

Office of the Attorney General

Washington, D.C. 20530

April 21, 1997

Thomas B. Griffith
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Room 642
Washington, D.C. 20510-7250

Dear Mr. Griffith:

This letter is to inform you that the Department of Justice has determined not to continue with its appeal of the district court's orders in Theresa St. John v. Edward McElroy, No. 95 Cv. 9810 (S.D.N.Y.). The district court in this case held that, as applied to a returning lawful permanent resident alien who retained due process rights despite her absence from the country, the prohibition in former Section 236(e) of the Immigration and Nationality Act (INA), 8 U.S.C. 1226(e) (1994), against parole pending exclusion proceedings, was unconstitutional. The district court therefore ordered that the alien be afforded a parole hearing before an immigration judge.

After the district court ruling, however, the Board of Immigration Appeals (BIA) held that St. John was not excludable under the INA. The BIA therefore terminated the exclusion proceedings, and the Immigration and Naturalization Service (INS) released St. John after the BIA denied the INS's request for a stay of its ruling. As a result, the case is moot as a practical matter, and pursuit of the appeal would have no meaningful effect.

Factual Background

Theresa St. John, who was 20 years old at the time of the district court ruling, is a citizen of Jamaica. She entered the United States as a lawful permanent resident on June 29, 1990, when she was 14 years old. She has two young children, one of whom is a United States citizen and is seriously ill, suffering from sickle cell anemia. St. John's mother and two of her siblings are lawful permanent resident aliens.

When St. John was 17 years old, she was detained in Bermuda and charged with importing six ounces of cocaine into that country. She was convicted on the charge and sentenced to five years' imprisonment in Bermuda. After completion of approximately two years' imprisonment, St. John persuaded Bermudian authorities to remit her sentence and to permit her to return to her children. St. John was released from prison on October 6, 1995, and she was deported from Bermuda that same day. St. John returned to the United States, where she previously had been living with her family.

Upon her arrival via airplane in the United States, the INS detained her on the ground that she could be permanently excluded from the United States due to her Bermuda conviction, which involved illegal trafficking in a controlled substance. See 8 U.S.C. 1182(a)(2)(A)(i) & (a)(2)(C). While in INS custody, on October 18, 1995, St. John attempted to hang herself. The INS hospitalized her and gave her anti-depressant medication. Her attending physician attributed her condition to the strain of her prolonged separation from her daughter. St. John again tried to commit suicide on January 5, 1996, by drinking bleach. She was again hospitalized and treated.

Procedural background

St. John had requested, pursuant to 8 U.S.C. 1182(d)(5)(A), release from INS detention and parole into the United States pending her exclusion proceedings. The INS district director denied the request. St. John then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, contending that she had been denied due process because she had not been afforded a parole hearing and because the district director had abused his discretion in finding that she did not suffer from a serious medical condition justifying parole. The INS contended that St. John was not eligible for parole by virtue of Section 236(e) of the INA, 8 U.S.C. 1226(e), because she had been convicted of an aggravated felony. The district court held that St. John was entitled to a parole hearing because, although she was in exclusion proceedings, she was a lawful permanent resident who had not intended to abandon her United States residency and therefore was entitled to due process protections beyond those afforded other aliens in exclusion proceedings. The court also noted that it was unclear whether St. John's conviction at the age of 17 qualified as an aggravated felony that would render her ineligible for parole under Section 236(e).

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In response to the district court's ruling, the INS district director conducted a parole hearing and again, on December 29, 1995, ruled that St. John should not be paroled, rejecting her claim that she suffered from a serious medical condition. In a February 5, 1996, opinion, however, the district court concluded that the district director had failed to discuss St. John's medical records, which included treatment notes warning of possible future suicide attempts and discussing her depression dating back to being raped when she was 13 years old. The court granted St. John's request for access to her medical records and for an independent medical examination. In opinions dated March 4 and 7, 1996, as amended on May 6, 1996, the court remanded the case for a second parole hearing before an immigration judge and denied a stay pending appeal. The court held that the first parole hearing did not meet due process standards because it was not based on an individualized assessment of whether St. John posed a threat to the community or a flight risk. In the course of its opinion, the court held that, as applied to returning lawful permanent resident aliens who retain due process rights despite their absence from the country, the absolute prohibition in Section 236(e) of the INA against parole pending exclusion proceedings was unconstitutional.

Meanwhile, St. John's exclusion proceedings also went forward. On December 1, 1995, an immigration judge held a hearing and excluded St. John from the United States based on her Bermuda conviction. On March 8, 1996, however, the BIA sustained St. John's appeal, concluding that she was not excludable based on her Bermuda conviction because she would not have been subject to federal prosecution in the United States for that offense. Rather, she would have been subject to juvenile offender treatment under applicable federal law, and the offense therefore would not have resulted in a controlled substance conviction within the meaning of 8 U.S.C. 1182(a)(2)(A)(i)(II). The BIA also ruled that, because St. John's sole offense would have subjected her to juvenile offender treatment in the United States, she could not be excluded as a trafficker in controlled substances under 8 U.S.C. 1182(a)(2)(C).

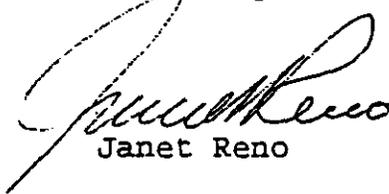
In light of the BIA ruling, the exclusion proceedings were terminated and St. John was released. The district court declined to dismiss the habeas proceeding as moot, however, because the INS had filed a motion with the BIA for reconsideration. Although that motion is still pending before the BIA, the district court's prior parole ruling in this habeas corpus proceeding is moot as a practical matter because the INS has no current basis to detain St. John. Thus, the Department of Justice has concluded that a full presentation of an argument on the merits concerning the availability of a parole hearing pending exclusion proceedings for a returning lawful permanent

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resident is not warranted at the appellate level at this time in the unique circumstances of this case. Accordingly, the Department will withdraw its appeal on April 30, 1997, the date on which the government's merits brief would have been due.

In accordance with the practice of the Department, I am informing the Congress that the Department of Justice will not appeal the order in the St. John case.

Sincerely,



Janet Reno

Enclosures

cc: Geraldine R. Gennet
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