IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC PIERRE JOSEPH MIGUEL, Petitioner,	:	CIVIL ACTION
v.	:	No. 00-3291
JANET RENO, UNITED STATES ATTORNEY GENERAL, et al., Respondents.	:	

MEMORANDUM

ROBERT F. KELLY, J. AUGUST 25, 2000

Marc Pierre Joseph Miguel ("Miguel") filed this Petition for Writ of Habeas Corpus on June 29, 2000. Miguel, currently in immigration detention pending removal in the State Correctional Institution at York County, Pennsylvania, seeks relief from a deportation Order. The Board of Immigration Appeals ("BIA") reversed the decision by the Immigration Judge ("IJ") to grant Miguel relief from deportation. Miguel now appeals the BIA's decision.

I. FACTS.

Miguel, a native of Haiti, was admitted to the United States as a lawful permanent resident alien in January, 1983, based on a marriage. He divorced in 1984. He and his second wife, to whom he has been married since 1985, have three daughters. On October 11, 1995, Miguel was convicted of two counts of corrupt organizations and five counts of possession with intent to deliver cocaine in the Court of Common Pleas of

Adams County, Pennsylvania. On December 26, 1995, he was convicted in the Circuit Court of Frederick County, Maryland, for possession of a controlled dangerous substance with intent to distribute cocaine. Miguel was charged with removal as an aggravated felon under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(I) of the Immigration and Nationality Act due to his convictions relating to a controlled substance.

The Immigration and Naturalization Service at Philadelphia ("INS") issued Miguel a Notice to Appear ("NTA") on October 21, 1998, which commenced deportation proceedings against him. The drug trafficking convictions rendered Miguel deportable under 8 U.S.C. section 1227(a)(2)(B)(I), relating to aliens convicted of drug offenses, and under 8 U.S.C. section 1227(a)(2)(A)(iii), rendering deportable aliens convicted of "aggravated felonies," including drug offenses. Miguel conceded the removal charges against him in proceedings before the IJ, but sought a deferral of his removal known as "withholding" under the Convention Against Torture ("CAT").[1] 8 C.F.R. § 208.17 (1999).

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[1]The "Convention Against Torture" is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985). The United States ratified the convention on October 21, 1994; 34 I.L.M. 590, 591 (1995). The CAT was implemented by the Foreign Affairs Reform and Restructuring Act of 1998, § 242, Pub.L. No. 105-277, Div. G, 112 Stat. 2681, 2691-761 (Oct. 21, 1998). However, the Attorney General did not promulgate regulations to implement the convention until February of 1999, principally at 8 CFR, Part 208. See 64 Fed. Reg. 8478 (Feb. 19, 1999) and the corrections

As a former secret police officer under the Duvalier regime, Miguel claims he will be subject to torture by the present Haitian government if he is returned to Haiti. On July 16, 1999, the IJ granted Miguel's application for withholding.

The INS appealed the IJ's Order to the BIA. On June 5, 2000, the BIA reversed the IJ, ordered Miguel removed from the United States, and held the amount of evidence Miguel presented was insufficient to establish a "clear probability" that he would be tortured by the Haitian government upon his return. Miguel, who is subject to immediate removal, filed this Petition on June 29, 2000.

II. DISCUSSION.

Miguel contests the BIA decision on the basis that the BIA erred in drawing its conclusions that (1) Miguel only had a limited role with the Haitian police and, after passage of twenty-five years, there was no meaningful evidence that similarly situated individuals had been tortured by, with the acquiescence of, or with the consent of public officials or persons acting in an official capacity; and (2) there was no documentary evidence to support Miguel's claim. The evidence which the BIA should have considered, according to Miguel, includes: (1) Miguel may have made only 10 to 15 arrests, but

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at 64 Fed. Reg. 9435 (Feb. 26, 1999) and 64 Fed. Reg. 13881 (Mar. 23, 1999).

those arrests were made during the period that Miguel worked for General Breton;[2] (2) a fellow detective was killed, and, in March of 1999, Miguel's brother-in-law was killed;[3] (3) Miguel protected Duvalier directly and submitted as evidence a photograph showing him together with Duvalier and LaFontant; (4) Gerara Louis ("Louis") testified that he presumed Miguel would be in extreme danger if he returned to Haiti because the people he arrested were now in the government and have killed a number of former officials and soldiers.[4]

The BIA found, based upon the testimony of Miguel and Louis, that "[Miguel] has not met his burden of demonstrating that it is more likely than not that he will be tortured if returned to Haiti." (BIA decision at 5.) The BIA based its decision on testimony that Miguel had a limited role with the

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[2]Miguel's witness, Gerara Louis ("Louis"), testifying telephonically from New York, identified himself as the former Chief of Police in Cap-Haitien under Duvalier. (Tr. at 170-171.) Miguel worked for him from 1964 through 1967 as a special detective. (Id. at 126.) Louis reported to General Claude Breton, who reported directly to President Duvalier. (Id. at 69, 70.) After Miguel was transferred to General Breton's command, Miguel worked directly for him from 1967 through 1973. (Id. at 74.)

[3]Miguel's brother-in-law was a senator at the time of his death.

[4]Louis further testified that Miguel's role was to infiltrate communist cells and to make arrests of those individuals. (Tr. at 161.) However, Louis also testified that he knew of only one person at Miguel's level in the police who had been killed, and he believed the killing occurred toward the end of 1994. (Id. at 165.)

police department, Miguel arrested communists but did not participate in the persecution of prisoners, and the passage of over 25 years since Miguel worked with the Haitian police. (Id.)

Neither Miguel nor the Government contests whether this Court has jurisdiction over Miguel's Petition for Writ of Habeas Corpus. The starting point in evaluating this Petition is, therefore, whether Miguel has been convicted of crimes forming the basis of his removal. In Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit ("Third Circuit") recognized that the 1996 amendments to the Immigration and Nationality Act severely restricted judicial review of the Attorney General's decisions in deportation cases. Under Sandoval, district courts retain habeas review under 28 U.S.C. § 2241 to review certain statutory and constitutional challenges to the deportation order. Sandoval, 166 F.3d at 238; see also Liang v. INS, 206 F.3d 308, 310 (3d Cir. 2000). Miguel asserts subject matter jurisdiction under habeas and other theories, including the Administrative Procedures Act ("APA"), which requires a federal court to set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Miguel argues that he has met his burden of proving eligibility for deferral of removal under the Convention Against Torture because the BIA failed to evaluate key testimony. 8 C.F.R. § 208.17.

This Court considers Miguel's Petition under the Habeas Corpus Act. 28 U.S.C. § 2241.

In adjudicating an application for deferral of removal, according to the BIA, the alien has the burden of demonstrating that it is more likely than not that he will be tortured if returned to a particular country. Miguel presented testimony that he would have problems right away once he landed in Haiti because of his past employment involved with routing out communists in Haiti from 1964 through 1973. Miguel argues that his final removal order is unlawful because the BIA "failed to consider critical facts . . ." relating to his CAT claim. (Pet. at 12, ¶ 24.) As the Government notes, in reviewing any asylum or withholding decision, the court must defer to the BIA's decision unless the evidence presented by the alien was such that a reasonable fact-finder would be compelled to conclude that a "well-founded fear of persecution" existed. INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992); Khourassany v. INS, 208 F.3d 1096, 1100 (9th Cir. 2000). The Government argues that Miguel has not established that specific harm or threats have been directed at him, a standard which has been considered a key factor in determining that evidence is sufficient for withholding deportation. Gonzales-Neyra v. INS, 122 F.3d 1293, 1297 (9th Cir. 1997), amended by 133 F.3d 726 (9th Cir. 1998)(citation omitted).

The evidence presented by Miguel is that he was a former secret, undercover policeman in Haiti over twenty-five years ago and that he arrested suspected political opponents of the Duvalier regime. Miguel testified that he has not been harmed in Haiti nor threatened with harm there, despite returning there approximately 4 times since coming to the United States.[5] As the Government contends, neither Miguel nor his witness offered any direct evidence that Miguel would be tortured if he returned to Haiti; the testimony established that only one former policeman, whose name was unknown, had been killed there. The BIA found, therefore, that Miguel provided insufficient detail about that decedent or his death.

Given the lack of direct evidence presented by Miguel and his witness providing any certitude that he will be tortured and killed by the current Haitian government if he returns to Haiti, this Court affirms the BIA decision. The Petition for Writ of Habeas Corpus is denied.

An Order follows.

[5]Miguel testified that he returned to Haiti in 1984 for approximately 2 weeks and also returned 2 or 3 other times. (Tr. at 113.) In December of 1991, Miguel was there "on the coup." (Id. at 111.) He stayed a couple of weeks, but had planned to stay longer. (Id. at 112.)

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ORDER

AND NOW, this 25th day of August, 2000, upon consideration of the Petition for Writ of Habeas Corpus, and the Immigration and Naturalization Service's Response thereto, it is ORDERED that the Petition for Writ of Habeas Corpus is DENIED.

BY THE COURT:

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ROBERT F. KELLY, J.