

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2003

5 (Argued: October 28, 2003

Decided: December 9, 2003
6 Errata Filed: January 7, 2004)

7 Docket No. 03-2126

8
9 FAZILA KHAN,

10 Petitioner-Appellant,

11 - v. -

12 JOHN ASHCROFT, Attorney General of the United States; DORIS MEISSNER,
13 Commissioner, Immigration and Naturalization Service; EDWARD MCELROY,
14 New York District Director, Immigration and Naturalization Service;
15 IMMIGRATION AND NATURALIZATION SERVICE; U.S. DEPARTMENT
16 OF JUSTICE,

17 Respondents-Appellees.

18
19 Before: FEINBERG, KEARSE, and RAGGI, Circuit Judges.

20 Appeal from a judgment of the United States District Court for the Eastern District of
21 New York, Edward R. Korman, Chief Judge, dismissing habeas corpus petition challenging
22 constitutionality of AEDPA provision that eliminated Attorney General's discretionary authority to
23 grant waiver of deportation to an alien convicted of an aggravated felony, see Pub. L. 104-132,
24 § 440(d), 110 Stat. 1214, 1277 (1996), as applied to an alien whose offense conduct predated
25 AEDPA's effective date.

26 Affirmed.

27 MATTHEW L. GUADAGNO, New York, New York (Kerry
28 William Bretz, Jules E. Coven, Bretz & Coven, New York,
29 New York, on the brief), for Petitioner-Appellant.

30 KRISTEN CHAPMAN, Assistant United States Attorney,
31 Brooklyn, New York (Roslynn R. Mauskopf, United States
32 Attorney for the Eastern District of New York, Varuni Nelson,
33 Assistant United States Attorney, Brooklyn, New York, on the

1 brief), for Respondents-Appellees.

2 KEARSE, Circuit Judge:

3 Petitioner Fazila Khan appeals from a judgment of the United States District Court for
4 the Eastern District of New York, Edward R. Korman, Chief Judge, dismissing her petition for a writ
5 of habeas corpus challenging the constitutionality of § 440(d) of the Antiterrorism and Effective Death
6 Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, 1277 (1996), which bars the United States
7 Attorney General from granting a discretionary waiver of deportation under former § 212(c) of the
8 Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1182(c) (1994) (repealed by the Illegal
9 Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, Div.
10 C, § 304(b), 110 Stat. 3009-546, 3009-597), to any alien who is removable from the United States by
11 reason of her conviction of an aggravated felony. The petition alleged that AEDPA § 440(d) cannot
12 constitutionally be applied to Khan, who pleaded guilty after the effective date of AEDPA, because
13 her offense conduct predated AEDPA's effective date. The district court dismissed the petition, citing
14 this Court's decision in Mohammed v. Reno, 309 F.3d 95 (2d Cir. 2002) ("Mohammed"). On appeal,
15 Khan contends principally (a) that the panel that decided Mohammed did not intend its decision to be
16 binding in other cases, and (b) that Domond v. INS, 244 F.3d 81 (2d Cir. 2001) ("Domond"), relied
17 on by Mohammed, was implicitly overruled by the Supreme Court in INS v. St. Cyr, 533 U.S. 289
18 (2001) ("St. Cyr II"). For the reasons that follow, we reject all of Khan's contentions and affirm the
19 judgment of the district court.

20 In November 1996, Khan, a citizen of Guyana who had been admitted to the United
21 States as a permanent resident alien, pleaded guilty to using a telephone to facilitate the distribution
22 of heroin, in violation of 21 U.S.C. §§ 843(b) and (d), an aggravated felony within the meaning of the
23 INA, see 8 U.S.C. § 1101(a)(43)(B) (defining "aggravated felony" to include any "drug trafficking
24 crime (as defined in section 924(c) of title 18)"); 18 U.S.C. § 924(c)(2) (defining "drug trafficking
25 crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et

1 seq.)"). As a result of that conviction, Khan was found removable from the United States, see 8
2 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after
3 admission is deportable."). Although former INA § 212(c) gave the Attorney General discretion to
4 waive deportation for certain permanent resident aliens, Khan was ruled ineligible for that relief in
5 light of AEDPA § 440(d), which made § 212(c) discretionary relief unavailable to any alien who "is
6 deportable by reason of having committed any criminal offense covered in [8 U.S.C.
7 § 1227(a)(2)(A)(iii)]." Pub. L. 104-132, § 440(d), 110 Stat. at 1277.

8 Khan's present habeas petition asserted, and she argues on this appeal, that AEDPA's
9 prohibition against discretionary relief under former INA § 212(c) cannot constitutionally be applied
10 to her because her criminal conduct occurred prior to AEDPA's April 24, 1996 effective date. We
11 hold that this argument is foreclosed by this Court's precedents. See, e.g., Mohammed, 309 F.3d at
12 102-03; Domond, 244 F.3d at 85-86.

