UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOCRATES W. SOTO,	:	
Petitioner,	:	00 Civ. 5986 (AJP)
-against-	:	OPINION AND ORDER
JOHN ASHCROFT, United States Attorney General,	:	
Respondent.	:	

ANDREW J. PECK, United States Magistrate Judge:

Pro se petitioner Socrates Soto brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging a final administrative order of removal by the Board of Immigration Appeals ("BIA"). Soto's petition alleges that: (1) the BIA abused its discretion when it denied him discretionary relief from deportation under INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996) (Dkt. No. 1: Pet. at 2-3); and (2) he is entitled to waiver of removal under Article III of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027, 1028 ("Torture Convention") (Pet. at 3). The parties have consented to decision of this habeas petition by a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Dkt. No. 7.)

For the reasons set forth below, Soto's habeas petition is DENIED.

FACTS

Background

In 1983, Soto came to the United States from the Dominican Republic as a permanent resident alien. (See Dkt. No. 5: 10/20/00 Letter of A.U.S.A. Krishna R. Patel, INS Return Ex. A: Certified Administrative Record ["R."] at 16: Immigration Judge ["IJ"] 12/17/99 Decision; R. 116: 11/5/99 Removal Hearing Transcript ["Tr."].)

Soto's New York State Criminal History Report, popularly known as a "rap sheet," shows arrests and convictions for various controlled substance, weapons and assault charges from 1993-1999. (R. 135-39: Soto Crim. History Report.) The convictions relevant to Soto's present habeas petition are his May 18, 1993 and his December 10, 1998 New York felony convictions, upon pleas of guilty, for criminal possession of a controlled substance (cocaine), for which he was sentenced to five years probation and three-and-a-half to seven years imprisonment, respectively. (R. 17-18: IJ 12/17/99 Oral Decision; R. 135-36: Soto Crim. History Report.)

Soto's INS Removal Proceedings

Based on Soto's December 1998 felony conviction for criminal possession of a controlled substance, in May 1999, the INS instituted removal proceedings against Soto under Immigration and Naturalization Act ("INA") § 237(a)(2)(B)(i), codified at 8 U.S.C. § 1227(a)(2)(iii) and § 1227(a)(2)(B)(i), providing for removal of aliens convicted of certain

drug crimes. (See R. 22-23: INS Notice to Appear; R. 156-59: INS Notice of Hearing in Removal Proceedings.)[1/] At Soto's initial removal hearing on September 10, 1999, the IJ informed Soto of his right to an attorney if he could obtain one (the government does not provide counsel), and adjourned the hearing to provide Soto the opportunity to obtain counsel. (R. 109-12: 9/10/99 Tr.) At the November 5, 1999 removal hearing, Soto appeared by video from state prison, was represented by counsel, and a Spanish interpreter also was present. (R. 113-15: 11/5/99 Tr.; R. 17: IJ Decision.) At that hearing, Soto, through his attorney, conceded that he "is removable under 237(a)(2)(B)(i)" due to his narcotics conviction, but sought "cancellation of removal under Section 240(a)(A)" (R. 116-17), codified as 8 U.S.C. § 1229b, providing for cancellation of removal for certain permanent residents who, inter alia,

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[1/] The INS Notice of Hearing in Removal proceedings provided that:

> [Soto was] convicted of the crime of Criminal Possession of a Controlled Substance in the Fifth Degree, to wit; Cocaine in violation of Section 220.06 of the New York State Penal law, pursuant to a judgment entered on or about December 10, 1998 by the Supreme Court of the State of New York, County of New York, under indictment number 7704-95.
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> . . . .
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> Section 237(a)(2)(B)(i) of the Immigration and Nationality Act (Act), as amended, [provides for removal of aliens, if] at any time after admission, [the alien has] been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act [21 U.S.C. 802, which includes cocaine]).
>
> (R. 159.)

