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

UNITED STATES, ex rel. ETIENNE TSITRON, Petitioner,	:	CIVIL ACTION
v.	:	NO. 01-CV-4241
KENNETH ELWOOD, District Director, U.S. Immigration & Naturalization Service, Respondent.	:	

MEMORANDUM-ORDER

Presently before the Court is Petitioner's Petition for Writ of Habeas Corpus challenging the constitutionality of 8 U.S.C. § 1226(c)(1) and the Government's Response.[1]

On or around June 26, 2000, in the United States District Court for the Central District of California, Petitioner was prosecuted and pled guilty to conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371 and mail fraud, in violation of 18 U.S.C. § 1341. Petitioner was sentenced to 33 months in prison and under 18 U.S.C. § 3663A, was ordered to provide restitution in the amount of $484,765.10.

On or around August 17, 2000, the Immigration and Naturalization Service (INS) issued a Notice to Appear and commenced removal proceedings against Petitioner. The INS alleged that Petitioner was subject to removal under § 237(a)(2)(A)(iii) of the

[1]Following oral argument in chambers on November 7, 2001, the Court, pursuant to Local Rule of Civil Procedure 7.1(c), requested that the parties provide the Court with supplemental briefing as to the constitutionality of 8 U.S.C. § 1226(c)(1). Counsel were aware that this precise issue was pending in two cases before the United States Court of Appeals for the Third Circuit (Patel v. Zemski and Radoncic v. Zemski, consolidated for disposition) and were of the opinion that a decision in those cases would be dispositive of the above-captioned case.

Immigration and Nationality Act (INA) (codified at 8 U.S.C. § 1227(a)(2)(a)(iii)) based upon the above convictions. Following the completion of his jail sentence on June 12, 2001, Petitioner was subject to mandatory custody pursuant to 8 U.S.C. § 1226(c)(1) since he was an "aggravated felon" as defined by sections 101(a)(43)(M) and (U) of the INA (codified at 8 U.S.C. §§ 1101(a)(43)(M) and (U)), which relates to offenses of conviction involving fraud or deceit in which the loss to the victim exceeds $10,000 and a conspiracy to commit such an offense. Petitioner is currently being held in York County Prison pending removal.

On July 10, 2001, during a hearing before an Immigration Judge (IJ), Petitioner's counsel attempted to change Petitioner's custody status by arguing that Petitioner's actions resulted in less than a $10,000 loss to the victims, and therefore, the convictions did not constitute "aggravated felonies" as defined by the INA. The IJ ruled that because Petitioner was ordered to pay restitution in excess of $10,000, Petitioner was considered an aggravated felon under the INA. The IJ also denied Petitioner's request for bail, holding that because Petitioner was subject to mandatory custody pursuant to 8 U.S.C. § 1226(c)(1) as an "aggravated felon," he had no jurisdiction to consider such a request. Petitioner appealed the IJ's decision as to his status as an "aggravated felon" and that appeal is currently pending before the Board of Immigration Appeals.

On August 20, 2001, Petitioner filed a writ of habeas corpus in this Court challenging the constitutionality of 8 U.S.C. § 1226(c)(1). Petitioner contends that the mandatory detention of pre-final order "aggravated felons" under 8 U.S.C. § 1226(c)(1) is unconstitutional because it is a bill of attainder, denies due process of law and mandates imprisonment without any individualized consideration of the specific facts of

the case. As such, the issue before the Court is whether pursuant to 8 U.S.C. § 1226(c)(1) it is constitutional for Respondent to mandatorily detain Petitioner pending a final determination on removal absent an opportunity for an individualized determination of his flight risk or danger to the community.

A recent Third Circuit U.S. Court of Appeals case, *Patel v. Zemski*, No. 01-2398, 2001 U.S. App. LEXIS 26907 (3d Cir. Dec. 19, 2001) addressed this precise issue. Although the Third Circuit stopped short of declaring 8 U.S.C. § 1226(c)(1) unconstitutional, it held that the

> mandatory detention of aliens after they have been found subject to removal but who have not yet been ordered removed because they are pursuing their administrative remedies violates their due process rights *unless* they have been afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight risk or danger to the community.

Id. at *40 (emphasis added).

The holding in *Patel* is an explicit rejection of the Seventh Circuit's decision in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), which held that because Congress has "plenary power" over the treatment of aliens and because virtually every alien who faces deportation as an "aggravated felon" will ultimately be deported, aliens have no liberty interest in being free from detention pending their final order of removal. Id. at 958. Rather, the Third Circuit held that aliens facing deportation have a "fundamental" interest in their liberty that continues until their deportation is finalized and because this right is a fundamental one, the government must show a "compelling" interest that is furthered by the statute, something which the Third Circuit found that the government could not do in *Patel*. See Patel, 2001 U.S. App. LEXIS 26907, at *17-34.[2]

[2]The Third Circuit reasoned that: "To deprive these individuals of their fundamental right to freedom furthers no government goal, while generating a

Therefore, in relying upon the Third Circuit's decision in *Patel*, this Court will direct Respondent to release Petitioner from custody unless Respondent makes a prompt individualized determination whether Petitioner's detention is necessary to prevent risk of flight and/or danger to the community. An appropriate order follows.

considerable cost to the government, the alien, and the alien's family. The goals articulated by the government-- to prevent aliens from absconding or endangering the (cont.) community-- only justify detention of those individuals who present such a risk." Id. at *31. The Third Circuit further opined that because under section 236(c) (codified at 8 U.S.C. § 1226(c)) of the INA aliens are already entitled to a hearing to determine if they meet the statute's definition of an "aggravated felon," "[t]here appears to be no insurmountable reason why this hearing could not be expanded to incorporate an evaluation of flight risk and danger, an evaluation that immigration judges already undertake for non criminal aliens." Id. at *32.

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ORDER

AND NOW, this _____ day of January, 2002, **IT IS HEREBY ORDERED** that Respondent release Petitioner from custody unless Respondent provides Petitioner with a hearing and makes a prompt individualized determination whether Petitioner's detention is necessary to prevent risk of flight and/or danger to the community. **IT IS FURTHER ORDERED** that Petitioner's hearing be held within **thirty (30) days** of this Court's Order.

BY THE COURT:

_____
CLIFFORD SCOTT GREEN, S.J.