2019 WL 8723753
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Olvin Said TORRES MURILLO, Petitioner,
v.
William BARR, et al., Respondents.

Case No. 19-cv-05676-SK
|
Signed 10/23/2019

Attorneys and Law Firms

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ORDER DENYING PETITION FOR WRIT OF *HABEAS CORPUS*

Regarding Docket No. 1

SALLIE KIM, United States Magistrate Judge

***1** On September 9, 2019, Olvin Said Torres Murillo ("Petitioner") filed an application for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2241 and Art. I § 9, cl. 2 of the United States Constitution and a motion for a temporary restraining order. (Dkt. 1.) On September 12, 2019, the Court set a briefing schedule, to which the parties stipulated. (Dkts. 4, 5, 7.) Respondents opposed both the temporary restraining order and the application for *habeas* relief. (Dkt. 8.) All parties consented to the jurisdiction of the undersigned, and on October 7, 2019, the Court heard oral argument. Having considered the submissions of the parties and the relevant legal authority, the Court HEREBY DENIES the petition and the motion, for the reasons set forth below.

BACKGROUND

Petitioner is a citizen of Honduras. (Dkt. 1-6 (Bond Documents Ex. A, E).) After fleeing violence from gangs in Honduras, he has been living in the United States with his wife and two daughters. (*Id.* (Bond Documents Ex. A, B).) Petitioner has resided in the United States since approximately July 2011. (*Id.* (Bond Documents Ex. A).) Petitioner has no criminal history in the United States. (Dkt. 1-6 (Bond Documents Ex. R).) Until recently, Petitioner resided in the United States with nonimmigrant status under a T-2 visa. (Dkt. 8-1 (Gagelonia Dec.).) However, on September 24, 2018, Interpol published a Red Notice identifying Petitioner as a fugitive sought for criminal prosecution for murder in Honduras. (Dkt. 8-2 (Gagelonia Dec. Ex. B).) Based on the Red Notice, United States Citizenship and Immigration Services ("USCIS") revoked Petitioner's T-2 visa and changed his immigration status to make him subject to removal. (Dkt. 8-2 (Gagelonia Dec. Ex. A).)

On March 29, 2019, ICE arrested Petitioner, charging him with removability under section 237(a)(1)(C)(i) of the Immigration and Nationality Act ("INA"). (Dkt. 8-2 (Gagelonia Dec. Ex. C).) Petitioner moved to terminate the removal proceedings against him on May 7, 2019, and on May 15, 2019, the Immigration Judge ("IJ") granted his motion. (Dkt. 8-2 (Gagelonia Dec. Ex. D).) The Department of Homeland Security ("DHS") filed an appeal of the IJ's decision granting the motion to terminate with the Board of Immigration Appeals ("BIA"). (Dkt. 8-2 (Gagelonia Dec. Ex. E).) DHS' appeal of the IJ's decision remains pending. On July 10, 2019, Petitioner appeared before the IJ at a bond hearing, where the IJ denied Petitioner's request for bond, reasoning that he poses a flight risk. (Dkt. 8-2 (Gagelonia Dec. Ex. F).) Petitioner appealed the IJ's bond decision to the BIA, and that appeal also remains pending. (Dkt. 8-2 (Gagelonia Dec. Ex. G).)

Petitioner is currently detained at the Yuba County Jail in Marysville, California, pending the BIA's adjudication of the two appeals. Petitioner seeks the writ of *habeas corpus*, arguing that he was denied due process in his bond hearing because the hearing was procedurally flawed insofar as the IJ did not hear direct oral testimony from Petitioner on the question of flight risk, because the IJ relied on evidence outside the record, and because the IJ failed to consider supervised release as an alternative to placing Petitioner in custody. Petitioner further argues that the IJ improperly relied on the Red Notice, which was unsupported by probable cause, in making the decision denying Petitioner's request for release from custody on bond. Petitioner asks the Court to find that the IJ's reliance on the Red Notice was improper and to order his immediate release from ICE custody. Respondents

contend in turn that Petitioner's due process rights were not violated by either the form of the bond proceedings or the IJ's reliance on the Red Notice, and Respondents maintain that the Court should decline to review the issues presented because Petitioner has not exhausted his appeal with the BIA. Respondents also aver that the Court lacks jurisdiction to review the IJ's discretionary decision about bonds.