13 In Domond, this Court held that the application of AEDPA § 440(d) to an alien whose
14 offense conduct occurred prior to AEDPA's effective date is not impermissibly retroactive where the
15 alien pleaded guilty after AEDPA's effective date. See 244 F.3d at 85-86. Using the analytical
16 framework set forth in Landgraf v. USI Film Products, 511 U.S. 244 (1994), we inquired, first,
17 whether Congress had expressed its intent as to whether AEDPA § 440(d) was to apply to an alien
18 whose criminal conduct predated AEDPA's enactment but whose conviction followed AEDPA's
19 effective date, and, second, if there was no clear expression of intent, whether the section had a
20 retroactive effect. See Domond, 244 F.3d at 84-85. We concluded that Congress's intent as to
21 retrospectivity was ambiguous. See id. at 85. We then concluded that § 440(d) imposed no new legal
22 consequences on such an alien, given that "[i]t is the conviction, not the underlying criminal act, that
23 triggers the disqualification from § 212(c) relief," id. at 85-86 (quoting St. Cyr v. INS, 229 F.3d 406,
24 418 (2d Cir. 2000) ("St. Cyr I") (other internal quotation marks omitted), aff'd, St. Cyr II, 533 U.S. 289
25 (2001)), and that the section thus did not have a retroactive effect. Accordingly, application of
26 § 440(d) to Domond did not violate his rights under the Due Process or Ex Post Facto Clauses.

1 Khan contends that the Supreme Court decision in St. Cyr II implicitly overruled our
2 decision in Domond. We disagree. In St. Cyr II, which affirmed this Court's decision in St. Cyr I, the
3 alien whose conduct constituted an aggravated felony had entered his plea of guilty prior to the
4 enactment of AEDPA and IIRIRA. In St. Cyr I, we therefore concluded that the application of
5 AEDPA § 440(d) to him would have a retroactive effect. See 229 F.3d at 418. Further, we reasoned
6 that, in light of "the dramatic impact removal would have on a legal resident's life," a lawful
7 permanent resident would likely elect to concede guilt to a crime rendering him removable "only . . . in
8 order to be eligible to apply for relief from removal." Id. at 419. As the retroactive application of
9 § 440(d) to an alien who had pleaded guilty prior to its enactment would upset his settled expectations,
10 we concluded that that application was impermissible. In affirming this ruling, the Supreme Court
11 stated that depriving an alien of the benefits of a plea entered into at a time when § 212(c)
12 discretionary relief was available would be contrary to "familiar considerations of fair notice,
13 reasonable reliance, and settled expectations." St. Cyr II, 533 U.S. at 323 (quoting Landgraf, 511 U.S.
14 at 270). The St. Cyr II Court concluded that "§ 212(c) relief remains available for aliens . . . whose
15 convictions were obtained through plea agreements and who, notwithstanding those convictions,
16 would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533
17 U.S. at 326 (emphasis added).

18 We see nothing in St. Cyr II that detracts from the result or reasoning of Domond. This
19 Court's decision in St. Cyr I had been issued shortly before the oral argument in Domond, and in
20 deciding the latter case, we noted the difference in the timing of the aliens' guilty pleas in the two
21 cases. We expressly applied the principle noted in St. Cyr I, i.e., that "[i]t is the conviction, not the
22 underlying criminal act, that triggers the disqualification from § 212(c) relief," Domond, 244 F.3d at
23 85-86 (quoting St. Cyr I, 229 F.3d at 418) (other internal quotation marks omitted). But whereas in
24 St. Cyr I, the alien's plea of guilty prior to the passage of AEDPA § 440(d) could have been entered
25 in reliance on the possibility of being granted a § 212(c) discretionary waiver of deportation, in
26 Domond we noted that, in contrast, "it cannot reasonably be argued that aliens committed crimes in

1 reliance on" such a possibility. Domond, 244 F.3d at 86. Thus, guided by the "'familiar considerations
2 of fair notice, reasonable reliance, and settled expectations,'" id. at 85 (quoting Landgraf, 511 U.S. at
3 270), we concluded in Domond that the application of AEDPA § 440(d) to an alien who pleaded guilty
4 after that section became effective is not impermissible, see 244 F.3d at 86-87.

5 In sum, the same considerations and principle that led us to reach a different decision
6 in Domond than we had reached in St. Cyr I lead us to conclude that Domond remains good law in
7 the wake of the Supreme Court's decision in St. Cyr II. Given that St. Cyr II, like Domond, evaluated
8 aliens' expectations in light of "the time of their plea under the law then in effect," 533 U.S. at 326,
9 we see no basis for concluding that St. Cyr II overruled Domond.

10 Indeed, this Court has repeatedly followed Domond in the wake of St. Cyr II. See, e.g.,
11 Beharry v. Ashcroft, 329 F.3d 51, 63 (2d Cir. 2003) (noting that even if the petitioner had properly
12 exhausted his administrative remedies, we would affirm the denial of his habeas petition on the basis
13 of Domond, as "Domond remains good law"); Mohammed, 309 F.3d 102-03.

