

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

AWNY BESHAY,

Petitioner,

v.

UNITED STATES OF AMERICA,
John Ashcroft, Attorney General
of the United States,

Respondent.

ORDER

03-C-206-C

A hearing on petitioner Awny Beshay's petition for a writ of habeas corpus was held in this case on May 2, 2003, before United States District Judge Barbara B. Crabb. John Sesini represented petitioner. Steven O'Connor, Assistant United States Attorney, represented respondent.

After hearing argument, I concluded that petitioner had failed to show any basis on which this court could entertain a petition for a writ of habeas corpus. In his petition, Beshay alleges that he came to the United States in 1997 on a properly issued tourist visa, valid for a period of six months. Before his visa expired, he applied for religious asylum. His application was denied on October 27, 1999, by an immigration judge in Newark, New

Jersey, who ordered petitioner removed from the United States but granted petitioner's request for voluntary departure within thirty days at no expense to the government if he posted a \$5,000 bond. Petitioner appealed the decision. He did not depart or post the \$5,000 bond. On December 9, 2002, the Board of Immigration Appeals denied the appeal and renewed the privilege of voluntary departure with the same conditions as the immigration judge had imposed.

Meanwhile, on November 3, 2002, petitioner married an American citizen, who filed an "I-130" petition with the Vermont Service Center, seeking an amendment of petitioner's status because of his marriage. He did not depart the United States or post a bond, but filed a "Motion to Reopen for Adjustment of Status and Stay of Removal" with the BIA on January 27, 2003. This motion was denied on April 17, 2003. The BIA noted that petitioner had failed to depart following a grant of voluntary departure and held that he was barred from applying for adjustment of status by § 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). Petitioner has filed a motion for reconsideration of this order. He filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on April 24, 2003, seeking a stay of deportation. On April 25, 2003, I ordered petitioner's deportation stayed through May 2, 2003, to permit briefing and a hearing on the petition.

Judicial review of immigration orders is limited. 8 U.S.C. § 1252(a)(1) provides that judicial review of a final order of removal is governed by 28 U.S.C. § 158, with only limited

exceptions. In an effort to avoid these limitations, petitioner contends that, despite § 1252(a)(1), the remedy of habeas corpus is still available to persons contesting the legality of an administrative ruling in their immigration challenges. Petitioner relies on St. Cyr v. United States, 533 U.S. 289 (2001), a case in which the United States Supreme Court held that Congress had not stripped the federal courts of their jurisdiction to hear pure questions of law in immigration cases and that they retain habeas corpus jurisdiction to hear challenges raising significant questions of law. In St. Cyr, the question was the retroactivity of the provision that persons convicted of crimes could not be granted discretionary waivers of deportation. St. Cyr had pleaded guilty to a crime before the provision was enacted; he contended that the provision should not apply to him because he had entered his plea of guilty in the belief that he would be eligible for consideration of a waiver.

In Riley v. I.N.S., 310 F.3d 1253 (10th Cir. 2002); Liu v. I.N.S., 293 F.3d 36 (2d Cir. 2002); and Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001), courts of appeals have considered constitutional challenges to immigration proceedings that did not involve criminal proceedings. In Riley and Chmakov, the issue was the alleged constitutional ineffectiveness of counsel; in Liu, it was the alleged violation of the due process clause and Liu's right to equal protection by not affording her the non-adversarial interview required by 8 C.F.R. § 298.9. In all three cases, the courts of appeals held that federal courts had jurisdiction to decide petitioners' challenges despite the apparent withdrawal of such

jurisdiction in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and despite the fact that they had never been convicted of crimes, as St. Cyr had been. In Sharif ex rel. Sharif v. Ashcroft, 280 F.3d 786 (7th Cir. 2002), however, the Court of Appeals for the Seventh Circuit held that a federal court had no authority to hear a petition for a writ of habeas corpus brought by two sisters who sought a stay of deportation to prevent the Immigration and Naturalization Service from implementing the removal orders it had entered against them.

Petitioner acknowledges the difficulty he faces in asking for a stay of deportation from this court in a habeas corpus proceeding and has amended his petition to state that he is challenging the legality of the BIA's dismissal of his asylum application and the Order of Removal entered against him. The fact remains, however, that he is seeking a stay of deportation; a remedy that Sharif seems to foreclose. Moreover, even if he disavowed such relief, he does not rest his challenge to his deportation on an important issue of law. He argues only that it was error for the BIA to affirm the denial of his application for asylum without explaining its reasons for doing so and that it was error to deny his motion to reopen, on the ground that he was not entitled to seek adjustment of his status because he had been provided voluntary departure. (He contends that once he failed to post the bond required of him, he was no longer on voluntary departure status.) He cites no law to the effect that a terse affirmance violates his legal rights or that voluntary departure status is lost

whenever a person afforded that status fails to post a bond. I find the first argument unpersuasive and the second one tenuous at best. At most it raises a question of the interpretation of a regulation.

Petitioner has not alleged any defect in the proceedings that would support a finding that respondent has made a serious legal error or that he had been denied due process. His belated attempt to allege ineffective assistance of counsel is not sufficient to raise that issue. In any event, it does not appear that the failure to appeal from an adverse asylum decision would amount to wholly ineffective assistance of counsel in the circumstances of this case.

Therefore, IT IS ORDERED that this petition for a writ of habeas corpus is DENIED and this case is DISMISSED for lack of jurisdiction. FURTHER, IT IS ORDERED that deportation proceedings against petitioner Awny Beshay are stayed until the close of business on Tuesday, May 6, 2003, to permit petitioner the opportunity to take an appeal from this decision to the Court of Appeals for the Seventh Circuit.

Entered this 2nd day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge