

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

WILFRED HAYNES	:	
	:	
Petitioner	:	
	:	
VS.	:	3:CV-05-0339
	:	(CHIEF JUDGE VANASKIE)
	:	
DEPARTMENT OF HOMELAND	:	
SECURITY	:	
	:	
Respondent	:	

MEMORANDUM

At issue in this habeas proceeding is whether the Bureau of Immigration and Customs Enforcement ("BICE") provided Petitioner with due process in its review of his continued custody. Wilfred Haynes, a native and citizen of Barbados, has been in the custody of the BICE since January 28, 2004. A removal decree against Haynes has been stayed by judicial order. This Court previously determined that the due process clause of the Fifth Amendment required that Haynes be afforded an opportunity to be heard on the question of conditional release pending judicial review of the removal decree. Haynes v. Dep't of Homeland Security, No. 3:CV-05-0339, 2005 WL 1606321, at \*1 (M.D. Pa. July 8, 2005). This Court also determined that the type of review procedures set forth in 8 C.F.R. § 241.4(i), if applied in good faith, would satisfy due process requirements. BICE was then afforded the opportunity to consider Petitioner for conditional release. Unfortunately, BICE failed to accord Petitioner the personal

interview contemplated by 8 C.F.R. § 241.4(i). Absent an opportunity to personally plead one's case for conditional release or address a decision maker's concerns, an alien has not been given the meaningful consideration that due process demands when liberty is at stake. Because BICE has abridged the requirements of the due process clause, a writ of habeas corpus compelling the conditional release of Petitioner will issue.

### **I. Background**

BICE commenced deportation proceedings against Haynes on April 21, 1995. BICE moved for his removal based on 1984 convictions in New York State for criminal possession of marijuana in the second degree<sup>1</sup> and criminal possession of a weapon in the third degree.<sup>2</sup> This removal proceeding was still pending when Haynes was convicted of possession of a controlled substance in the fifth degree in New York State on January 28, 2003. As a result, Haynes served one year in prison in New York State. BICE took custody of Haynes upon his release on January 28, 2004. Afterwards, BICE filed an additional charge of deportability based on this latest conviction.

An Immigration Judge ordered Haynes removed on May 12, 2004. Haynes then exhausted his administrative remedies with the Board of Immigration Appeals. Afterwards, he

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<sup>1</sup> Section 241(a)(2)(B)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(B)(i), allows the deportation of an alien convicted of a violation of any law of a State relating to a controlled substance.

<sup>2</sup> Haynes was convicted of carrying a loaded revolver. INA § 241(a)(2)(c), 8 U.S.C. § 1227(a)(2)(c), allows the deportation of an alien convicted of possessing a firearm.

filed a Petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2241.

(Haynes v. Dep't of Homeland Security, No. 3:CV-04-2142 (M.D. Pa.)) This Court granted a stay of deportation on September 28, 2004.<sup>3</sup>

Afterwards, BICE conducted a records review to determine whether Haynes should continue to be detained. This consisted primarily of a routine completion of a worksheet. It was unclear whether Haynes was given advance notice of the review. It was clear, however, that he did not receive an opportunity to appear before the decisionmakers to make a plea for release. The reviewers recommended that Haynes remain in custody because his "long and sometime violent criminal history."

In addressing Haynes's challenge to the validity of his continuing detention, this Court determined that Haynes had a "constitutional right to a meaningful individualized determination of his status pending adjudication of the validity of the removal order." Haynes v. Dep't of Homeland Security, No. 3:CV-05-0339, 2005 WL 1606321, at \*1 (M.D. Pa. July 8, 2005). This Court further determined that the procedures set forth in 8 C.F.R. § 241.4(i) would satisfy the

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<sup>3</sup> The stay was still in effect on June 29, 2005, when the challenge to the validity of the removal order was transferred to the United States Court of Appeals for the Third Circuit pursuant to the Real ID Act.

demands of due process.<sup>4</sup> *Id.* at \*5. Under § 241.4(i), an alien is entitled to a records review<sup>5</sup> by a review panel, and also a personal interview<sup>6</sup> if the review panel does not recommend release or the Headquarters Post Order Detention Unit (“HQPDU”) Director does not accept a review panel’s recommendation of release. BICE was afforded sixty days from July 8, 2005, to

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<sup>4</sup> The process set forth in § 241.4(i) conforms with procedures our Court of Appeals found to satisfy due process in Ngo v. INS, 192 F.3d 390, 398-99 (3d Cir. 1999).

<sup>5</sup> 8 C.F.R. § 241.4(i)(2), states:

Records review. Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefor.

<sup>6</sup> 8 C.F.R. § 241.4(i)(3), states:

Personal interview.

(i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

provide proper process. The July 8<sup>th</sup> Order further provided that if BICE failed to provide the type of process set forth in 8 C.F.R. § 241.4(i), Petitioner was to be released, subject to pertinent conditions of supervision. BICE was directed to file a status report by August 31, 2005.

BICE filed its report as required. (Dkt. Entry 10.) Also, Plaintiff, contending that BICE had not provided the requisite opportunity for a personal interview, moved for release. (Dkt. Entry 9.)

On September 6, 2005, BICE filed a Notice of Appeal from the July 8, 2005 Order. (Dkt. Entry 11.) On October 3, 2005, Petitioner advised the Court that BICE had withdrawn its notice of appeal on September 22, 2005, and requested that this Court "expedite" its ruling on his motion for release from confinement. (Dkt. Entry 15.)

As indicated in the Post Order Custody Review Worksheet submitted as Exhibit "B" to BICE's August 31, 2005 Status Report, BICE once again conducted only a records review to determine whether Haynes should continue to be detained. (Resp't Status Report, Ex. B at 3.) This time, however, the government clearly did provide Petitioner with prior notice of the review and an opportunity to submit records. (Resp't Status Report, Ex. A.) The worksheet noted that Petitioner had a place to live in the United States, prospective employment, vocational training, and evidence of rehabilitation courses attended in prison not previously noted on the previous custody review worksheet. (Resp't Status Report, Ex. B. at 5.)

Nonetheless, the reviewing officers recommended Petitioner remain in custody. (Resp't Status Report, Ex. B at 6.) Review officer Michael T. Fairless noted the subject's "long criminal history" in his comments, but erased his previous comment of a "sometime violent" criminal history.<sup>7</sup> (Resp't Status Report, Ex. B at 6.) The second review officer, Kelly Mitra, observed that Petitioner had a "long history of drug, burglary and weapons violations" in a separate assessment. (Resp't Status Report, Ex. B at 6.) The BICE Deciding Officer accepted the recommendation of the reviewing officers. Petitioner was not offered a personal interview. (Resp't Status Report, Ex. B at 3.)

## **II. Discussion**

This Court ordered BICE to provide Petitioner with the type of meaningful review contemplated by 8 C.F.R. § 241.4(i). This requires (1) a review panel to provide (2) a records review, and if release is not recommended, (3) a personal interview. 8 C.F.R. § 241.4(i)(1)-(3).

A valid review panel consists of two-members. § 241.4(i)(1). Any recommendation by the two-member review panel must be unanimous. Id. In this case, the review consisted of two

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<sup>7</sup> As indicated in the worksheet, Petitioner was convicted in 1984 for criminal possession of a weapon, third degree, and criminal possession of marijuana in the second degree, for which he was sentenced to 5 years probation. In 1987, he was convicted of unauthorized use of a vehicle, and sentenced to 60 days imprisonment. He was also sentenced to 30 days imprisonment in 1987 on a plea of guilty to criminal possession of stolen property. He received a conditional discharge in 1990 on a charge of criminal possession of a controlled substance, seventh degree. In 1992, Petitioner was sentenced to 18 months to 3 years for unauthorized use of a vehicle. In January of 2002, Petitioner was sentenced to 10 days for possession of marijuana. Later in 2002, Petitioner was sentenced to 2 to 4 years for criminal possession of a controlled substance.

