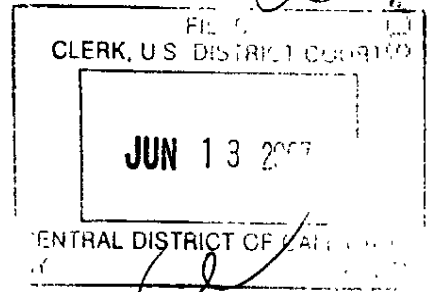


V86

LINK:1

Blair



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

MOHIUDDIN A.K.M. AHMED,

Case No. CV 07-3576 GAF (FFM)

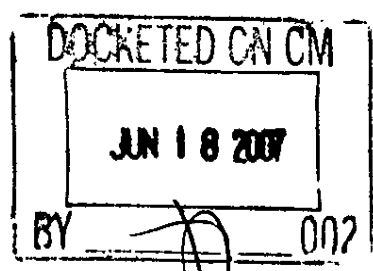
Petitioner,

**ORDER REGARDING PETITION FOR
HABEAS CORPUS**

v.

JAMES T. HAYES,

Respondent.



I.

INTRODUCTION & BACKGROUND

Petitioner Mohiuddin A.K.M. Ahmed seeks a writ of habeas corpus that would stay his deportation to Bangladesh, where he stands convicted in absentia of participating in the 1975 coup and assassination of the then-Prime Minister. Petitioner fears he will be executed virtually on arrival, and hopes to be removed instead to Canada, which has a policy against deporting individuals to countries where they face death sentences. Petitioner resisted removal by seeking asylum and relief under the Convention Against Torture, but this relief was denied by an

10

1 immigration judge, whose opinion was affirmed in by the Board of Immigration
2 Appeals and the Ninth Circuit. After the Ninth Circuit declined to rehear the matter en
3 banc, the government informed Petitioner it would remove him on June 2, 2007, and
4 he reacted by filing this Petition on the afternoon of Friday, June 1, 2007.

5 The Court temporarily stayed the deportation following receipt of the Petition,
6 and later held oral argument on June 5, 2007. Following oral argument and a review
7 of additional materials submitted by Petitioner, the Court understood Petitioner to
8 contend not only that the government's execution of his removal order was improper,
9 but also that on June 1, 2007, which was during Congress' Memorial Day recess, staff
10 members of the Department of Homeland Security ("DHS") had misled congressional
11 staff as to when Petitioner would be deported, thereby depriving him of the possibility
12 that Members could intervene on his behalf. Congressional intervention seemed
13 possible because Rep. Jim McDermott had introduced a private bill on Petitioner's
14 behalf, and the Court noted an internal DHS policy – that apparently allowed
15 Members of the House and Senate Judiciary Committees to stay deportation merely
16 by asking for a report on the matter.¹ The policy appeared to indicate that action
17 short of a formal legislative enactment, which obviously could not have benefitted
18 Petitioner during the Memorial Day recess, could have helped Petitioner had it not
19 been thwarted by a DHS misrepresentation.

20 Because the compressed schedule prevented the parties from fully briefing
21 the issues, the Court asked for additional submissions on various topics, with each
22 question designed to assess (1) whether any claimed misrepresentation from DHS to
23 congressional staff could have injured Petitioner; and (2) if so, whether the
24 misrepresentation gave rise to a cognizable claim that this Court had jurisdiction to
25 issue.

26 _____
27 ¹ The policy provides in relevant part: "Upon receipt of a request from the House or Senate
28 . . . [i]f the beneficiary appears to be an alien in the United States, a stay of deportation will
generally be authorized." I.N.S. Op. Instr. 107.1(c).

1 The parties have submitted further briefing, and participated in a second oral
 2 argument, both of which make clear that Plaintiff was not injured by any
 3 misrepresentation to Congress (even assuming one did occur). Moreover, even if
 4 Plaintiff was injured, the claim would now be moot because the Court's preliminary
 5 stays gave Congress the opportunity to take any action it otherwise would have but
 6 for a misrepresentation. Therefore, as discussed below, the Petition shall be **DENIED**
 7 **IN PART** and **DISMISSED IN PART**. It shall be **DENIED** to the extent Petitioner
 8 claims injury from some misrepresentation to Congress on the part of DHS, and
 9 **DISMISSED** to the extent he challenges the underlying execution of his removal
 10 order.

