IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3234

ALEX BINI,
INS No. A77 867 477,

Petitioner - Appellant,

v.

CURTIS ALJETS, District Director,
Immigration and Naturalization Service (INS)

***Respondent - Appellee*.**

ON APPEAL FROM UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA

BRIEF OF RESPONDENT - APPELLEE

ROBERT D. McCALLUM, JR.

Attorneys for Respondent - Appellee

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3. Whether the District Court had no habeas jurisdiction to review Bini's challenge to the unavailability of discretionary relief under repealed Section 212(c) of the Immigration and Nationality Act ("INA"), Bini's claim of ineffective assistance of counsel, or his request to reopen his removal proceedings, where these are wholly new claims never raised before the agency below, as to which Bini

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The criminal complaint showed that Bini's two convictions arose out of an incident that occurred on March 12, 1999, when he entered a bank in Brooklyn Center, Minnesota, and attempted to open a bank account in the name of "Ross

truthful with the officers and avoid committing a second offense. Id.

Judge concluded that although there is a statutory exception to the one-year rule if an applicant can demonstrate that there are changed circumstances in his country materially affecting his eligibility for asylum, Bini failed to qualify for this exception. Id. at 42-43; see 8 C.F.R. § 208.4(a)(4) ("changed circumstances" refers to circumstances that materially affect an alien's eligibility for asylum, including changes in the conditions of the applicant's country of nationality). The Immigration Judge found that Bini's claim that he would be treated worse in Nigeria today than when he left in 1984 to be wholly conclusory, and that there was no evidence of "changed circumstances" in Nigeria. Id. at 43. The Immigration Judge based this on State Department reports on country conditions showing that there have been ongoing disputes between Christians and Muslims in Nigeria for an extended period of time and that these disputes were limited to select regions of Nigeria. Id. On these bases, the Immigration Judge concluded that Bini failed to show that he qualify for the "changed country conditions" exception to the one-year time limit for filing for asylum. Id.

Next, the Immigration Judge reviewed Bini's application for withholding of removal based on his claim to fear future persecution by Muslims in Nigeria as a Christian evangelical. Id. at 43. The Immigration Judge found that Bini failed to prove a "cdapplication forution orutigra nce perso

11Id.

[3] Bini has misstated the facts in this regard by claiming that he applied for

sought to submit a late brief to the Board because of illness, but the brief was rejected as untimely.

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discretionary relief under repealed § 212(c). See Add. 1 at 27-48 and Appellant's Brief at 13 .

Nigeria, which is home to millions of Christians," and that Bini's parents, who remained in Nigeria as alleged evangelicals "have remained . . . without untoward

Nigeria and that his life or freedom would be threatened because of his religion and membership in a Christian evangelical group. Id. Second, he asked that his removal proceedings be reopen-272i in.75 iled,hver ylied for relief under and

[4] A check with the Board's automated telephonic system reveals that Bini has never filed a motion to reopen his proceedings with the Board, and no such motion is currently pending. Moreover, as shown above, contrary to Bini's representation in his Habeas Petition, he already applied for relief under the Torture Convention and has been found ineligible for such relief. Add. 1 at 46 and 54.

[5] As shown in the Facts and Note 3 above, Bini never applied for Section 212(c) relief in his removal proceedings and only sought asylum, withholding of removal, and relief under the Torture Convention.

to permit him "the first and only opportunity to apply under the Convention Against Torture," referring to relief for which he ha2,readyto apiedst anbeenef u and

[9] This claim has never been presented to Board below. See

to consider Bini's claims, and as for detention, the District Court correctly concluded that it is lawful, reasonable, and not governed by Zadvydas.

SUMMARY OF ARGUMENT

I. There is no appellate review of Bini's chaloncl.5 n his removability for two crimes of moral turpit0.0ee3d noarising outes oa single schemees oo crinally

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corroboration, and failed to convincingly prove his claims for withholding of removal and relieand ,er the Torture Convention. These are evidentiary challenges to the Board's fact-finding, and as such are outside the scope outsnges

relief under the Torture Convention, is subject to review for substantial evidence. See INS v. Elias-Zacarias, 502 U.S. 478, 481 n. 1, 482-83 (1992).

ARGUMENT

I. THERE IS NO APPELLATE OR HABEAS JURISDICTION TO

1315 (8th Cir. 1991); see also U. S. Dep't of Labor v. Rapid Robert's Inc., 130 F.3d 345, 348 (8th Cir.1997) ("Ordinarily, we will not entertain issues raised for the first time on appeal).

As this Court has long held, where Congress has created a statutory remedy of direct review in the courts of appeals for questions regarding an alien's deportability, habeas corpus may not be used to evade or bypass that review. Daneshvar v. Chauvin, 644 F.2d 1248, 1250-51 (8th Cir. 1981) (holding that under predecessor review scheme for deportation orders, habeas corpus may not be used to review alien's deportability since that question is subject to direct review in the courts of appeals). It would frustrate Congress' intent if the more general remedy of habeas corpus were to be used to evade the specific means and forum designated by Congress for reviewing questions regarding an alien's deportability. See id..

This rationale is consistent with general preclusion-of-review jurisprudence, where the courts construe the existence of a specific, Congressionally-designated scheme and forum for review to preclude other more general forms of review. See, e.g., FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984) (where the Hobbs Act gives "[e]xclusive jurisdiction for review of final . . . orders" in the courts of appeals, a litigant "may not evade these provisions" by resorting to more general provisions such as the Administrative Procedure Act); Preiser v. Rodriguez, 411 U.S. 475, 488 (1973) ("statute [that] is a general one" whose terms are "literal[ly] applicab[le]" does not allow review when a "specific federal . . . statute,

explicitly and historically designed to provide the means for . . . [review] must be understood to be the exclusive remedy available in a situation").