14 In Mohammed, we expressly explored "the continued validity, in light of . . . St. Cyr
15 [II], 533 U.S. 289, . . . of our decision in Domond." Mohammed, 309 F.3d at 97. We observed that
16 Domond had

17 explicitly noted the Supreme Court's instruction in Landgraf that "'reasonable
18 reliance'" and "'settled expectations'" provide "guidance in determining
19 retroactive effect," Domond, 244 F.3d at 85 (quoting Landgraf, 511 U.S. at
20 270, 114 S.Ct. 1483), and concluded, as we had previously observed in St.
21 Cyr [I], 229 F.3d 406 (2d Cir. 2000), aff'd, 533 U.S. 289, 121 S.Ct. 2271, 150
22 L.Ed.2d 347 (2001), that "'[i]t would border on the absurd'" to suppose that an
23 alien might have been deterred from committing a crime had he known that,
24 in addition to the prospect of imprisonment and deportation following release,
25 he could not ask for discretionary relief from deportation. Domond, 244 F.3d
26 at 84 (quoting St. Cyr [I], 229 F.3d at 418).

27 Mohammed, 309 F.3d at 102. We noted that the Supreme Court in St. Cyr II simply affirmed our
28 ruling in St. Cyr I that aliens who pleaded guilty prior to the effective date of AEDPA had reasonable
29 expectations with respect to continued eligibility for discretionary § 212(c) relief, and that the St.
30 Cyr II Court had not disturbed Domond's holding that those were expectations that could not
31 reasonably be shared by aliens who pleaded guilty after AEDPA became effective. See Mohammed,

1 309 F.3d at 102-03.

2 Accordingly, in Mohammed, we lifted a stay of removal that had been granted on the
3 premise that the elimination of § 212(c) discretionary relief for aggravated felons had an
4 impermissibly retroactive effect on an alien whose plea of guilty to an aggravated felony was entered
5 after the effective date of AEDPA, because we concluded that, in light of the continued vitality of
6 Domond, Mohammed had no substantial likelihood of success on appeal.

7 In the course of our discussion, we stated that "at least for purposes of considering the
8 pending motion to lift the stay, . . . Domond remains binding authority in this Circuit," Mohammed,
9 309 F.3d at 10; and Khan contends that the words "at least for purposes of considering the pending
10 motion to lift the stay" indicate that the Mohammed panel "did not intend for other courts to be bound
11 by its decision" (Khan brief on appeal at 13). We reject the contention that the Mohammed panel's
12 view of Domond was somehow intended to be less than precedential. The question of Domond's
13 continued validity was essential to an evaluation of Mohammed's entitlement to a stay. We considered
14 "the gravity of the injury to the alien if a stay is denied," 309 F.3d at 102, and we ruled that in order
15 to retain his stay, Mohammed need not show more than a 50 percent chance of success on appeal, see
16 id. We concluded that he simply could not meet that standard in light of Domond. The reasoning in
17 Mohammed, which reaffirmed the result and rationale of Domond in refusing to lift the stay of
18 removal, is equally applicable in the instant case, where the challenge to a finding of ineligibility for
19 § 212(c) relief is made in a petition for habeas corpus. Indeed, Mohammed has been relied on by this
20 Court in addressing the merits of petitions for habeas corpus. See, e.g., Rankine v. Reno, 319 F.3d
21 93, 100-01 (2d Cir.) (noting that the impermissible retroactive effect of § 440(d) identified by the
22 Supreme Court in St. Cyr II stemmed from "the alien's reliance on the prior availability of
23 discretionary relief in deciding whether to plead guilty" (quoting Mohammed, 309 F.3d at 103)), cert.
24 denied, 124 S. Ct. 287 (2003).

25 Finally, we note that in a number of appeals in which the appellants have made a
26 retroactivity argument similar to Khan's, this Court has rejected the argument summarily on the basis

1 of Domond. See, e.g., Carr v. Reno, No. 01-2270, 2002 WL 24144 (2d Cir. Jan. 4, 2002) (affirming
2 denial of habeas, citing Domond), reh'g denied (2d Cir. Aug. 27, 2003); Hibbert v. Ashcroft, No.
3 02-2281, 2003 WL 21466746 (2d Cir. June 20, 2003) (same). Although these summary affirmances
4 are not themselves precedential authority, see Rules of the United States Court of Appeals for the
5 Second Circuit, § 0.23, they clearly acknowledge the continued precedential effect of Domond.

6 In sum, our decision in Domond remains good law. AEDPA § 440(d) is not
7 impermissibly retroactive as applied to aliens such as Khan who pleaded guilty following AEDPA's
8 effective date, even if the criminal conduct underlying their convictions took place before AEDPA's
9 effective date.

10 We have considered all of Khan's contentions on this appeal and have found them to
11 be without merit. The judgment of the district court is affirmed.