"ha[ve] not been convicted of any aggravated felony." Counsel for the INS stated that it appeared that Soto also had a 1993 drug conviction. (R. 117-18.) Since the IJ did not have a copy of Soto's "rap sheet," he adjourned the hearing until December 17, 1999. (R. 117-21.)

At the December 17, 1999 hearing, Soto again appeared by video from the correctional facility, was represented by counsel (who appeared by phone), and a Spanish interpreter also was present. (R. 122-23.) The IJ noted that Soto's rap sheet indicated a May 18, 1993 conviction of "Raymond Martinez." (R. 125-26.) When Soto's attorney attempted to raise a question of identity, the IJ placed Soto under oath, and Soto candidly conceded that he was convicted in 1993 for a drug felony under the name "Raymond Martinez." (R. 126-27.) The IJ then determined that Soto "is not going to be eligible for cancellation of removal [under Section 240(a)(A), codified as 8 U.S.C. § 1229b] because he has two [separate] drug offenses." (R. 127-28.)

At the December 1999 hearing, Soto also sought relief from removal under INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), which provided for discretionary relief from removal for aliens in the United States for seven years or more, on the ground that both his drug offenses occurred prior to enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") repeal of § 212(c), which Soto's counsel argued could not be applied retroactively to Soto's pre-AEDPA offenses. (R. 128.) Soto's counsel asked that the IJ "withhold making a

decision" in Soto's case in light of then-pending Second Circuit cases regarding the AEDPA's retroactive application, but the IJ denied the request. (R. 128.)[2/]

The IJ's December 17, 1999 Oral Decision (R. 16-19) held that:

> There is no relief that will allow Mr. Soto de Pena to stay in this country basically, with two drug offense possessions that occurred at different times and different places, the respondent is an aggravated felon and he is not eligible for cancellation of removal, even though only one of them is charged on the Notice to Appear. He is not eligible for political asylum, though he has not raised it. And he is not eligible for adjustment of status because of his drug offenses. The Court finds that [Soto] has raised no issue of past persecution or fear of future persecution . . . [Soto's] three and a half to seven year prison sentence . . . under the current immigration law, makes it a particularly serious crime and he is not eligible for withholding [of removal]. . . . The Court has heard no issue [pertaining to] the Convention Against Torture and considers it to be a non-issue in this case.

2/ At the conclusion of the hearing, the IJ stated:

> Mr. Soto, there is no legal way that you're going to be able to stay in this country because . . . [you have two separate convictions for drug offenses], so that's going to bar you from qualifying for cancellation of removal. And . . . your lawyer has asked for a, basically a 212(c) hearing.
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> . . . .
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> And Mr. [Soto], your lawyer is betting really on the future of what may happen as far as some case law that's pending over in the Federal Courts in the 2nd Circuit Court of Appeals . . . . But at this level, I cannot use that case law because it hasn't been handed down by that Court yet, it's still just, just out there, it's not law yet. So, what I'm going to tell you is I'm going to order you deported today. Your lawyer is going to reserve the right to appeal for you and that means you're not going anywhere as far as being deported is concerned until the appeal is over.

(R. 129-30.)

> There is no relief whatsoever for the respondent. The Court also finds that the respondent is not eligible . . . for a 212(c) hearing because he is in removal proceedings . . . [and] because 212(c) was repealed [in 1996 by the AEDPA and the IIRIRA]. . . .

(R.18-19: IJ 12/17/99 Decision, emphasis added.) The IJ ordered Soto removed to the Dominican Republic. (R. 19.)

Soto appealed the IJs decision to the Board of Immigration Appeals ("BIA") on December 23, 1999. (R. 93-94: Notice of Appeal.) On appeal, Soto, through counsel, argued that "[t]he immigration court pretermitted cancellation [of removal] under INA Section 240A and 212(c) for non-aggravated offenses committed before April 24, 1996 [the AEDPA effective date], while INS lodged the removal charges after April 1, 1997." (R. 93.) The brief submitted by counsel in support of Soto's BIA appeal (R. 83-84: 3/11/00 Soto BIA Br.), argued that Soto should be eligible for relief from removal because "this alien's offenses [were] completed in 1993 and 1995 before the enactment of IIRIRA and AEDPA in 1996" repealed § 212(c) discretionary relief from removal. (R. 83.) While conceding that he did not raise any arguments under the Torture Convention before the IJ, Soto's counsel before the BIA nonetheless argued that Soto should be eligible for such relief in light of the "cruel treatment faced by deportees [in the Dominican Republic] -- particularly, after repatriation from the United States." (R. 84.)

