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 Class Action

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

I. Due Process Prohibits Prolonged Detention Without an Individualized Determination of Flight Risk or Dangerousness.

This Court held that prolonged detention without an individualized determination of flight risk or dangerousness is unconstitutional, set six months as the period after which any presumption of reasonableness ends, and ordered relief for "all asserting such claims," which, at the time, the Court and parties understood to be those detained under 8 U.S.C. § 1226(c) or § 1231. Op. & Order, ECF 191, Pg.ID# 5345-46. The Court's reasoning was not confined to the particulars of § 1226(c) or § 1231; it was based on the understanding that "'due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* at Pg.ID# 5335-36 (quoting *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008)).

It has now emerged that some detainees are held under § 1225. Respondents do not explain why the bedrock constitutional principle requiring the government to justify restraints on liberty is therefore inapplicable. Respondents do not argue that individuals suffering prolonged detention under § 1225 are materially different from other class members. *See* Decls., ECF 227-2 to 227-4, Pg.ID# 5897-5912.

Instead, Respondents raise three objections. First, Respondents state—incorrectly—that Petitioners did not seek such relief in their complaint, and should therefore be required to amend before the Court can grant any relief. In fact, the

complaint did not limit the prolonged detention claim to those held under any particular statutory authority, and therefore no amendment is needed.[1]

Second, Respondents—having steadfastly declined to provide information about their purported detention authority for each class member, *see* Exhibit A—suggest they are somehow prejudiced by the fact that briefing on the preliminary injunction and class certification motions did not address § 1225. But at this point, the issue has been briefed and the Court will hold a hearing. It is entirely appropriate for the Court to tweak the class definition after new facts come to light. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments."); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) ("[T]he district court's multiple amendments merely showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed.").

Finally Respondents argue on the merits that prolonged detention without individualized review is permissible because "individuals are not entitled to bond

[1] The complaint states: "The government is subjecting Petitioners to detention for months, potentially years, without any individualized determination that they pose a danger or flight risk that would justify their detention." 2d Am. Compl., ¶ 136, ECF 118, Pg.ID# 3025. "Due process requires that Petitioners be afforded individualized hearings before impartial adjudicators to assess whether their continued detention is justified based on danger or flight risk." *Id.* ¶ 138. The relief requested is "a prompt individualized hearing by an impartial adjudicator … for each one" on danger and flight risk. *Id.* ¶ I, Pg.ID# 3029.

hearings under 1225." Gov't Br., ECF 239, Pg.ID# 6112. Of course § 1231 and § 1226(c) detainees also lack a statutory entitlement to bond hearings. But once detention becomes prolonged, constitutional due process protections kick in. Respondents fail to explain why due process does not protect § 1225 detainees just as it protects § 1231 and § 1226(c) detainees.[2] And such argument is foreclosed by *Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003) (en banc).

II. Stays That Prolong Detention Without Independent Review or Due Process Are Inconsistent With This Court's Order.

Petitioners make two primary arguments with respect to stays of immigration judge releases of class members. First, allowing ICE to unilaterally prolong detention for up to three additional months by obtaining an automatic stay *after* an immigration judge has decided release is warranted is inconsistent with this Court's order that detention longer than 180 days must be based on an individualized and independent determination of flight risk or dangerousness. Second, because a discretionary stay of an immigration judge's decision to grant bond further prolongs the detainee's incarceration, that stay must comport with basic due process principles. Respondents do not engage the merits of either argument. Nor do Respondents dispute (a) that automatic stays allow them to

[2] The government's argument against judicial review of "discretionary" decisions was rejected in *Demore v. Kim*, 538 U.S. 510, 516-17 (2013), when the Supreme Court found jurisdiction because the detainee "does not challenge a 'discretionary judgment' . . . regarding his detention or release [but rather] challenges the statutory framework that permits his detention without bail."

unilaterally prolong detention or (b) that discretionary stays are often issued *ex parte* without any articulable standard for effectively reversing the immigration judge's decision while the case is on appeal—a process that has no regulatory time limit and can result in many more months of incarceration. Respondents' only argument is that this is how bond hearings normally proceed.

The "we always do it this way" argument ignores the fact that the hearings this Court has ordered are not ordinary bond hearings conducted shortly after an individual's arrest, but rather occur after a half a year of detention. This Court held that when detention becomes prolonged, continuing detention decisions must be made by an independent adjudicator, i.e. the immigration judge. Op. & Order, ECF 191, Pg.ID# 5335-37 (citing *Diouf v. Napolitano*, 634 F.3d 1081, 1085 (9th Cir. 2011)). Automatic stays allow ICE to circumvent that order by prolonging detention for three months where an independent adjudicator has already found release appropriate. Discretionary stays likewise conflict with this Court's order, albeit for a different reason (since discretionary stays, unlike automatic stays, are decided by the BIA). This Court required release "unless the Government establishes by clear and convincing evidence that the detainee is a flight or public safety risk." Op. & Order, ECF 191, Pg.ID# 5344 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013), *cert granted sub. nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016)). But the BIA grants discretionary stays without finding

clear and convincing evidence that the detainee is a flight or public safety risk. Indeed, discretionary stays do not even meet the general stay standard, that the movant has demonstrated a "strong likelihood of success on the merits." *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). As this Court said, freedom from physical restraint is a "core value of liberty our Constitution was designed to protect." Op. & Order, ECF 191, Pg.ID# 5347. Given the private interest affected; the risk of erroneous deprivation inherent in standardless and *ex parte* decision-making; and the minimal burden of enhanced procedural protections, the Court should adopt Petitioners' requested guidelines. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The government offers no justification for its unilateral ability to prolong detention for many months through automatic stays. For discretionary stays the government argues that *ex parte* BIA decisions are needed to prevent noncitizens from fleeing upon release if, as ICE asserts, the immigration judge erred. Gov't Br., ECF 239, Pg.ID# 6118. Petitioners' procedures meet that concern, providing for continued detention of up to 10 days while the government seeks a stay, the detainee responds, and the BIA adjudicates the request, with a further extension for briefing if needed. Motion, ¶¶ 5, 6(a), (b), (d), ECF 227, Pg.ID# 5869-70.

Finally, while this Court has focused on ensuring Petitioners' access to the existing immigration court system, it has not hesitated to alter standard operating

procedures, such as by shifting the burden of proof for bond after prolonged detention, where necessary. The Court has addressed constitutional flaws in the existing law and regulations governing bond. Indeed, the whole point of the Court's January 2nd Order is to require bond hearings that would not otherwise occur.

III. Class Members Held More Than 180 Days Without a Hearing

Petitioners agree that disclosure about class members held without a bond hearing—which has not yet occurred—is a predicate to determining whether bond hearings are being wrongfully denied. Petitioners' requested clarification of the disclosure requirements is designed to ensure that all relevant information is provided. Motion, ¶ 3, ECF 227, Pg.ID# 5868-69.

IV. Some Common Six-Month Clock Issues Can Be Decided Now, and Others on a Case-by-Case Basis.

Petitioners do not object to the government's proposal to address six-month-clock calculations case-by-case. But Petitioners can review and seek appropriate relief only if Respondents produce, for each class member who has been "writted out" into criminal custody: ICE detention dates (in and out); current custody; and the government's view on whether a bond hearing should be held.

In addition, the Court should decide two issues that will affect calculations generally, thereby avoiding long delays in bond hearings going forward:

- The clock should not "reset" after a period of criminal custody. If a detainee entered ICE detention on June 12, 2017, exited on December 12 into criminal custody, and returned a week later, the six-month point has been reached.

- Time in criminal custody subject to an ICE hold should count towards the six months. The hold prevents release on criminal bond, so this period of detention is caused by ICE's procedures; once such detention grows prolonged, it constitutionally requires individualized justification.

V. Individuals Not Born in Iraq.

The government offers no substantive response to Petitioners' request for clarification that anyone ICE seeks to remove to Iraq is a class member (if the other class membership criteria are met). Rather, Respondents argue that the issue is unripe. Respondents' declaration does demonstrate that Mr. Paul Rasho, the exemplar cited by Petitioners, is currently in criminal custody, although it is unclear whether an ICE hold has prevented his release on bail. *See* Salvatera Decl., ECF 239-1, Pg.ID# 6123-24. However, unlike Respondents' *brief*, the *declaration* does not state that this is why Mr. Rasho has been denied a bond hearing. In fact, Respondents do not refute Petitioners' evidence that EOIR declined to schedule the hearing because Mr. Rasho was born in Lebanon. Moreover, Petitioners have told Respondents about two other individuals born outside Iraq whose class membership—and eligibility for a bond hearing—Respondents apparently dispute. One of these is mentioned in Petitioners' Motion for Additional Disclosure; the other came to Petitioners' attention more recently.

Therefore, this Court should clarify that if an individual is sufficiently Iraqi that ICE is seeking removal to Iraq, he is sufficiently Iraqi for class membership.

Respectfully submitted,

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Dated: February 22, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2018, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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EXHIBIT A

Partial List of Prior Pleadings Where Respondents Objected to Discovery That Would Have Allowed Petitioners to Determine That Some Detainees Are Held Under Section 1225 After Their Motion to Reopen is Granted

1. **Petitioners' Status Report dated 8/30/2017**, ECF 95, Pg.ID# 2544-50:
    a. Petitioners asked for Respondents to confirm if mandatory detention applies to each detainee and "the basis for any continued detentions", as well as information on custody reviews and bond hearings. Respondents opposed providing this information.

2. **Joint Status Report dated 9/26/2017**, ECF 111, Pg.ID# 2825-45.
    a. Petitioners requested discovery on "the basis for continued detention of those whose motions to reopen have been granted." Pg.ID# 2832.
    b. Respondents opposed such discovery as premature, arguing that a Rule 26(f) conference had not been held and that expedited discovery was improper. Respondents also argued that discovery should not be permitted until *after* the Court rules on respondents' motion to dismiss. Pg.ID# 2841-45.

3. **Respondents' Objections to Petitioners Discovery Requests, dated October 27, 2017:** The Court allowed Petitioners to serve discovery requests and required the government to set forth any objections. Order Regarding Further Proceedings, dated Sept. 29, 2017, ECF 115, Pg.ID# 2943. Respondents objected on various grounds to all of Petitioners' discovery requests seeking information on the basis for detention.
    a. Respondents' Objections to Petitioners' First Set of Interrogatories, ECF 129, Pg.ID# 3105-124.
        i. No. 1: sought the basis for continued detention following post order custody reviews.
        ii. No. 2: sought the basis for continued detention following bond hearings.
        iii. No. 3: sought the basis for continued detention for each individual who sought to be released (other than based on custody review or bond hearing).
    b. Respondents' Objections to Petitioners' First Set of Requests for Production, ECF 130, Pg.ID# 3125-150.
        i. Nos. 1 and 2: sought production of custody review decisions and documents.
        ii. No. 6: sought notices of bond hearing; notices informing Iraqi nationals that they are subject to mandatory detention; ICE

decisions regarding bond or release; immigration judge and BIA decisions regarding bond or release; and correspondence between ICE and Iraqi nationals related to continuing detention and eligibility for bond.

4. **Respondents' Motion to Lift Preliminary Injunction as to George Arthur and Others with Final Orders of Expedited Removal**, ECF 134, Pg.ID# 3249-61.
    a. Respondents moved to lift the stay of removal for one individual "as well as other individuals with final orders of expedited removal," arguing that those individuals cannot file motions to reopen. Pg.ID# 3252, 3256-58.
        i. Although the removal order for Mr. Arthur was entered under § 1225(b), because he has a final order, the authority for his detention is § 1231. Particularly given that Respondents' brief was focused on arguing that individuals in Mr. Arthur's position cannot file motions to reopen, Petitioners had no way of knowing that Respondents were simultaneously holding other class members who *had filed motions to reopen* under § 1225.
    b. Petitioners opposed the motion as unripe, explaining that despite repeated requests, Respondents had not provided information about the other individuals for whom they sought to lift the stay. ECF 144, Pg.ID# 3864-68.

5. **Petitioners' Motion for Discovery**, **dated December 4, 2017**, ECF 160, Pg.ID# 4179-89, and **Respondents' Opposition, dated December 7, 2017**, ECF 165, Pg.ID# 4230-37.
    a. Petitioners sought the identity and number of individuals in proposed mandatory detention subclass to rebut Respondents' numerosity arguments in opposition to certification of that subclass. This information, if obtained, would have shown which of the 59 detainees that Petitioners believed were being held under §1226(c) were in fact being held under that statute.
    b. Respondents argued that the Court did not need the information to decide the class certification motion, and that it was burdensome since the government would have to review individual case files:
        "Whether an individual is subject to mandatory detention, or is able to request release on bond, is ultimately a legal determination made after the case is reopened. The simple fact

> that someone remains detained after their case is reopened does not mean that they are subject to mandatory detention. It may be that the individual was eligible to request a custody redetermination, but the immigration judge determined that bond was not appropriate or, alternatively, set a bond that the individual has not paid. To answer Petitioners' request, therefore, Respondents would have to review the files of the 59 purported Mandatory Subclass members in Petitioners' motion for class certification (after Petitioners identify the individuals by name and A number), and manually review their files to determine whether the applicable detention authority, specifically, whether the individual is currently being held pursuant to 8 U.S.C. § 1226(c) **or another authority**, such as 8 U.S.C. § 1226(a). This review would take approximately two weeks." (Emphasis added.) Pg.ID# 4234-35.

The government's position, therefore, was that it did not itself know the detention authority under which different class members were being held, and that this information was not necessary to decide the class certification motion.

c. The Court denied Petitioners' motion for this discovery based on the government's assertions that this information was not needed to resolve the class certification motion and on burden grounds. Order Denying Discovery, ECF 166.