UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YUSUF ALI ALI, et al.,

Petitioners,

v.

JOHN ASHCROFT, et al.,

Respondents.

No. C02-2304P

ORDER GRANTING PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER

Petitioners move for a temporary restraining order ("TRO") enjoining the Immigration and Naturalization Service ("INS") from removing Somali natives or nationals in the United States to Somalia. (Dkt. No. 9.) On December 9, 2002, the Court heard oral argument and considered briefing submitted by both parties. Having weighed the moving parties' probability of success on the merits and possibility of irreparable injury, the Court GRANTS Petitioners' motion for a TRO. Pending a hearing on the merits, Respondent is ORDERED not to remove the following nationwide class of persons to Somalia: "All persons in the United States who are subject to orders of removal, expedited removal, deportation or exclusion to Somalia that are either final or that one or more of Respondents believe to be final."

ANALYSIS

In requesting a TRO, Petitioners meet their burden by demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. Textile

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Unlimited, Inc. v. A..BMH Co., Inc., 240 F.3d 781, 786 (9th Cir. 2001); Mayo v. United States Gov. Printing Off., 839 F. Supp 697, 699 (N.D. Cal. 1992), aff'd, 9 F.3d 1450 (9th Cir. 1993). These two formulations are not separate tests but represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987).

1. Harm

Petitioners have made a strong showing of serious harm, and the Court concludes that the balance of hardships tips sharply in their favor. The Government, by its own submission, demonstrates that Somalia is a war-torn country under strife with no government in control. Some of the Petitioners left Somalia many years ago, have no family there, and plead that they fear significant harm or death on return. Respondents claim that since 9/11 the situation has deteriorated in Somalia, and that terrorists are "indicated to be present" in the country. (Resp. at 3.) The Court considers this to weigh in favor of Petitioners' interest in not being returned to Somalia. There is no dispute that Petitioners' removal to Somalia is imminent. In oral argument, the Government declared that it would not delay removal beyond the date of oral argument on the TRO. Respondents, on the other hand, argue their harm is the inability to deport persons with a final order of removal and the expense of detaining these persons. The balance of harms strongly weighs in Petitioners' favor.

2. Merits

Although there is no clear precedent from the Ninth Circuit on this precise issue, courts that have considered the matter credit Petitioners' arguments. The single case directly addressing this issue on the merits ruled that under the controlling statute, 8 U.S.C. § 1231(b), the United States cannot remove a petitioner to a country whose government does not agree to accept him or her. Jama v. INS, No. 01-1172, 2002 WL 507046 *6-7 (D. Minn. filed March 31, 2002) (Petitioner not to be removed to Somalia without acceptance by

Somali government.). The Jama decision strongly supports Petitioners' argument that they will prevail on the merits of the statutory claim. Furthermore, two Louisiana Courts have recently issued TRO's enjoining the removal of individual Somalis to Somalia. Mohamed v. Ashcroft, No. 02-2484 (W.D. La. filed Dec. 3, 2002); Ghelle v. Ashcroft, No. 02-3478 (E.D. La. filed Nov. 27, 2002). This Court previously issued a TRO on the individual Petitioners' motion. (Dkt. No. 5.) Having heard oral argument and reviewed the submissions of both parties, this Court concludes that Petitioners have demonstrated a strong likelihood of success on the merits. Below the Court briefly addresses the specific arguments advanced by Respondent.

A. Jurisdiction

The Government argues that § 1252(f)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., prohibits this Court from enjoining INS action on a class-wide basis. That section states:

> (f) Limit On Injunctive Relief –
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> (1) In general – Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation fo the provision of part IV of this subchapter [which comprises 8 U.S.C. §§ 1221-1231], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1).

Petitioners argue, however, that they do not seek to enjoin the "operation" of 1231(b), but rather seek to enjoin violations of that statute. In other words, when Petitioners allege that the INS is violating its own statute, injunctive relief is not prohibited by § 1252(f)(1). This argument has been accepted by at least two other courts. Grimaldo v. Reno, 187 F.R.D. 643, 648 (D. Colo. 1999) (holding that class action alleging constitutional violations by the INS in the administration of § 1226 was not barred by § 1252(f)(1)); Tefel v. Reno, 972 F. Supp. 608, 618 (S.D. Fla. 1997) (allowing putative class action seeking proper

implementation of the INA), vacated on other grounds, 180 F.3d 1286 (11th Cir. 1999). This Court agrees with the rationale explained in those cases. Petitioners do not seek to enjoin the legal operation of 1231(b); instead, they seek to ensure that the provision is properly implemented. Because the Petitioners have demonstrated a likelihood of success on the merits of showing that the INS has improperly or illegally implemented § 1231(b), this Court finds that 1252(f)(1) stands as no bar to class-wide relief.