The BIA affirmed the IJs removal order on June 28, 2000 (R. 75-77), holding:

> The record reflects that [Soto] has two convictions for drug possession in New York. On May 18, 1993, [Soto] was convicted of criminal possession of a controlled substance in the fourth degree, and was sentenced to 5 years' probation. Subsequently, on December 10, 1998, [Soto] was convicted of criminal possession of a controlled substance in the fifth degree, and was sentenced to a term of imprisonment of 42 months to 7 years. A state conviction for a simple possession conviction that follows a prior drug conviction is a felony under 21 U.S.C. § 844(a), and is therefore analogous to "any felony" under the Controlled Substances Act, 18 U.S.C. § 3559(a). [Soto]'s second conviction thus qualifies as a "drug trafficking crime" within the ambit of 18 U.S.C. § 924(c) and, consequently, is "illicit trafficking" in a controlled substance and an aggravated felony within the meaning of section 101(a)(43)(B) of the Act. . . . Finally, we find that relief under 212(c) of the Act is unavailable in removal proceedings, as this provision was repealed by section 304(b) of the IIRIRA. See Henderson v. INS, 157 F.3d 106 (2d Cir. 1998) (determining that the restrictions on section 212(c) relief added by the [AEDPA] do not apply retroactively to deportation proceedings commenced on or before April 24, 1996).

(R. 76-77, fn. & citations omitted.) Regarding Soto's argument that he is eligible for deferral of removal under the Torture Convention, the BIA found that Soto "failed to present any affidavits or other evidence, either before the Immigration Judge or on appeal, demonstrating that he would be subject to torture by any public official in the Dominican Republic, or at the instigation or with the acquiescence of such an official, in support of his claim for protection under the Convention Against Torture. See 8 C.F.R. §§ 208.16(c), 208.17, 208.18(a)(1), (2) (2000)." (R. 77 n.3.)

On July 20, 2000, Soto filed a pro se motion to reopen or reconsider the BIA's decision, seeking, inter alia, "Deferral of Removal pursuant to Article 3 of the Convention Against Torture, for the life-risking consequences of removal to the Dominican Republic" and for "reopening of [his] removal proceeding" under § 212(c). (R. 9-11: Soto Request for

Reopening.) Along with his motion to reopen, Soto also filed an Application for Asylum. (R. 29-72.) Soto's asylum application conceded that neither he nor members of his family were members of organizations or groups in the Dominican Republic that are likely candidates for torture, were mistreated or threatened in the Dominican Republic, or were arrested, accused or imprisoned in the Dominican Republic. (R. 31.) Rather, his Torture Convention asylum claim was based on newspaper clippings and Human Rights group reports about human rights violations in the Dominican Republic, not specific to Soto. (R. 32-33, attaching newspaper articles as R. 34-72.) On September 11, 2000, the BIA denied Soto's reconsideration motion (R. 2-4), finding inter alia that Soto does not face "torture" in the Dominican Republic as defined in 8 C.F.R. § 208.18(a)(1)-(6), and that "relief under section 212(c) of the [INA] is unavailable in removal proceedings, as this provision was repealed by section 304(b) of the IIRIRA." (R. 3.)

Soto's § 2241 Habeas Petition

Soto's § 2241 habeas petition is dated July 24, 2000, was received by the Court's Pro Se Office on July 26, 2000, and was filed as of August 14, 2000. (Dkt. No. 1: Pet. at 1, 4.) Soto's petition, read liberally, claims that he is eligible for § 212(c) relief because he committed his drug offenses in 1993 and 1995, before the AEDPA and IIRIRA eliminated § 212(c) relief (Pet. at 1-2, 4), and that the Torture Convention prohibits his removal to the Dominican Republic (Pet. at 3).