Thus, as a matter of statutory preclusion, where Congress has created a scheme of direct review in the courts of appeal for challenges to deportability, there is no habeas jurisdiction to review such matters. See

departure by dilatory tactics in the courts"); see also Stone v. INS, 514 U.S. 386, 399 (1995).

The new review scheme also reflects Congress' concern that the law prior to 1996 had been ineffective in securing the prompt deportation of aliens once administrative proceedings were completed. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt 1 at 118-126 (1996).

This new review scheme requires that review of removal orders is to take place "only" in the courts of appeals by means of a petition for direct review, where there is all-encompassing review of all issues arising in the course of the removal proceeding. See

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Accordingly, in detisindin whether his crimes a requalifydin crimes involvdin

(same); Nguyen v. INS, 208 F.3d 528, 531 (5th Cir. 2000), aff'd 533 U.S. 53, 121 S.Ct. 2053 (2001) (same); Hall v. INS, 167 F.3d 852 (4th Cir. 1999).

[13] St. Cyr, supra

promotes development of the necessary record to decide a claim, the "autonomy"

adjudication by his delegate the Board, the Attorney General has interpreted a "single scheme of criminal misconduct" to mean as follows:

> [T]he natural and reasonable meaning of the statutory phrase is that when an alien has performed an act which, in and of itself, constitutes a complete, individual and distinct crime then he becomes deportable when he again commits such an act, provided he is convicted of both. The fact that one may follow the other closely, even immediately, in point of time is of no moment. Equally immaterial is the fact that they may be similaiin ancTj 6 d.

[14] While the majority of circuits have adopted the Board's construction, the

at the same time and executed in accordance with that plan, [and if so], ... that the government has failed in its burden to establish that the conviction did not arise out

[15] See St. Cyr, 121 S.Ct. at 2282, stating that "other than the question whether there [is] some evidence to support the order, . . . the courts generally d[o] not review factual

immigration judge, Board relies upon its own independent judgment in deciding ultimate disposition of the case).

In Bini's case, the Board reviewed his claims for withholding of removal and relief under the Torture Convention *de novo,* giving independent reasons of its own for finding Bini ineligible for these forms of relief, namely his lack of credibilty, inadequate corroboration, and failure to convincingly prove a clear probability of persecution or torture upon return to Nigeria. See Add. 1 at 52-53. Since the Board conducted *de novo* review of these matters, its decision rather than the decision of the Immigration Judge is the one that is subject to review. See Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001); Abdulai v. Ashcroft, 239 F.3d 542 (3rd Cir. 2001; Ghaly v. INS, 58 F.3d 1425 (9th Cir. 1995).

In both his habeas petition and now on appeal, Bini has challenged the Board's findings that he lacked ty,

shown in the Argument at pages 30-35 above, since Bini is a criminal alien, review of his removal order is now divided between the court of appeals on direct review for jurisdictional and substantial constitutional issues, and district court by means of habeas corpus for any other "purely legal" challenges to his removal order.

Nonetheless, although the District Court's reasoning was inaccurate, its ultimate conclusion that it had no habeas corpus jurisdiction to review Bini's

[16] Should this Court nonetheless conclude that these factual challenges are

impermissibly "retroactive" only where it is applied to a criminal alien "would have been eligible for 212(c) relief at the time of [his] plea under the law then in effect." St. Cyr

Since a removal proceeding is civil in nature, there is no constitutional right

correct any procedural errors he may have show. Id.; see also

ineffective assistance of counsel made each year. See Lara

prove his claim. Add. 1 at 52-53. Thus, there is no habeas jurisdiction to "grant" Bini's request for reopening.

For all of the foregoing reasons, there is no habeas jurisdiction to review Bini's challenges to his removal order and the habeas petition was correctly denied as to these matters.

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT BINI'S CONTINUED DETENTIOUU3NDING EXECUNTIOUOFT

is finite: it ends once the removal proceedings are completed and there is a final administrative order. See id. This statute is not at issue in Bini's case, because as the Facts above show, he has an administratively final removal order. Accordingly, Bini's arguments challenging the length of his pre-order detention under Section 1226 pending his removal proceedings are moot and have no bearing on his present detention. Rather, by virtue of the entry of the final administrative order in his case, Bini's detention is authorized by a "post-order" detention statute at 8 U.S.C. § 1231.

The detention scheme created by this statute is as follows. First, it creates a

Second, there is an "extension" or "suspension" provision at 8 U.S.C. § 1231(a)(1)(C), which extends this 90-day "removal period" when an alien "acts to

statute at 8 U.S.C.§ 1231(a)(6), where the alien is stateless, or where there are other reasons (such as the absence of diplomatic relations with his home country) that his country refuses to accept him for repatriation. Zadvydas, 121 S.Ct. at 2495, 2505.

In Zadvydas the Supreme Court held that to avoid what it considered would

obtaining a stay of removal, not any inability by the INS to repatriate him to Nigeria. And there is no potential for indefinite detention as there was in Zadvydas, because the stay of removal is finite and will end once this Court reviews Bini's appeal and the stay of removal pending appeal is lifted. For these reasons Bini's detention is lawful, and the District Court correctly denied his habeas petition.

CONCLUSION

For the foregoing