11 II.

12 DISCUSSION

13 **A. ANY DHS MISREPRESENTATION TO CONGRESS DID NOT INJURE PLAINTIFF, AND EVEN IF**
 14 **IT DID, ANY CLAIM TO REDRESS THAT INJURY WOULD BE MOOT**

15 1. SUBJECT MATTER JURISDICTION

16 The Supreme Court has held that even where cases can easily be resolved
 17 on the merits, a federal court may not do so without considering its subject matter
 18 jurisdiction. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101-02
 19 (1998). Thus, the Court must do so here.

20 Upon consideration, the Court concludes it has jurisdiction over Petitioner's
 21 misrepresentation theory pursuant to the habeas statute and the Administrative
 22 Procedures Act ("APA"), which allows judicial review of final agency actions "except to
 23 the extent that- (1) statutes preclude judicial review; or (2) agency action is
 24 committed to agency discretion by law." 5 U.S.C. § 701(a). Although the APA does
 25 not independently confer subject matter jurisdiction, it does waive the government's
 26 sovereign immunity, Gallo Cattle Co. v. U.S. Dep't of Agric., 159 F.3d 1194, 1198 (9th
 27 Cir. 1998), and thus allows review of agency actions in conjunction with the habeas
 28 statute, at least in some situations. Cf. Comejo-Barreto v. Seifert, 218 F.3d 1004,

1 1007 (9th Cir. 2000) (allowing an individual facing extradition to invoke jurisdiction
 2 under the APA in combination with habeas statutes because there were no statutory
 3 bars or matters committed to agency discretion). The Court recognizes that the
 4 extradition context addressed by the Cornejo-Barreto court is quite different because
 5 Congress has substantially curtailed courts' jurisdiction in immigration matters. But in
 6 the Court's view, Petitioner's misrepresentation theory does not "arise from the
 7 decision . . . to . . . execute removal orders" such that it would be jurisdictionally
 8 barred by section 242(g) of the INA, 8 U.S.C. § 1252(g). It also does not seek
 9 "judicial review of an order of removal" such that the exclusive forum for relief would
 10 be the Court of Appeals pursuant to 8 U.S.C. § 1252(a)(5). Rather, he contends here
 11 that *in addition to ordering his removal and executing that order*, DHS injured
 12 him by lying to Congress. It seems unlikely Congress intended to insulate DHS from
 13 judicial review of such conduct.

14 Petitioner's success ends here, however, because he cannot prevail on the
 15 merits.

16 2. PLAINTIFF PRESENTS VIRTUALLY NO EVIDENCE OF A MISREPRESENTATION

17 As the government notes, Petitioner presents only extraordinarily thin
 18 evidence that DHS misled congressional staffers concerning the timing of his
 19 removal. His evidence is a declaration from an associate of his lawyer that:

20 On Friday, June 1, 2007, Mr. Ahmed's counsel, Joseph Sandoval,
 21 informed me that he had been told by an ICE (U.S. Immigrations
 22 and Customs Enforcement) official that Mr. Ahmed's deportation to
 23 Bangladesh was scheduled for Saturday, June 2, 2007 at 11 pm. I
 24 asked Congressional offices to confirm whether or not this was
 25 true, and to intervene if possible to ensure that it did not occur until
 26 the U.S. House of Representatives Judiciary Committee had the
 27 opportunity to consider H.R. 2181 [the McDermott bill]. The
 28 answers that Congressional staff were given by their contacts in
 DHS . . . fell into these categories: (1) Mr. Ahmed would not be
 deported anytime soon because of the Congressional interest in his
 case; (2) *Mr. Ahmed could be deported at any moment*; (3) Mr.
 Ahmed would not be deported on June 2, but that could occur
 anytime after that; or (4) DHS would not indicate to anyone,
 including Congressional staff, when Mr. Ahmed might be deported
 due to security reasons.