At the Government's request, this Court deferred consideration of Soto's petition until the Supreme Court decided whether federal courts retain jurisdiction over § 2241 habeas petitions by aliens in INS custody. Upon the Supreme Court's affirmative answer to that question,[3/] the Court now turns to the merits of Soto's petition.

ANALYSIS

I. SOTO IS NOT ELIGIBLE FOR INA § 212(c) RELIEF BECAUSE HE PLED GUILTY AFTER ENACTMENT OF THE AEDPA AND IIRIRA, WHICH REPEALED SUCH RELIEF

Soto argues that he is eligible for § 212(c) discretionary relief from removal because his convictions were for offenses committed before enactment of the AEDPA and IIRIRA, which eliminated such § 212(c) relief. (Pet. at 1-2.) Soto's argument has no merit.

Prior to IIRIRA's effective date in April 1997 (and the AEDPA's effective date in April 1996), INA § 212(c) provided the Attorney General with broad discretion to waive deportation in certain cases. See INS v. St. Cyr, 121 S. Ct. 2271, 2275 (2001) ("St. Cyr II"); see also, e.g., Lawrence v. INS, 00 Civ. 2154, 2001 WL 818141 at *3 (S.D.N.Y. July 20, 2001)

3/ The Supreme Court this past term ruled that neither AEDPA nor IIRIRA repealed general federal habeas jurisdiction under 28 U.S.C. § 2241 to entertain challenges to INS removal decisions raising pure questions of law. INS v. St. Cyr, 121 S. Ct. 2271, 2278-87 (2001). Citing "the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas" of pure questions of law, coupled with the substantial constitutional questions such preclusion would raise, the Supreme Court concluded that § 2241 habeas jurisdiction was not repealed by AEDPA and IIRIRA. Id. at 2287. Accordingly, this Court has jurisdiction over Soto's § 2241 habeas petition. See also, e.g., Lawrence v. INS, 00 Civ. 2154, 2001 WL 818141 at *2 (S.D.N.Y. July 20, 2001) (Peck, M.J.).

(Peck, M.J.). After IIRIRA's enactment, the Second Circuit held that although relief under former INA § 212(c) was repealed (by IIRIRA section 304(b)),[4/] § 212(c) relief remained available to aliens in removal proceedings who entered guilty or nolo contendere pleas prior to IIRIRA's September 30, 1996 enactment. St. Cyr v. INS, 229 F.3d 406, 418 (2d Cir. 2000) ("St. Cyr I"). The Second Circuit specifically held that the elimination of discretionary § 212(c) relief by the AEDPA and IIRIRA would not be retroactively applied to pre-enactment guilty pleas:

> The INS's warning against "an absurd superprospective result" is also unfounded. We do not rule today that application of the 1996 amendments to pre-enactment convictions has an impermissible retroactive effect. Rather, we hold that AEDPA § 440(d) and IIRIRA § 304 do not apply to pre-enactment guilty pleas or pleas of nolo contendere because such an application would upset reasonable, settled expectations and change the legal effect of prior conduct. Our ruling affects the narrow class of cases where an alien pled guilty to a criminal offense that qualifies as a removable crime. Discretionary relief as amended by AEDPA § 440(d) still applies to all aliens with convictions pre-dating its enactment and to all guilty pleas entered after its effective date. Likewise, cancellation of removal still applies to all aliens with convictions pre-dating IIRIRA and to all guilty pleas entered by aliens to deportable crimes after it took effect.

St. Cyr I, 229 F.3d at 420-21 (emphasis added).