Similarly, the Government argues that this Court has no jurisdiction to hear this case based on § 1252(g). That section states:

> (g) Exclusive jurisdiction
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> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim 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.

8 U.S.C. § 1252(g).

This provision has been significantly narrowed by the Supreme Court. The Court has held that § 1252(g) is limited to three discrete, discretionary actions that the Attorney General may take: "her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999). Petitioners here do not challenge the Attorney General's discretionary decision to execute their removal; rather they challenge the legality of removal to Somalia, a country that has no government to accept Petitioners for removal. Therefore § 1252(g) stands as no bar to this Court's review of alleged illegal action by the INS. For the same reason, Petitioners' claims are not barred for failing to exhaust administrative remedies – the administrative decision to remove Petitioners to Somalia is not challenged, only the legality under statute of removal to a country with no government to accept Petitioners. Accordingly, the Court concludes that it has jurisdiction to consider the TRO.

B. Nationwide Class Certification

Petitioners have demonstrated a strong likelihood of prevailing on certification of a nationwide class. Courts may certify nationwide habeas and declaratory classes. Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1203 (9th Cir. 1975); Perez-Funez v. INS, 611 F. Supp. 990, 1000 (C.D. Cal. 1984) (quoting Califano v. Yamasaki, 442 U.S. 682 (1979)). Courts have not required petitioners to show next-friend standing in habeas and declaratory classes. Nguyen Da Yen, 528 F.2d at 1203; United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1126 (2d Cir. 1974), cert. denied, 421 U.S. 921 (1975). Because the named Petitioners have individual standing, Fed. R. Civ. P. 23 addresses whether the named Petitioners are appropriate class representatives, and the next-friend issue does not arise. It is appropriate for the Court to rule on a TRO before certifying the class. Nguyen Da Yen, 528 F.2d at 1203-4. Apart from the jurisdictional arguments above, Respondents do not contest the Court's authority to certify a nationwide declaratory class, and such a class may be particularly appropriate when a discrete matter of federal law is at issue.

A nationwide habeas class, however, may be maintained only in a much more narrow set of circumstances, because the proper respondent is generally the director of the detention facility where a petitioner is held. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973); but see Henderson v. INS, 157 F.3d 106, 128 (2d Cir. 1998), cert. denied sub nom., Reno v. Navas, 526 U.S. 1004 (1999) ("the question of whether the Attorney General is an appropriate respondent in habeas corpus petitions brought by aliens is one that evokes powerful arguments on each side . . . Accordingly, its resolution should be avoided unless and until it is manifestly needed to decide a real case in controversy."). A nationwide habeas class with the Attorney General as respondent is appropriate when the location of the putative class members is unclear. Nguyen Da Yen, 523 F.2d at 1204; see Demjanjuk v. Meese, 784 F.2d 1114, 1116 (D.C. Cir. 1986). A broad habeas class may also be appropriate if class members have been transferred out of the district. See Ex parte Mitsuye Endo, 323

U.S. 283, 304-7 (1944); Nwankwo v. Reno, 828 F. Supp. 171, 174-75 (E.D.N.Y. 1993). Despite Petitioners' Freedom of Information Act ("FOIA") request, and Court's questions to Respondents during oral argument, the INS has not disclosed the location of putative class members. Accordingly, both nationwide habeas and declaratory classes appear appropriate at this juncture.

CONCLUSION

The Petitioners have raised a matter of grave importance. Because the matter was brought as a TRO, and the Government was willing to delay removal of the Somali Petitioners for only a short time pending the TRO, the matter was hurriedly considered. The Court requires more time and full briefing to properly consider the merits of the action. Given Petitioners' showing on both harm and merits, the Court has no choice but to issue a TRO and schedule a prompt full hearing on the matter. By agreement, the parties will submit briefs to the Court for consideration of the merits of a preliminary injunction on the following dates: Respondents are to submit a Response by December 16, 2002; Petitioners may file their Opposition by January 10, 2003. The Court will hear oral argument at 9 a.m. on January 14, 2003.

The Clerk is directed to send copies of this order to all counsel of record.

Dated this 10 day of December, 2002.

Marsha J. Pechman
United States District Judge