1 (Greenwood Decl. ¶ 6 (emphasis added).)² As the emphasized text indicates, even
2 Petitioner himself acknowledges that some congressional staffers were told he could
3 be deported at any time, and others were told his departure was imminent.³ Because
4 both statements were true, Petitioner's own evidence demonstrates it is virtually
5 impossible that DHS misled congressional staffers at all, except on the remote
6 possibility that some were intentionally kept out of the loop.

7 Moreover, contrary to Petitioner's representation at the first oral argument, the
8 Court has received no declarations from staffers or Members of Congress indicating
9 they were misled. Equally unavailing is his contention at the second oral argument
10 that, because he asserts a claim under the Administrative Procedures Act, he need
11 not provide evidence before seeking temporary injunctive relief because he is entitled
12 to an "administrative record" of the DHS communications to Congress. Petitioner
13 cites no authority for this proposition, and the Court can locate none. Although review
14 of most APA questions is based on an administrative record, see 5 U.S.C. § 706, the
15 claim here arises not from a formal proceeding, but from informal conversations, for
16 which Petitioner does not claim a record even exists. Because Petitioner claims he
17 knows the general nature of DHS' statements, and because he concedes that
18 accurate information was presented both to congressional staff and directly to his
19 counsel, the Court is unpersuaded that an "administrative record" is required here.
20 The record is sufficient to indicate that there is virtually no possibility Congress was
21 misled.

22 //

23

24 ² Contrary to Petitioner's suggestion at the second oral argument, the McDermott Declaration
25 does not indicate that the Congressman was misled in any way, and indeed states he knew
removal was "imminent" as early as April 2007. (McDermott Decl. ¶ 1.)

26 ³ The government protests that the Greenwald Declaration contains hearsay, but the Court has
27 discretion to consider hearsay evidence on applications for a temporary restraining order. See
28 Republic of the Philippines v. Marcos, 862 F.2d 1355, 1363 (9th Cir. 1988) ("It was within the
discretion of the district court to accept this hearsay for purposes of deciding whether to issue
the preliminary injunction."). Therefore, the Court shall consider the hearsay evidence, but as
should be obvious to the parties, concludes it is of relatively little weight.

ORIGINAL
FILED

1 **3. ANY MISREPRESENTATION WAS HARMLESS**

2 Again, Petitioner’s theory rests on the contention that a misrepresentation
3 from DHS actually injured him by thwarting congressional action that otherwise could
4 have taken place during the Memorial Day recess, and specifically on June 1, 2007.
5 But the parties’ briefing makes clear this could not have occurred: even assuming
6 DHS wrongfully told congressional staff that Petitioner would not be deported, the
7 staff were powerless to take action in any event.

8 The staff lacked power for two reasons. First, the parties agree that as of
9 June 1, 2007, the House Judiciary Committee had not even adopted rules for how it
10 would request reports in connection with private immigration bills, and did not do so
11 until June 6, 2007. (Pet.’s Br. at 8; Def.’s Br. at 8; see also *id.* Ex. D [Rules of
12 Procedure and Statement of Policy for Private Immigration Bills, 110th Congress].)
13 Thus, the mechanism apparently available to Petitioner was actually merely illusory,
14 as Congress had not yet given itself the power to invoke it at the time of the claimed
15 misrepresentations.⁴

16 Moreover, under the rules that were eventually enacted, a request for a report
17 requires a vote on a motion made at a **formal** meeting of the House Subcommittee
18 on Immigration. (Pet.’s Br. at 9; Def.’s Br. at 8; *id.* Ex. D [Rules of Procedure and
19 Statement of Policy for Private Immigration Bills, 110th Congress].) Therefore,
20 because Congress was on recess at the time of the alleged misrepresentation, the
21 Immigration Subcommittee could not have acted in any event, even through staff that
22 were working during the holiday.

