

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4201
(Summary Calendar)

SAMUEL A. BAMIDELE,

Plaintiff-Appellant,

versus

STUART M. GERSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana

(92-CV-2192)

(June 7, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Samuel A. Bamidele, a citizen of Nigeria and a detainee awaiting deportation as a result, inter alia, of his conviction on a plea of guilty to a drug offense, appeals the

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

denial of his petition for habeas corpus relief under 28 U.S.C. § 2241. Finding no reversible error in the district court's denial of Bamidele's petition, we affirm.

I

FACTS AND PROCEEDINGS

Bamidele is currently incarcerated at the Federal Correctional Institute in Oakdale, Louisiana. In 1991, Bamidele pleaded guilty to conspiracy to possess with intent to distribute heroin and was sentenced to 33 months. Before he was released, the Immigration and Naturalization Service (INS) issued an Order to Show Cause why Bamidele should not be deported. He was initially held without bond and requested a review of this determination by an Immigration Judge (IJ) pursuant to 8 C.F.R. § 242.2(b) and (c). Ruling that Bamidele was not a danger to the community and would present himself for any future hearings, the IJ set bond at \$25,000. The Board of Immigration Appeals (BIA) denied Bamidele's request for a reduction in the amount of bond on the grounds that he was a "poor bail risk." He then filed a pro se 28 U.S.C. § 2201 petition styled a civil action for declaratory judgment and injunctive relief in the Northern District of Illinois. The district court there ruled that Bamidele's effort to gain release by attacking the level of his bond sounded in habeas corpus, transferring the case to the Western District of Louisiana under 28 U.S.C. § 1406(a).

Proceeding IFP, Bamidele moved the court to expedite his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2243. The district court concurred with the earlier

determination that Bamidele's action was actually a petition for habeas corpus, treated it as a request for relief from the BIA's refusal to extinguish or reduce his bond, and named the Warden at Oakdale as the respondent. The district court ruled that the BIA did not abuse its discretion and acted with "reasonable dispatch." The court denied Bamidele's writ of habeas corpus, and he timely appealed.¹

II

ANALYSIS

Bamidele asserts that the \$25,000 amount of the bond was arbitrary and capricious considering his indigence and thus violated his due process rights. According to Bamidele, the district court improperly dismissed his habeas corpus petition by ignoring the mandates of § 2243 and applying the wrong standard of review to his claim that the amount of the bond violated his Eighth Amendment rights. Bamidele also contends that his bond was made "unaffordable" because of his national origin.

The record reflects that Bamidele's appeal is moot because he has been ordered deported, and his administrative appeal of this determination has been dismissed. The source of this information is the U.S. Attorney in the Northern District of Illinois. Bamidele does not address these assertions. In order to avoid additional delays and waste of resources by all concerned, however,

¹ According to a Special Assistant United States Attorney in the Northern District of Illinois, Bamidele was ordered deported following a September 4, 1992, hearing at Oakdale. The BIA dismissed his appeal November 23, 1992.

we assume arguendo that the petition is not moot.

Our jurisdiction over direct appeals from the BIA is limited to reviewing final orders of deportation and does not include bond determinations involving INS detainees. Young v. United States Dept. of Justice, I.N.S., 759 F.2d 450, 457 (5th Cir.), cert. denied, 474 U.S. 996 (1985). We do, however, have authority to review a bond determination in a habeas corpus proceeding "upon a conclusive showing . . . that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." 8 U.S.C. § 1252(a)(1) (West Supp. 1992). Although Bamidele does not cite § 1252(a)(1), he appears to complain that the Attorney General was not acting with sufficient dispatch.² Even assuming that the Attorney General did not act with sufficient dispatch, the bond determination was reasonable.

An alien taken into custody pending a final determination of deportability may, in the discretion of the Attorney General, be held in custody, released under bond of at least \$500, or released on conditional parole. § 1252(a)(1)(A)-(C). The Immigration and Naturalization Act of 1952 "vests wide discretion in the Attorney General and his delegates to determine whether or not to release an alien on bail pending a final decision in deportation proceedings." United States ex rel. Barbour v. District Dir. of I.N.S., 491 F.2d

² Certain of the delays of which Bamidele complains are a result of the fact that he did not initially file a writ of habeas corpus. Further delays occurred because, after his action was determined to be a petition for habeas corpus, it had to be transferred to the proper district.

573, 577 (5th Cir.), cert. denied, 419 U.S. 873 (1974). The Attorney General has delegated virtually all powers under the Act to the BIA. Id. at 577 & n.4. To override the Attorney General's authority, an alien must demonstrate that the Attorney General has abused his discretion. Id. at 577-78. "The Attorney General may not release from custody any lawfully admitted alien convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates . . . that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." § 1252(a)(2)(B); Matter of De La Cruz, Interim Decision 3155 (BIA 1991) (copy attached); see United States ex rel. Barbour, 491 F.2d at 576-77. The court looks to see whether any basis in fact supports the agency's decision. United States ex rel. Barbour, 491 F.2d at 578.

Here, the BIA refused to reduce Bamidele's bond because he was a poor bail risk. His drug offense was an aggravated felony. See Matter of De La Cruz, Interim Decision 3155 (BIA 1991). Although the BIA did not specify why it believed Bamidele was a poor bail risk, an alien's criminal record affects the determination whether he poses a risk of flight before deportation proceedings. See O'Rourke v. Warden, Metropolitan Correction Center, 539 F.Supp. 1131, 1136 (S.D.N.Y. 1982). The decisions cited to by Bamidele, Matter of Patel, 15 I & N 666 (BIA 1976), Matter of San Martin, 15 I & N 167 (BIA 1974), and Matter of De La Cruz, are factually distinguishable (in Matter of Patel the alien had no criminal record) or, contrary to Bamidele's contentions, consistent with the

BIA's resolution of the instant case.

The district court correctly applied an abuse of discretion standard of review to Bamidele's habeas petition. As Bamidele has a criminal record, the BIA's decision has a basis in fact and thus the Attorney General did not abuse his discretion.

There is no support for Bamidele's proposition that indigence should affect bond determinations. Because Bamidele's current imprisonment is a result of a deportation proceeding and not a criminal conviction, the Eighth Amendment is inapplicable. Equan v. United States I.N.S., 844 F.2d 276, 279 (5th Cir. 1988). Contrary to Bamidele's assertions, the district court was not required to issue a show cause order to the defendants to file an answer to his habeas allegations. 28 U.S.C. § 2243.

Although Bamidele makes much of the fact that the IJ ruled that he would not pose a danger to the community and would appear for future hearings, these conclusions were made in the context of setting bond at \$25,000. The BIA refused to reduce bond because it determined that Bamidele was a poor bail risk. Both determinations can be read consistently with each other. The IJ believed that if Bamidele was released on a \$25,000 bond he would appear for his hearings. The BIA phrased its conclusion somewhat differently, stating in effect that, to the extent bail was reduced or extinguished, Bamidele was a poor bail risk.

Finally, Bamidele's contention that his bond was set at a prohibitively high level because of his national origin is raised for the first time on appeal. Although Bamidele purports to

document discrimination against Nigerian detainees, this is a factual issue that should have been resolved in the district court. We will not consider issues raised for the first time on appeal unless they involve purely legal questions and failure to consider them would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). Neither situation is present here.

AFFIRMED.