In June 2001, the Supreme Court affirmed the Second Circuit's St. Cyr I decision and held that "§ 212(c) relief remains available for aliens . . . whose convictions were obtained

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[4/] IIRIRA § 304(b), 110 Stat. 3009-597, repealed § 212(c) relief, and replaced it with 8 U.S.C. § 1229(b), which allows the Attorney General to cancel the removal of a deportable alien if, inter alia, the alien "has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." St. Cyr II, 121 S. Ct. at 2293.[5/]

The INS ordered Soto removed because of his 1993 and 1998 convictions based on his pleas of guilty to sale of a controlled substance (cocaine). Only the 1993 conviction predates the effective dates of the AEDPA and IIRIRA. Were Soto's removal ordered solely because of his 1993 guilty plea conviction, he would be entitled to § 212(c) discretionary relief under St. Cyr. However, Soto's second felony conviction in 1998 for sale of cocaine, for which he received his Notice of Removal, provides the INS sufficient basis to order Soto's removal and to deny § 212(c) discretionary relief.[6/]

[5/] Applying the familiar test of Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483 (1994), the Supreme Court in St. Cyr II first found, as had the Second Circuit, that IIRIRA and its legislative history did not unambiguously indicate that the repeal of § 212(c) discretionary relief should apply retroactively. St. Cyr II, 121 S. Ct. at 2287-93, aff'g, St. Cyr I, 229 F.3d at 412-16. The Supreme Court, as had the Second Circuit, proceeded to the "second step of Landgraf's retroactivity analysis," that is, whether the statute if applied retroactively "'attaches a new disability, in respect to transactions or considerations already past.'" St. Cyr II, 121 S. Ct. at 2290-91; see also St. Cyr I, 229 F.3d at 417. The Supreme Court found, as had the Second Circuit, that applying IIRIRA's elimination of § 212(c) discretionary relief to those who pleaded guilty before IIRIRA's enactment would upset settled expectations. St. Cyr II, 121 S. Ct. at 2291-93.

[6/] An alien is deportable upon conviction for any "aggravated felony," Anti-Drug Abuse Act of 1988, 102 Stat. 4469-4470, § 1227(a)(2)(A)(iii), without regard to when the offense was committed. 8 U.S.C. § 1227(a)(2)(A)(iii). "Aggravated felony" includes a drug trafficking crime. 8 U.S.C. § 1101(a)(43)(B).

Soto argues, however, that application of AEDPA/IIRIRA to his 1998 conviction would be "retroactive" since his 1998 conviction was for a 1995 offense, which predates AEDPA and IIRIRA. (Pet. at 1-4.) The Second Circuit already rejected this argument in St. Cyr I:

> As an initial matter, we note that it is difficult to argue that barring eligibility for discretionary relief on the basis of pre-enactment criminal conduct – as opposed to a plea going to the guilt of a deportable crime – constitutes an impermissible retroactive application of a statute. Indeed, we agree that,
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> > It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.
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> > Thus, we conclude that the bar to discretionary relief applies regardless of whether a legal permanent alien's underlying criminal conduct predated the AEDPA or IIRIRA.

St. Cyr I, 229 F.3d at 418 (emphasis added) (quoting Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1150-51 (10th Cir. 1999), cert. denied, 529 U.S. 1041, 120 S. Ct. 1539 (2000)); accord Lawrence v. INS, 2001 WL 818141 at *6.[7/]

[7/] After discussing the expectations of one who pleads guilty, the Second Circuit in St. Cyr I concluded:

> The INS's warning against "an absurd superprospective result" is also unfounded. We do not rule today that application of the 1996 amendments to pre-enactment convictions has an impermissible retroactive effect. Rather, we hold that AEDPA § 440(d) and IIRIRA § 304 do not apply to pre-enactment guilty pleas or pleas of nolo contendere because such an application would upset reasonable, settled expectations and change the legal effect of prior conduct. Our ruling affects the narrow class of cases where an alien pled guilty to a criminal offense that qualifies as

(continued...)