"Reviewing Officers," Michael T. Fairless and Kelly Mitra. Officers Fairless and Mitra agreed that Haynes should remain in custody. Thus, BICE adequately followed the provisions for a review panel.

Initially, a review panel "shall review the alien's records." § 241.4(i)(2). The review by BICE involved the completion of a Post Order Custody Review Worksheet based on the Petitioner's records. Petitioner received prior notice of this review. In addition, BICE corrected information in Haynes's worksheet from his previous worksheet, thus suggesting that it provided more than just a cursory review of his records. As a result, BICE correctly followed the procedures for a records review, as contemplated by § 241.4(i)(2).<sup>8</sup>

Nonetheless, BICE failed to afford due process to Haynes by not offering him a personal interview. Pursuant to § 241.4(i)(3), a review panel "shall personally interview the detainee" if an alien is not recommended for release.<sup>9</sup> Indeed, the standard Post Order Custody Review Worksheet used by the government includes fields for recording interview details. (Resp't Status Report, Ex. B at 3.) However, the reviewing officers did not offer Haynes a personal interview. This is a "rudimentary element of due process" under the review scheme. Oyedeji v. Ashcroft, 332 F. Supp. 2d 747, 754 (M.D. Pa. 2004). A personal interview affords an alien an

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<sup>8</sup> The issue before this Court is whether the government has provided due process to Haynes. Whether the review panel made an appropriate recommendation based on the records before it is not a question for this Court at this time.

<sup>9</sup> Petitioner may also be "accompanied during the interview by a person of his or her own choice." 8 C.F.R. § 241.4(i)(3).

opportunity to plead his case or explain entries in documents. Id. Moreover, a personal meeting with the detainee compels the review board to appreciate the significance of their decision in a way that completing a standardized worksheet cannot. This helps ensure that custody determinations do not become mechanical exercises. See Ngo v. INS, 192 F.3d 390, 399 (3d Cir. 1999).

In this case, the determinations by the reviewing officers were based primarily on the Petitioner's criminal history. In Ngo, our Court of Appeals cautioned that "[t]o presume dangerousness to the community and risk of flight based solely on [an alien's] past record does not satisfy due process." Ngo, 192 F.3d at 398-99. A personal interview provides the best opportunity for the review board to assess whether a past criminal remains a risk to the community. By not providing Haynes with this crucial opportunity to plead his case, BICE did not provide Haynes due process.

### **III. Conclusion**

Haynes has been detained for more than a year and a half while pursuing his legal remedies to avoid removal from the United States. The United States Supreme Court has clearly established that an alien is within the protection of the Fifth Amendment. See Tineo v. Ashcroft, 350 F.3d 382, 398 (3d Cir. 2003). Petitioner is entitled to the type of meaningful review contemplated by 8 C.F.R. § 241.4(i). This includes the opportunity for a personal interview where he could present his case for conditional release. The government did not

provide Haynes this opportunity, and habeas corpus relief is therefore warranted. An appropriate Order follows.

**s/ Thomas I. Vanaskie**  
Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania

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	:	
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ORDER

NOW, THIS 4th DAY OF OCTOBER, 2005, for the reasons set forth in the foregoing Memorandum, IT IS HEREBY ORDERED THAT:

1. The Petition for Writ of Habeas Corpus is **GRANTED**. Respondent shall release Petitioner forthwith, subject to reasonable conditions of supervision as determined in accordance with applicable law and regulations.
2. Within twenty (20) days from the date of this Order, Respondent shall report to this Court the fact of Petitioner's release and any conditions imposed on such release.

s/ Thomas I. Vanaskie  
Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania