IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

RESPONSE TO PETITIONERS' MOTION FOR RELIEF ON ISSUES RELATED TO IMPLEMENTATION OF DETENTION ORDERS

On February 8, 2018, Petitioners filed the Motion for Relief on Issues Related to Implementation of Detention Orders, ECF No. 227. Given the number of issues raised in this motion and the research (both legal and factual) necessary to respond, as well as the other deadlines in this case, Respondents requested that they be given until March 1 to respond. That request was declined so that the issues raised in Petitioners' motion could be addressed at the hearing scheduled on February 26, 2018. Respondents provide this response based on the information available at this time and given the other case-related deadlines, but anticipate that further information may be available by the time of the February 26 hearing.

I. Respondents have complied with this Court's Orders by providing bond hearings to members of the Mandatory Detention Subclass.

In their motion, Petitioners ask the Court to modify "[j]ust two sentences" of this Court's order which provided the Mandatory Detention Subclass definition to include (or more correctly, *not exclude*) individuals who are detained under 8 U.S.C. § 1225. ECF No. 227 at 10. The effect of doing so would be to grant relief to detainees who are not members of the sub-classes certified by the Court, based on a legal theory that the Court has not addressed—the lawfulness of pre-order detention under section 1225. Petitioners have not previously sought relief from the Court based on a challenge to section 1225. None of the 147 paragraphs in the Second Amended Complaint (ECF No. 118) mention section 1225, much less allege that the government is unlawfully detaining Petitioners or putative class members under that provision. Likewise, Petitioners' Amended Motion for Class Certification (ECF No. 139), and Motion for a Preliminary Injunction on Detention Issues (ECF No. 138), do not challenge or seek relief from this Court based on alleged unlawful detention under section 1225, and do not provide any argument concerning why individuals detained under section 1225 should be included in the sub-classes. Thus, Respondents have not had the opportunity to move to dismiss this challenge, or oppose class certification and the preliminary injunction based on this new challenge. Rather than simply amending the order on class certification, Petitioners

must affirmatively demonstrate why they are entitled to a preliminary injunction on this claim, and why individuals detained under this provision should be added to the sub-class. Accordingly, the Court should deny Petitioners' motion.

There are important differences between the government's detention authority under 1225 and 1226, perhaps the most significant of which is that individuals are not entitled to bond hearings under 1225. Section 1225 may apply to arriving aliens, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien **shall be detained** for a [removal] proceeding under [INA § 240]." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). The regulations pertaining to arriving aliens who are placed in removal proceeding under INA § 240 provide that: "any arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the [INA] **shall be detained** in accordance with section 235(b) of the [INA]. **Parole of such alien shall only be considered in accordance with § 212.5(b) of this chapter.**" 8 C.F.R. § 235.3(c) (emphasis added). *See also* INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A)(providing for parole of arriving

aliens in the discretion of the Attorney General);[1] 8 C.F.R. § 212.5 (parole of aliens into the United States); *Clark v. Martinez,* 543 U.S. 371, 373 (2005) (". . . the alien may be detained, subject to the Secretary's discretionary authority to parole him into the country"); *Ferreras v. Ashcroft*, 160 F.Supp.2d 617, 624 (S.D.N.Y. 2001) (aliens detained pursuant to INA § 235(b) may only be released from custody in accordance with the provisions of 8 U.S.C. § 1182(d)(5)(A)).

Parole from detention of arriving aliens in removal proceedings is as a matter of discretion. *See Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987) ("Congress has authorized the Attorney General, in his discretion, to grant parole to any non-

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[1] The provision authorizing parole of arriving aliens provides as follows:

> The Attorney General may . . . **in his discretion** parole into the United States temporarily under such conditions as he may describe on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (emphasis added).

admitted alien when the Attorney General deems such lenity to be in the public interest.”). Further, pursuant to 8 C.F.R. 1003.19(h)(2)(i)(B), an immigration judge is precluded from re-determining the custody status of arriving aliens. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B); *see also* 8 C.F.R. § 212.5(b); *see also Matter of Collado-Munoz*, 21 I. & N. Dec. 1061 (BIA 1998). Such authority has not been delegated to an immigration judge and there is no provision under the INA for a bond hearing before an immigration judge for an inadmissible arriving alien. *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 1003.19(h)(2)(i)(B). Further, a discretionary determination not to grant parole is not subject to judicial review. See 8 U.S.C. § 1252(a)(2)(B)(ii)(providing that “no court shall have discretion to review- . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security. . . .”).

Accordingly, because there are important differences between Respondents' authority to detain people under sections 1225 and 1226, the Court should not amend the definition of the subclass simply because “class counsel was unaware that some class members whose motions to reopen are granted would be subject to detention under § 1225 rather than § 1226.” Rather, the Court should require Petitioners to amend the complaint as necessary, and demonstrate why the individuals are

members of the subclass and entitled to a preliminary injunction. In fact, Respondents previously filed a motion to exclude one individual detained under section 1225 because he is in expedited removal proceedings and thus ineligible for relief under this Court's initial preliminary injunction. *See* Mot. Lift Prelim. Inj. re George P. Arthur, ECF No. 134. For similar reasons and those discussed above, he is not a member of the subclass and not entitled to a bond hearing.

II. Further factual development regarding Petitioners' concern about the bond hearings related to the Detained Final Order Subclass is necessary.

Petitioners express concern that ICE is objecting at bond hearings for certain individuals who are subject to final removal orders, and ask the Court to modify the new bi-weekly disclosure requirement provided in paragraph 9.d. of the Order Regarding Further Proceedings, ECF No. 201. The Court's Order requires Respondents to "identify each detainee whose time in detention has reached 180 days or more but whom the government does not consider eligible for a bond hearing, and the reason asserted for non-eligibility." *Id.* The time for Respondents to start this additional reporting requirement has not yet started, and perhaps that report will clarify the issue and Petitioners can raise specific concerns that they have.

III. This Court should not disturb the stay procedure available to obtain review of immigration bond determinations.

Petitioners are requesting that this Court modify its Opinion and Order, ECF No. 191, so that individuals who are entitled to bond hearings under that Order are exempt from the stay procedures that apply to every other bond hearing in the country. On several occasions the Court has stated that it did not intend for its Order to change the established immigration bond procedures, and the Court should decline Petitioners' request to do so here.

Either party—the alien or DHS—may appeal an immigration judge's bond ruling to the BIA. *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3)(i). The appeal of a bond decision is governed by the same procedures that govern any other type of appeal of an immigration judge's decision. BIA Manual ¶ 7.3(a) (citing chs. 3 & 4). The parties may file briefs, the alien is entitled to be represented by counsel, and the alien may move to reopen or reconsider the BIA decision. 8 C.F.R. §§ 1003.2, 1003.3. In addition, under its governing regulations, the BIA is required to decide an appeal on the merits as soon as practicable, with a priority given to cases or custody appeals involving detained aliens, and, except in exigent circumstance, in no more than ninety days of completion of the record on appeal. 8 C.F.R. § 1003.1(e)(8).

If an alien appeals an immigration judge's bond determination, that decision remains in effect while the appeal is pending. 8 C.F.R. § 1236.1(d)(4). The same

holds true for DHS's appeal of an immigration judge's bond determination—unless the decision is stayed. *See id.*; 8 C.F.R. § 1003.19(i)(1) & (2). A stay of an immigration judge's bond determination means that the immigration judge's decision does not go into effect and DHS's decision to detain the alien remains in effect until the BIA decides the appeal. *See* 8 C.F.R. § 1003.19(i)(2). An immigration judge's bond determination can be stayed automatically or by an adjudication by the BIA in the exercise of its discretion. The determination is stayed automatically when DHS has determined that the alien should not be released, the immigration judge authorized the alien's release and set bond at $10,000 or more, other specified conditions are met, and DHS fulfils certain procedural requirements. *Id.*; 8 C.F.R. § 1003.6(c). The stay remains in effect until the Board decides the appeal, or ninety days from the filing of the appeal, whichever occurs first. 8 C.F.R. § 1003.6(c)(5).

A discretionary stay, on the other hand, requires an adjudication by an independent arbiter, the BIA.[2] *See* 8 C.F.R. § 1003.19(i)(1); *Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1999). The BIA may grant a stay in response to a motion

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[2] In 2006, DHS amended the emergency stay provision by re-naming it the "discretionary" stay provision and clarifying that its use is not limited to emergency situations and may be granted by the BIA at any time. *See Review of Custody Determinations*, 71 Fed. Reg. 57,873, 57,876 (Oct. 2, 2006).

by DHS or on its own motion. 8 C.F.R. § 1003.19(i)(1). "DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the Board in connection with such an appeal at any time." *Id*. The discretionary stay regulation does not prohibit the alien from responding to a discretionary stay request, but the nature of the discretionary stay request requires the BIA to act quickly, in order to prevent an alien provisionally ordered released from custody from fleeing. 8 C.F.R. § 1003.19(i)(1). Because the decision must be made quickly, and the regulations do not explicitly provide for an opportunity for the alien to respond, the grant of a discretionary stay may be *ex parte*. The decision is not, however, automatic or unilateral, because it must be made by the BIA.

The stay procedures provided by the pertinent regulations apply to bond hearings across the country and should not be circumvented or absent a showing that they are *ultra vires* or otherwise unlawful. This Court should decline Petitioners' request to "clarify" its Order so that these regulations as written do not apply to them.

IV. The Court should address any challenges to how ICE is calculating the six-month clock for the purposes of providing bond hearings on a case-by-case basis.

The calculation of six-month clock for the purposes of providing bond hearings has to be addressed on a case-by-case basis. The petitioner's detention pending removal from the United States is governed by 8 U.S.C. § 1231(a).The post-

order statute provides authority to detain after an alien has an administratively final order of removal. 8 USC 1231. When there is no judicial impediment to removal, *Zadvydas v. Davis* provides for a presumptively reasonable period of 180 days of custody to effectuate removal. This time does not start running until ICE has custody of an individual. *Cheng Ke Chen v. Holder*, 783 F. Supp. 2d 1183, 1192 (N.D. Ala. 2011) ("Because Zadvydas clearly involved detention of a petitioner during the presumptively reasonable period, it defies common sense to suggest that Zadvydas time can run while a petitioner is not in custody.")

V. The purported issue of class members born outside of Iraq is not ripe for consideration.

Petitioners express concern that Respondents have not provided a bond hearing for one class member because he was born in Lebanon, and not Iraq. ECF No. 227 at 19. The reason he has not been provided a bond hearing, however, is because he is in state custody in Macomb County, Michigan, and not immigration custody. *See* Declaration of David W. Jennings (attached hereto as "Exhibit A"). Accordingly, the Court should not modify its order with respect to detention issues, ECF No. 191, on this basis.

Dated: February 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served via CM/ECF upon all counsel of record.

Dated: February 20, 2018

Respectfully submitted,

/s/ Nicole N. Murley
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Counsel for Respondents

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Class Action

DECLARATION OF JOSEPH SALVATERA

In accordance with 28 U.S.C. § 1746, I Joseph Salvatera, make the following declaration:

1. I am a Deportation Officer employed in the Detroit Field Office, Office of Enforcement and Removal Operations (ERO), United States Immigration and Customs Enforcement (ICE). Pursuant to my duties, I am familiar with Petitioner, [redacted], and with the ICE records regarding Petitioner.

2. On November 10, 2017, ICE ERO received a Writ of Habeas Corpus from the Macomb County Sheriff's office requesting delivery of [redacted] to the custody of the Macomb County Sheriff's office for prosecution of Felony Possession of Ammo by Felon at the 16th Circuit Court in Mount Clemens, Michigan, on November 27, 2017 (Case no. [redacted]).

3. On November 24, 2017, the Macomb County Sheriff's office took custody of [redacted], pursuant to the Writ of Habeas Corpus, and he has remained in their custody since that date, and has not been returned to immigration custody.

4. The 16th Circuit Court currently has [redacted] scheduled for a pretrial conference on February 26, 2018, and trial on March 1, 2018. The Macomb County Sheriff's office will maintain custody of [redacted] pending adjudication of his criminal case with the 16th Circuit Court.

Executed this 19th day of February, 2018.

Joseph Salvatera
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