U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

August 24, 2000

BY HAND DELIVERY

Patricia Mack Bryan, Esq.
Senate Legal Counsel
Senate Hart Office Building
Room 642
Washington, D.C. 20510-7250

Re: Sergey Starobinets v. Joseph R. Greene et al., No. 00-B-211 (D. Colo.)

Dear Ms. Bryan:

I am writing to inform you that I have determined not to appeal the decision in the above case to the United States Court of Appeals for the Tenth Circuit. See 2 U.S.C. 288k(b).

This case involves the mandatory detention, pending removal proceedings, of an alien, Sergey Starobinets, who is a lawful permanent resident of the United States. The Immigration and Naturalization Service (INS) initiated removal proceedings against Mr. Starobinets on January 10, 2000. He is currently charged with being removable under 8 U.S.C. 1227(a)(2)(B)(i), as an alien "convicted of a violation of * * * any law or regulation of a State * * * relating to a controlled substance * * *, other than a single offense involving possession for one's own use of 30 grams or less of marijuana." That charge is based on his conviction on two occasions of possession of less than one ounce of marijuana, in violation of a municipal code (Aurora Municipal Code § 94-218), for which he was fined a total of $222.

Mr. Starobinets was also charged by the INS with being removable under 8 U.S.C. 1227(a)(2)(A)(iii), as an alien who was convicted of an aggravated felony, and under 8 U.S.C. 1227(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude within five years after admission for which a sentence of one year or longer may be imposed. It is now unclear, however, that he is actually removable on those additional grounds.

The fact that Mr. Starobinets's ground of removability is listed in Section 1227(a)(2)(B) makes him subject to mandatory detention by the INS under 8 U.S.C. 1226(c) (except under narrow circumstances not present here) until entry of a final order of removal -- in other words, during the pendency of his removal proceedings before an immigration judge and any appeal to the Board of Immigration Appeals. Accordingly, on January 27, 2000, an immigration judge denied Mr. Starobinets's request for release on bond.

Mr. Starobinets then filed an action in the United States District Court for the District of Colorado to enjoin the INS from continuing to detain him without an individualized bond determination. On February 2, 2000, the district court entered an order directing the INS to provide Mr. Starobinets with "an individualized bond hearing in which [his] flight risk and risk to the community must be considered." The district court's order was based on an earlier district court ruling in Martinez v. Greene, 28 F. Supp. 2d 1275 (D. Colo. 1998), which held unconstitutional the provision in 8 U.S.C. 1226(c) for mandatory detention of specified categories of aliens during the pendency of removal proceedings. On February 4, 2000, pursuant to the district court's order, an immigration judge held an administrative bond hearing, and the immigration judge ordered Mr. Starobinets released on bond in the amount of $8,500. Mr. Starobinets posted bond shortly thereafter and remains free on bond.

A hearing before an immigration judge on the merits of the removal charges against Mr. Starobinets is scheduled for October 20, 2000. The INS has requested that the hearing be expedited. Mr. Starobinets is seeking to have the charge of removability dismissed on the ground that his convictions for marijuana possession under a municipal ordinance do not constitute a violation of a State law or regulation relating to a controlled substance, within the meaning of Section 1227(a)(2)(B)(i).

The district court order granting an individualized bond hearing in this case is not published and does not establish precedent that will be binding in any other case. Although I have decided not to pursue an appeal in the circumstances of this particular case, the Department is defending the constitutionality of Section 1226(c) in numerous cases in district courts and courts of appeals. The Department appealed the ruling in the earlier Martinez case to the Tenth Circuit, but that appeal ultimately was dismissed by the court of appeals because the case became moot. The Department also has just filed a brief in the Second Circuit in which we are appealing from a district court order invalidating, as a violation of procedural due process, the mandatory detention, under 8 U.S.C. 1226(c), of a lawful permanent resident who is charged with being removable as an inadmissible alien convicted of an aggravated felony (bank fraud). Zgombic v. Farquharson, No. 00-6165. A government appeal from another order holding unconstitutional the mandatory detention, under 8 U.S.C. 1226(c), of an aggravated felon is pending in the Ninth Circuit court of appeals. Hyung Joon Kim v. Schiltgen, No. 99-17373. The Department has successfully defended the constitutionality of Section 1226(c) in the Seventh

Circuit. See Parra v. Perryman, 172 F.3d 954 (1999). Finally, the Department of Justice is currently reviewing two other cases arising out of the District of Colorado involving mandatory detention under 8 U.S.C. 1226(c) that would be appealable to the Tenth Circuit.

A copy of the district court's order is enclosed. The government's opening brief is currently due on August 24, 2000, but we have requested a 20-day extension of time from the court of appeals. We intend to withdraw our notice of appeal on the date that the opening brief will be due. Please let me know if I can be of further assistance in this matter.

Sincerely,

Seth P. Waxman by FJW

Seth P. Waxman
Solicitor General

Enclosure