Thus, although Soto's second drug offense occurred in 1995, he was convicted and sentenced for it in 1998 – after passage of both AEDPA and IIRIRA – and thus the AEDPA/IIRIRA provisions eliminating § 212(c) relief apply to Soto. See, e.g., Domond v. United States INS, 244 F.3d 81, 84-86 (2d Cir. 2001) (AEDPA elimination of § 212(c) relief can be applied where crime occurred before AEDPA's effective date but conviction upon guilty plea occurred after effective date); Cinquemani v. Ashcroft, No. 00-CV-1460, 2001 WL 939664 at *4 (E.D.N.Y. Aug. 16, 2001) ("[W]here the admission of guilt occurs after the enactment of the [AEDPA and IIRIRA], regardless of the timing of the criminal conduct itself, there is no impermissible retroactive effect because the criminal defendant is presumed to be aware of the deportation consequences in existence at the time of giving his or her guilty plea, including the consequent bar to discretionary relief from deportation.").

Thus, Soto's § 212(c) habeas claim is without merit and is DENIED.

II. SOTO FAILED TO SUBMIT ANY EVIDENCE SUPPORTING HIS ALLEGATIONS UNDER THE TORTURE CONVENTION AND THEREFORE THE INS' DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The UN Torture Convention

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the Senate on October 21, 1994, was

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[7/] (...continued)
a removable crime.

St. Cyr I, 229 F.3d at 420-21 (emphasis added); accord Lawrence v. INS, 2001 WL 818141 at *6.

deposited with the United Nations by President Clinton that same day, and by its terms became effective one month later, on November 20, 1994. See 34 I.L.M. 590, 591 (1995); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 1999 WL 75823 (1999) (Background); see also Merisier v. INS, 00 Civ. 0393, 2000 WL 1281243 at *10 (S.D.N.Y. Sept. 12, 2000) (Peck, M.J.). Article III of the Torture Convention provides:

> 1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
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> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Torture Convention, Art. III, 23 I.L.M. 1027, 1028 (1984).

On October 21, 1998, Congress passed implementing legislation, the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). See Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-82 (1998). In FARRA, Congress stated that it is "the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." FARRA § 2242(a), codified as Note to 8 U.S.C. § 1231. Congress directed the Attorney General to develop regulations to implement the United States' treaty obligations under the Torture Convention. FARRA § 2242(b), codified as Note to 8 U.S.C. § 1231. Congress further provided that:

> (d) REVIEW AND CONSTRUCTION. -- Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

FARRA § 2242(d), codified as Note to 8 U.S.C. § 1231.

On February 19, 1999, the INS promulgated such regulations. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (1999), codified at 8 C.F.R. §§ 208.16 to 208.18 (2000). The regulations provide, in pertinent part, that "[a]n alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 [as was Soto] may apply for withholding of removal under § 208.16(c)." 8 C.F.R. § 208.18(b)(1). To be eligible for withholding of removal, "[t]he burden of proof is on the applicant for withholding of removal under this paragraph [–here, Soto--] to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). Evidence to be considered in assessing whether it is more likely than not that an applicant would be tortured in the country of removal includes: "[e]vidence of past torture inflicted upon the applicant," "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable," and "[o]ther relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3)(i)-(iv); see also Thavarajah v. District Director, INS, No. 99-4120, 210 F.3d 355 (table), 2000 WL 427378 at *3-4 (2d Cir. Apr. 19, 2000); Merisier v. INS, 2000 WL 1281243 at * 10.

B. Soto's Torture Convention Claim Lacks Merit

Soto alleges that returning him to the Dominican Republic will cause "family disintegration by the lethal consequences if removed to the Dominican Republic facing the extra-judicial killings by the corrupted members of the National Police there." (Pet. at 3.) The BIA found that Soto "failed to present any affidavits or other evidence, either before the Immigration Judge or on appeal, demonstrating that he would be subject to torture by any public official in the Dominican Republic, or at the instigation or with the acquiescence of such an official, in support of his claim for protection under the Convention Against Torture." (R. 77 n.3: 6/28/00 BIA Decision.) Upon consideration of Soto's motion to reopen or reconsider, the BIA found that, although Soto submitted newspaper articles and Human Rights group reports about human rights conditions in the Dominican Republic:

> [W]e cannot find that respondent faces "torture" upon his return to the Dominican Republic. Consequently, we cannot find that the applicant's allegations and evidence indicate, much less constitute prima facie evidence, that he would be subject to torture by any public official in the Dominican Republic, or at the instigation or with the acquiescence of such an official, such that the respondent has articulated a claim under the Convention Against Torture.