LEGAL STANDARDS

***2** Federal district courts are empowered to consider applications for *habeas corpus* relief pursuant to 28 U.S.C. § 2241 and Art. I § 9, cl. 2 of the United States Constitution. This remains true even when a statute – like the INA at issue here – purports to strip courts of jurisdiction over decisions typically left to the discretion of the executive branch. *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) ("claims that the discretionary process itself was constitutionally flawed are 'cognizable in federal court on habeas because they fit comfortably within the scope of § 2241.' ") (citation omitted). Similarly, the INA "does not limit habeas jurisdiction over questions of law." *Id.* Specifically, "a federal district court has jurisdiction under 28 U.S.C. § 2241 to review [...] bond hearing determinations for constitutional claims and legal error." *Id.* at 1200.

Section 2241 does not specifically require petitioners to exhaust direct appeals before filing petitions for *habeas corpus*. *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004). However, courts typically impose a prudential exhaustion requirement prior to hearing *habeas* petitions. *Id.* at 997-98. "Although courts have discretion to waive the exhaustion requirement when it is prudentially required, this discretion is not unfettered." *Id.* at 998. Findings that the requirement for exhaustion has been waived are properly limited to situations "where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Id.* at 1000 (quoting *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 (9th Cir. 1981)).

An immigrant subject to removal proceedings "may be arrested and detained pending a decision on whether" that person "is to be removed from the United States." 8 U.S.C. § 1226; *see also Prieto-Romero v. Clark*, 534 Fl3d 1053, 1065 (9th Cir. 2008). The Attorney General "may continue to detain the arrested" person and may issue or revoke a related bond at any time. 8 U.S.C. § 1226. To be released from custody on bond under § 1226(a), a detained immigrant must show "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Matter of Guerra*, 24 I & N Dec. 37, 40 (BIA 2006); *Singh*, 638 F.3d at 1206. In making the decision about release from custody on bond, "the IJ should consider "any or all" of the following factors: (1) whether the immigrant has a fixed address in the United States; (2) the immigrant's length of residence in the United States; (3) the immigrant's family ties in the United States; (4) the immigrant's employment history; (5) the immigrant's record of appearance in court; (6) the immigrant's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the immigrant's history of immigration violations; (8) any attempts by the immigrant to flee prosecution or otherwise escape from authorities; and (9) the immigrant's manner of entry to the United States. *Kharis v. Sessions*, 2018 WL 5809432, at *4 (N.D. Cal. Nov. 6, 2018), *appeal dismissed*, 2019 WL 1468148 (9th Cir. Feb. 14, 2019) (citing *Guerra* and *Singh*). The IJ has broad discretion in weighing these factors and may afford one factor more weight than the others, as long as the decision is reasonable. *Id.* A detainee may appeal the IJ's determination directly to the BIA, 8 C.F.R. § 1003.19(f), or may request a subsequent bond redetermination upon a showing of a material change in circumstances, 8 C.F.R. § 1003.19(e).

"[A] district court has jurisdiction to review an IJ's discretionary bond denial where that bond denial is challenged as legally erroneous or unconstitutional." *Kharis*, 2018 WL 5809432 at *4 (collecting cases). Because an IJ's bond determination presents a mixed question of law and fact, the district court must tread lightly in order "not to encroach upon the IJ's discretionary weighing of the evidence." *Id.* at *5 (citation omitted). The question for the district court, therefore, "is not 'whether this Court believes that the proof establishes, by clear and convincing evidence, that [the petitioner] is a danger to the community' or a flight risk." *Id.* (citing *Nguti v. Sessions*, No. 16-CV-6703, 2017

WL 5891328, at *3 (W.D.N.Y. Nov. 29, 2017)). Instead, the Court must determine whether the IJ relied on proof that could not establish his or her conclusion as a matter of law. *Id.* "[F]ailure to mention each specific piece of evidence" in a BIA or IJ order "is not dispositive" of whether the agency failed to consider that evidence; "[t]he agency's failure to mention specific evidence, by itself, does not overcome" the presumption that it reviewed all the evidence. *Kharis*, 2018 WL 5809432 at *8-9.

***3** Courts acknowledge that a Red Notice alone does not provide "a sufficient basis for the arrest of a subject because it does not meet the requirements for arrest under the 4th Amendment to the Constitution." *Kharis*, 2018 WL 5809432 at *7 (citing Department of Justice internal guidance). However, "it does not violate due process to give a Red Notice at least some weight in the context of determining whether a detainee poses a flight risk. *Id.* at *8.

An IJ's active refusal to hear relevant oral testimony may constitute a due process violation. *Oshodi v. Holder*, 729 F.3d 883, 889-90 (9th Cir. 2013) (reversing IJ who cut off relevant testimony regarding torture during asylum proceeding). Though an IJ must "receive and consider material and relevant evidence," 8 C.F.R. § 1240.1(c), "an affirmative duty to ensure that the record is fully developed" exists only where the person subject to removal is unrepresented by counsel. *Id.* at 889 (citing *Jacinto v. I.N.S.*, 208 F.3d 725, 734 (9th Cir. 2000)). Bond hearings are generally less formal than immigration court proceedings. *Joseph v. Holder*, 600 F.3d 1235, 1241 n.5 (9th Cir. 2010) (citing Immigration Court Practice Manual § 9.3(e)). "At the [IJ's] discretion, witnesses may be placed under oath and testimony taken. However, parties should be mindful that bond hearings are generally briefer and less formal than hearings in removal proceedings." *Id.* (citing Immigration Court Practice Manual § 9.3(vi)).

ANALYSIS

A. Jurisdiction.

This Court has jurisdiction to consider the constitutional and legal questions Petitioner raises in his application for *habeas* relief. *Singh*, 638 F.3d at 1202. Petitioner claims that his bond hearing violated due process in two respects: that the IJ conducted a procedurally improper hearing and that the IJ improperly relied on the Red Notice as evidence of flight risk. The Court considers each question below.

B. Exhaustion.

Irreparable injury would result if the Court refused to entertain Petitioner's *habeas* application because he failed to exhaust his appeal with the BIA. Respondents argue that the Court should not consider Petitioner's challenge to his detention because he has not fully exhausted his appeal before the BIA, which remains pending. The Court finds that the requirement of prudential exhaustion is waived because "irreparable injury will result" if the Court withholds constitutional review. *Laing*, 370 F.3d at 1000. The Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). "An alleged constitutional infringement will often alone constitute irreparable harm" for purposes of the preliminary injunction analysis. *Goldie's Bookstore, Inc. v. Superior Court of the State of California*, 739 F.2d 466, 472 (9th Cir. 1984); Wright and Miller, *11A Federal Practice and Procedure*, § 2948.1 (3d ed. 2019) ("When an alleged deprivation of a constitutional right is involved, [...] most courts hold that no further showing of irreparable injury is necessary.") The Court finds that here, where Petitioner has filed both a motion for a temporary restraining order and a petition for *habeas* relief challenging the constitutionality of his continued detention, the likelihood of irreparable harm has been sufficiently established to warrant judicial review. The Court therefore turns to the constitutionality of Petitioner's bond hearing and continued detention by ICE.

