the BIA has decided petitioner's pending appeal, and for such additional time as petitioner may require to file a timely petition for review to the Court of Appeals, if the BIA decision is adverse to him. If that should come to pass, and petitioner files a timely petition for review, this injunction will stay in effect until the Court of Appeals decides the case. Given these directions, I need not order the BIA to decide the appeal within a specified time. Presumably it will do so in the near future.

***5** Counsel for petitioner and the INS are directed to make a good faith endeavor to agree upon the terms and conditions of petitioner's bond in the interim. If counsel cannot agree, they may apply to this Court for a further ruling.

It is SO ORDERED.

1 *See* 8 CFR § 34 (last sentence).

2 A final order denying a motion to reopen deportation proceedings may be made the subject of a petition for review by the circuit courts of appeal. *Giona v. Rosenberg,* 379 U.S. 18 (1964) *per curiam reversing* 308 F.2d 347 (9th Cir.1962). But a petition for review lies only from an agency's final, written order. *See* 28 U.S.C. §§ 2341 *et seq.,* made applicable to immigration proceedings by 8 U.S.C. 1105(a). The denial of a stay of deportation pending appeal is not a final order of deportation, and accordingly not reviewable under § 1105(a). *Reynolds v. U.S. Dept. of Justice I.N.S.,* 846 F.2d 1288 (11th Cir.1988).

3 I do not mean to suggest that INS deliberately devised such a stratagem in cold blood, but the practical effect is the same.

4 The District Director himself concedes the possible applicability of *Rehman* to petitioner's situation, writing to counsel on March 27, 1989 in the course of denying a stay: "It is doubtful that the case of *Rehman v. I.N.S.* ... to which you refer in your current request, is applicable to the crime your client has been convicted of." That is a doubt the Court of Appeals must resolve, and the District Director abuses his discretion in denying petitioner the opportunity to ask that court to resolve the doubt in his favor.

Parallel Citations

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