23
24 _____
25 ⁴ The Senate Judiciary Committee provided no better option, as its rules prohibit
26 communications “designed to defer deportation of beneficiaries of private bills who have entered
27 the United States as nonimmigrants.” (Def.’s Br., Ex. E ¶ 2.) The rule does have an exception
28 for when the beneficiary would suffer “unusual hardship,” but even that only applies when the
author of the bill has presented “full and complete documentation” of the request. Here,
Petitioner fell within the general rule because he entered on a nonimmigrant, visitor visa in 1996.
(Def.’s Opp. to Pet., Ex. A [Immigration Judge’s Ruling] at 1.) Petitioner does not claim to fall
within the exception, and offers no evidence that Rep. McDermott had or was able to quickly
provide the requisite documentation to the Senate committee.

SCANNED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. ANY INJURY IS NOW MOOT

Finally, even if a misrepresentation occurred, and even if it prevented congressional action that otherwise could have occurred, any injury that might have occurred has been mooted by this Court's stays for further briefing. Because the House Judiciary Committee enacted its rules on June 6, 2007, it has now had a full week in which to act – with full knowledge of Petitioner's predicament – but has declined to do so. Thus, Petitioner can hardly argue that any harm created by a misrepresentation remains ongoing.

The Court remains firm in this conclusion even after Petitioner's contention at the second oral argument that "Congress is like the Titanic" and takes so much time to act that any misrepresentation could continue to prejudice Petitioner even now by delaying relief. Petitioner cannot have it both ways. He cannot claim that Congress could have been nimble enough to have helped him at the eleventh hour but for a DHS lie, but at the same time too sluggish to help him with a week's notice.

Thus, for each reason set forth above, the Court concludes that Petitioner has no claim based on a misrepresentation from DHS to congressional staff.

B. THE PETITION IS BARRED TO THE EXTENT IT CHALLENGES DHS'S EXECUTION OF THE REMOVAL ORDER

Without his misrepresentation theory, Petitioner is left only with a challenge to DHS's execution of his removal order. But, of course, such a challenge lies beyond the Court's jurisdiction, as provided by section 242(g) of the INA:

Exclusive jurisdiction
Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, **or execute removal orders against any alien** under this chapter.

1 8 U.S.C. § 1252(g) (emphasis added). The Court has located no exception to this
2 rule that would encompass Petitioner's request here, and he points to none.
3 Therefore, the Court concludes it lacks jurisdiction over the remainder of the Petition.

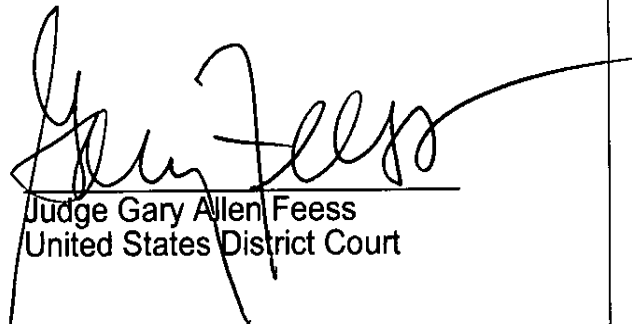
4 **III.**

5 **CONCLUSION**

6 For the foregoing reasons, the Petition is **DENIED IN PART** and **DISMISSED**
7 **IN PART**. It is **DENIED** to the extent Petitioner claims injury from some
8 misrepresentation to Congress on the part of DHS, and **DISMISSED** to the extent he
9 challenges the underlying execution of his removal order. The stay on removal
10 previously shall be **EXTENDED** one day so that Petitioner may seek relief from the
11 Ninth Circuit, and therefore shall expire at **5:00 p.m. Pacific Daylight Time on**
12 **Thursday, June 14, 2007.**

13
14 **IT IS SO ORDERED.**

15
16
17 **DATED: June 13, 2007**

18
19
20
21
22
23
24
25
26
27
28


Judge Gary Allen Fees
United States District Court