C. Alleged Procedural Flaws in the Bond Hearing.

1. Lack of Oral Testimony at the Bond Hearing.

***4** Petitioner argues that the IJ deprived him of his due process rights in failing to elicit oral testimony from Petitioner at the bond hearing and then relying on the fact that Petitioner did not testify on his own behalf. (Dkt. 1 at 15.) As the IJ's Bond Memorandum notes, Petitioner was represented by counsel at the bond hearing. (Dkt. 1-10 (Weisner Dec. Ex. 7).) The IJ would have had an affirmative duty to develop the record had Petitioner been unrepresented by counsel. See *Oshodi*, 729 F.3d at 889. In the informal context of a bond hearing, the decision whether or not to hear oral testimony

rests within the IJ's discretion. *Joseph*, 600 F.3d at 1241 n.5 (citing Immigration Court Practice Manual § 9.3(vi)). There is no affirmative duty by the IJ to elicit testimony if a petitioner does not offer it voluntarily.

The IJ in this case did not decline to hear critical oral testimony, as the Court found violated due process in the asylum hearing in *Oshodi*. Rather, Petitioner and his counsel did not offer oral testimony, and it rested within the IJ's discretion in an informal bond hearing for a represented detainee not to ask for oral testimony. It is unfortunate for Petitioner that the IJ interpreted his failure to proffer oral testimony as a failure to provide further compelling evidence he was not a flight risk. (Dkt. 1-10 (Weisner Dec. Ex. 7) ("[Petitioner] has not said that he would comply with an order to return to Honduras").) However, the fact that the IJ did not affirmatively elicit such testimony at the hearing does not constitute a due process violation.

2. Reliance on Evidence Outside the Record.

Petitioner next argues that the bond hearing was procedurally flawed because the IJ "assumed the existence of facts not in evidence, such as the existence of an arrest warrant" to substantiate the Red Notice. (Dkt. 1 at 15.) The IJ's bond memorandum does state that "it is clear that the red notice, and the underlying arrest warrant (or judicial equivalent) exist." (Dkt. 1-10 (Weisner Dec. Ex. 7).) And the Honduran documentation underlying the Red Notice does not exist, to this Court's knowledge, in the record. However, the point is moot because the IJ's bond memorandum goes on to state that the IJ is not relying on the Red Notice for evidence of guilt bolstered by the assumption that probable cause supports the presumptively extant local warrant. *Id.* ("Whether the [Petitioner] is guilty of the charge is irrelevant.") Rather, the IJ merely considered the Red Notice as evidence that Petitioner is "unlikely to comply with U.S. Government order regarding deportation" because Petitioner faces the risk of a significant charge in the country to which he would be deported. *Id.* The IJ's error in assuming the existence of an underlying warrant for the Red Notice thus did not prejudice Petitioner's due process rights.

3. Failure to Consider Supervised Release.

Petitioner then argues that the bond hearing was procedurally flawed because the IJ failed to consider the option of "conditional parole," such as release on bond with an ankle monitoring system pursuant to INA section 236(a)(2)(B). (Dkt. 1 at 16.) But the IJ's bond memorandum explicitly states that he "carefully considered all relevant factors in the case" and determined that no amount of bond could mitigate Petitioner's flight risk. (Dkt. 1-10 (Weisner Dec. Ex. 7).) The fact that the IJ did not specifically mention that he considered the possibility of monitored release does not imply that he failed to consider the option. *See, e.g.*, *Kharis*, 2018 WL 5809432 at *8-9 ("[F]ailure to mention each specific piece of evidence" in a BIA or IJ order "is not dispositive" of whether the agency failed to consider that evidence). Rather, the bond memorandum makes clear that the IJ weighed all of the evidence before him and found that no alternative short of detention would eliminate Petitioner's flight risk. The IJ did not deprive Petitioner of his due process rights in failing to consider supervised release or in failing to explicitly state that he had considered supervised release.

D. The IJ's Reliance on the Red Notice.

***5** Respondents are careful to note that the Red Notice was not the legal basis for ICE's arrest of Petitioner. Rather, Petitioner's failure "to maintain or comply with the conditions of the nonimmigrant status under which" he was admitted by not reporting an element of his criminal history (as disclosed by the Red Notice) made him subject to removal, and he was arrested based on removability. (Dkt. 8-1 (Gagelonia Dec ¶ 7.); Dkt. 8-2 (Gagelonia Dec. Ex. C).) Crucially for this Court's purposes, the IJ did not rely on the Red Notice to establish that ICE's arrest of Petitioner was valid. Red Notices, which need not meet the probable cause requirements of our judicial system, do not provide a sufficient basis for arrest under the Fourth Amendment if unsupported by other evidence. *Kharis*, 2018 WL 5809432 at *7.

However, the IJ was not assessing the validity of the underlying arrest at the bond hearing. His limited role was to consider whether Petitioner presented a danger to persons or property, was a threat to the national security, or posed a risk of flight. *Matter of Guerra*, 24 I & N Dec. 37, 40 (BIA 2006); *Singh*, 638 F.3d at 1206. For purposes of that analysis, "it does not violate due process to give a Red Notice at least some weight in the context of determining whether a detainee poses a flight risk." *Kharis*, 2018 WL 5809432 at *8. Here, the IJ relied on the Red Notice not to justify the underlying ICE arrest or to establish guilt as to the Honduran charge, but rather as evidence that Petitioner "is

unlikely to comply with U.S. Government orders regarding deportation." (Dkt. 1-10 (Weisner Dec. Ex. 7).) The fact that Petitioner "is facing up to twenty years in prison in Honduras" renders him such a flight risk that "no amount of bond would assure [Petitioner's] future appearance," the IJ reasoned. *Id.*

In reviewing the IJ's discretionary bond determination, the Court may not "encroach upon the IJ's discretionary weighing of the evidence." *Kharis*, 2018 WL 5809432, at *5. The question for the district court, therefore, "is not 'whether this Court believes that the proof establishes, by clear and convincing evidence, that [the petitioner] is a danger to the community' or a flight risk." *Id.* (citing *Nguti v. Sessions*, No. 16-CV-6703, 2017 WL 5891328, at *3 (W.D.N.Y. Nov. 29, 2017)). Instead the Court must determine whether the IJ relied on proof that could not establish his or her conclusion as a matter of law. *Id.*

In evaluating the IJ's reliance on the Red Notice, the Court takes particular note of the fact that Petitioner's expert on Red Notices, Dr. Theodore Bromund, did not remark on any procedural flaws in the Red Notice at issue here and did not find any clear evidence that the Red Notice arose from political persecution of Petitioner. (Dkt. 1-6 (Bond Documents Ex. T).) In fact, Bromund noted that "[t]he Red Notice on Mr. Torres Murillo, though short, is of higher quality than many I have examined." *Id.* He further observed that "there is also no obvious reason to believe that the Red Notice is political in the sense that Mr. Torres Murillo is being targeted for clearly political activity." *Id.* This contrasts with *Kharis*, where the same expert pointed to specific reasons that the Red Notice at issue in that case was likely fraudulent. 2018 WL 5809432, at *18. The Court can imagine a scenario in which this evidence supports the IJ's decision to rely on the Red Notice.

However, the IJ did not place substantive reliance on the Red Notice, employing it only for the proposition that its mere existence enhanced Petitioner's flight risk. (Dkt. 1-10 (Weisner Dec. Ex. 7).) Whether or not the Red Notice is procedurally flawed or based on charges motivated by political persecution of Petitioner, the fact remains that the very existence of the Red Notice makes it less likely that Petitioner would wish to return to Honduras to face persecution or jail time, or both. The Court therefore holds that the Red Notice did form a sufficient basis for establishing the IJ's conclusion that Petitioner posed a flight risk as a matter of law. It does not violate due process to give a red notice some weight in determining flight risk, and the Court finds that the IJ's determination to deny bond based on the Red Notice did not violate Petitioner's due process rights here.

CONCLUSION

***6** For the reasons set forth above, the Court DENIES Petitioner's application for a writ of *habeas corpus* and motion for a temporary restraining order. The Clerk of Court is directed to close the file.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 8723753

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