(R. 3: 9/11/00 BIA Decision, citations omitted.)

Because Soto's BIA appeal was filed on December 23, 1999 and decided on June 28, 2000, and his motion to reopen under the Torture Convention was filed on July 20, 2000 and denied on September 11, 2000, all after IIRIRA's enactment, IIRIRA's jurisdiction stripping amendments apply. (See pages 9-13 above.) See Akhtar v. Reno, 123 F. Supp. 2d

191, 195-96 (S.D.N.Y. 2000); Merisier v. INS, 00 Civ. 0393, 2000 WL 1281243 at *11 (S.D.N.Y. Sept. 12, 2000) (Peck, M.J.).

Nevertheless, under the Supreme Court's Calcano-Martinez opinion, after IIRIRA, federal courts retain § 2241 jurisdiction to review legal questions raised by deportation or removal orders. See Calcano-Martinez v. INS, 232 F.3d 328, 338-42 (2d Cir. 2000), aff'd, 121 S. Ct. 2268, 2269-71 (2001); see also Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 1996 S. Ct. 1141 (1999); Merisier v. INS, 2000 WL 1281243 at *11. Thus, this Court has jurisdiction under 28 U.S.C. § 2241 to review Soto's Torture Convention claim insofar as he alleges that as a matter of law his return to the Dominican Republic would violate the treaty. See Merisier v. INS, 2000 WL 1281243 at *11; cf. Mali v. Keeper of the Common Jail of Hudson County, New Jersey (Wildenhus' Case), 120 U.S. 1, 17, 7 S. Ct. 385, 390 (1887) (treaty rights may be enforced via a writ of habeas corpus).

While the exact scope of § 2241 habeas review of INS factual determinations after IIRIRA is not well defined, e.g., Goncalves v. Reno, 144 F.3d 110, 125 (1st Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1140 (1999), the standard of such review must be at least as deferential as it was before the 1996 amendments, when courts applied the substantial evidence test to asylum applications and accorded "'substantial deference' to the BIA's findings of fact." Purveegiin v. United States INS Processing Ctr., 73 F. Supp. 2d 411, 417 (S.D.N.Y. 1999) (citing Melendez v. Department of Justice, 926 F.2d 211, 216-18 (2d Cir. 1991)); accord, e.g., Melgar de Torres v. Reno, 191 F.3d 307, 312-13 (2d Cir. 1999);

Abankwah v. INS, 185 F.3d 18, 22 (2d Cir. 1999). As Judge Scheindlin recently explained in a post-IIRIRA case brought under 28 U.S.C. § 2241: Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." As such, the Court's scope of review is "exceedingly narrow." Purveegin v. United States INS Processing Ctr., 73 F. Supp. 2d at 417-18 (citation omitted); accord Merisier v. INS, 2000 WL 1281243 at *12-13; cf. Deng v. McElroy, No. 00-4148, 2001 WL 505738 at *2 & n.1 (2d Cir. May 10, 2001) (discussing the "stringent standard" for reviewing the BIA's factual findings under pre-IIRIRA provisions: "We review the BIA's factual findings under the substantial evidence standard, and will reverse only if no reasonable fact-finder could have failed to find the past persecution of fear of future persecution necessary to sustain the petitioner's burden."); Melgar de Torres v. Reno, 191 F.3d at 312-13 (same).

The INS' determination that there do not exist substantial grounds for believing that Soto would be tortured upon return to the Dominican Republic is supported by substantial evidence. Soto had ample opportunity to articulate the basis of his fear of torture in the Dominican Republic. First, at the deportation hearing before the IJ, neither Soto nor his counsel raised any evidence to support a claim that Soto would be tortured if removed to the Dominican Republic. (R. 109-12: 9/10/99 Tr.; R. 113-21: 11/5/99 Tr.; R. 122-34: 12/17/99 Tr.) In fact, because Soto failed to even allege (much less offer supporting evidence for) a claim under the Torture Convention, the IJ considered it a "non-issue." (R.106: IJ 12/17/99

Oral Decision.) On appeal to the BIA, Soto's counsel conceded that Soto did not raise any arguments under the Torture Convention before the IJ. (R. 84.) The only "evidence" provided to the BIA was Soto's generalized fears about the treatment of deportees from the United States in the Dominican Republic. (See R. 84.) Finally, Soto had the chance to present evidence in his application to BIA to reopen the proceedings or reconsider, but he merely presented newspaper articles about conditions in the Dominican Republic. (R. 58-72.) Each time, Soto failed to suggest a coherent theory of who might want to torture him or why. See, e.g., Merisier v. INS, 2001 WL 1281243 at *12 & n.11; Miguel v. Reno, No. Civ. 00-3291, 2000 WL 1209375 at *3 (ED. Pa. Aug. 25, 2000). Although Soto alleges that he faces "family disintegration by the lethal consequences if removed to the Dominican Republic" (Pet. at 3), this unsupported allegation, without more, does not constitute substantial grounds for believing that removing Soto to the Dominican Republic would likely result in his being tortured. See, e.g., Diallo v. INS, 232 F.3d 279, 284-90 (2d Cir. 2000); Thavarajah v. District Director, INS, No. 99-4120, 210 F.3d 355 (table), 2000 WL 427378 at *3-4 (2d Cir. Apr. 19, 2000); Khourassany v. INS, 208 F.3d 1096, 1100-01 (9th Cir. 2000) (proof of repeated harassment by government police did not constitute "sufficient evidence to establish past persecution or a well-founded fear of persecution"); Ademola v. INS, No. 99-1202, 208 F.3d 217 (table), 2000 WL 227860 at *1-2 (8th Cir. Feb. 14, 2000) (affirming BIA's denial of asylum where petitioner's "fear of persecution was not objectively reasonable"); Merisier v. INS, 2000 WL 1281243 at *12 & n.11. If Soto's evidence were sufficient, it would mean that all persons

sought to be removed to the Dominican Republic would be entitled to relief under the Torture Convention. That clearly is not the law. See Zachary Margulis-Ohnuma, Saying What the Law Is: Judicial Review of Criminal Aliens' Claims Under the Convention Against Torture, 33 N.Y.U.J. Int'l L. & Pol. 861, 864 n.10 (2001) ("According to an INS report on fiscal year 1998, eight countries [including the Dominican Republic] account for 88% of all removals . . . . The United States government has recognized that torture took place in all of these countries except Canada and Jamaica in the past year. . . . Non-governmental human rights groups have also criticized these countries in recent years.").

With no suggestion that the INS made an error of law or came to an unsupportable factual conclusion, this Court may not upset the INS' conclusions. Soto's Torture Convention habeas claim is DENIED. See, e.g., Merisier v. INS, 2000 WL 1281243 at * 12-13; Zachary Margulis-Ohnuma, Saying What the Law Is: Judicial Review of Criminal Aliens' Claims Under the Convention Against Torture, 33 N.Y.U.J. Int'l L. & Pol. at 873-84 (discussing the authority of federal district courts to afford habeas relief from removal under the Torture Convention); see also David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 Yale J. Int'l L. 129, 197-99, 208-10 (1999) (summarizing caselaw interpreting the Torture Convention and concluding that, in light of legislative history, courts should "exercise appropriate restraint" when an alternative forum is available to adjudicate Torture Convention rights).

CONCLUSION

For the reasons set forth above, Soto's § 2241 habeas corpus petition is DENIED.

DATED: New York, New York
September 7, 2001

Andrew J. Peck
United States Magistrate Judge

Copies to: Socrates Soto
Krishna Patel, Esq.