UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMADOU LAMINE DIOUF, Petitioner, v. MICHAEL B. MUKASEY, et al., Respondents.	NO. CV 06-7452 TJH (FMO) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Terry J. Hatter, Jr., United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On November 21, 2006, Amadou Lamine Diouf ("petitioner"), through counsel, filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody ("Petition"), pursuant to 28 U.S.C. § 2241. Petitioner challenges his detention by the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security ("ICE") for nearly two years while removal proceedings have been pending against him. On February 28, 2007, respondents[1] filed a Return

[1] Michael B. Mukasey, United States Attorney General, is substituted for his predecessor. Fed. R. Civ. P. 25(d)(1).

to the Petition ("Return"). Petitioner filed a Traverse and Reply to the Return ("Reply") on March 29, 2007. On May 18, 2007, petitioner filed a Supplemental Memorandum of Points and Authorities in Support of the Petition ("Supp. Mem."). On August 22, 2007, petitioner filed a Supplemental Authority in Support of the Petition. Oral argument was heard on December 5, 2007. On December 7, 2007, petitioner filed a Supplemental Memorandum Regarding Additional Legal Authority.

Having considered all the briefing and oral argument presented to the court regarding the Petition, it is recommended that the Petition be granted.

BACKGROUND

Petitioner is a native and citizen of Senegal. (Petition, Exh. 1 (Declaration of Amadou Diouf ("Diouf Decl.")) at ¶ 2; Return, Exh. 6 at 35). On February 4, 1996, petitioner was admitted to the United States on a student visa. (Diouf Decl. at ¶ 4; Return, Exh. 6 at 35). After finishing his degree, petitioner remained in the United States in violation of his visa. (Diouf Decl. at ¶ 4; Return, Exh. 6 at 35). On January 23, 2003, petitioner was convicted in the Grant County Superior Court (Case No. 02-1-00860-0) of possession of less than 40 grams of marijuana (Wash. Rev. Code § 69.50.410(e)), a misdemeanor. (Return, Exh. 5 at 30-31). The same day, petitioner was sentenced to 75 days in county jail with 30 days suspended for one year of good behavior. (Id. at 31).

On January 24, 2003, the Immigration and Naturalization Services ("INS")[2] served petitioner with a Notice to Appear and initiated removal proceedings. (Return, Exh. 6 at 34-35). Petitioner was charged with being removable as an alien: (1) who has remained in the United States for a time longer then permitted, Immigration and Nationality Act ("INA") § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B); (2) who failed to maintain or comply with the conditions of a change of status, INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i); and (3) who was convicted of a violation of a State law relating to a controlled substance, other than a single offense involving possession for one's

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[2] The INS was abolished on March 3, 2003, and its functions were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (2002).

own use of 30 grams or less of marijuana, INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). (See id. at 35).

At a bond hearing on February 24, 2003, an Immigration Judge ("IJ") set petitioner's bond at $5,000.00 after petitioner admitted the allegations contained in the Notice to Appear, conceded removability, requested voluntary departure and waived his right to appeal. (See Return, Exhs. 7 at 36 & 8 at 37-38). The IJ granted voluntary departure until June 24, 2003, and provided that if petitioner did not voluntarily depart by that date, the "order shall be withdrawn without further notice or proceedings and . . . [petitioner] shall be removed to Senegal on the charges in the Notice to Appear." (Id., Exh. 8 at 37).

On March 3, 2003, petitioner posted bond. (See Return, Exh. 9 at 39-40). Petitioner, however, did not voluntarily depart pursuant to the IJ's order and, on August 15, 2003, ICE sent petitioner a Notice requesting that he appear for removal on September 4, 2003. (See id., Exh. 10 at 41). Petitioner did not appear and, as a result, ICE cancelled petitioner's bond on October 15, 2003. (See id., Exh. 11 at 42 & 12 at 43).

On March 29, 2005, more than 17 months later, ICE arrested petitioner at his home and placed him in detention pending execution of his final order of removal. (See Return at 3 & Exh. 13 at 44). On May 27, 2005, petitioner filed a motion to reopen his immigration proceedings with the Executive Office of Immigration Review, which was denied by an IJ on June 28, 2005, as untimely. (See id., Exhs. 15 at 50 & 16 at 65). On July 3, 2006, petitioner appealed the IJ's denial of his motion to reopen to the Board of Immigration Appeals ("BIA"). (See id., Exh. 26 at 89). The BIA dismissed petitioner's appeal on July 26, 2006. (See id., Exh. 27 at 107-09).

On July 10, 2006, while petitioner's motion to reopen appeal was pending with the BIA and more than a year after he was taken into custody, ICE conducted a "File Custody Review" of petitioner's case without a hearing.[3] (See Petition at 6-7 & Exh. 3). On July 25, 2006, ICE issued a "Decision to Continue Detention" indicating that "[b]ased on [petitioner's] criminal history and lack

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[3] Although respondent indicates that petitioner received two file custody reviews on July 21, 2005, and July 24, 2006, (see Return at 4 & 6), the evidence in the record indicates that the review was conducted on July 10, 2006. (See Petition, Exh. 3).

of family support, [he is] considered a flight risk and will remain in custody until ICE establishes a sufficient release plan." (Id., Exh. 4).

Between June 2005, and February 2006, petitioner, proceeding pro se, filed three petitions for review in the Ninth Circuit Court of Appeals, which were all denied on procedural grounds. See Diouf v. Gonzales, No. 05-73252 (9th Cir. filed June 2, 2005); Diouf v. Gonzales, No. 05-75026 (9th Cir. filed Aug. 29, 2005) & Diouf v. Gonzales, No. 06-70731 (9th Cir. filed Feb. 8, 2006). On April 13, 2006, petitioner filed a fourth petition for review and a motion to stay deportation in the Ninth Circuit. See Diouf v. Clement, No. 06-71922 (9th Cir. filed April 13, 2006). On July 21, 2006, the Ninth Circuit granted a stay of removal. See Diouf, No. 06-71922 (9th Cir. July 21, 2006) (granting petitioner's motion for stay of removal pending disposition of petition for review).

Petitioner filed a fifth petition for review on August 15, 2006, which the Ninth Circuit consolidated with his prior petition. See Diouf v. Clement, No. 06-73991 (9th Cir. filed Aug. 15, 2006) & Diouf, No. 06-71922 (9th Cir. Oct. 16, 2006) (sua sponte consolidating cases 06-71922 and 06-73991). On January 17, 2007, the court appointed counsel for petitioner. See Diouf, 06-73991 (9th Cir. Jan. 17, 2007) (granting motion to proceed in forma pauperis and appointing pro bono counsel). Both petitions for review are currently pending in the Ninth Circuit.

On November 21, 2006, petitioner filed the instant Petition challenging the legality of his detention. On the same day, he filed a Motion for Preliminary Injunction, which District Judge Hatter granted on January 4, 2007. (See Court's Order of January 4, 2007). Judge Hatter ordered that petitioner be "afforded an individual hearing before an immigration judge concerning whether his prolonged detention is justified[]" and that petitioner be "released on reasonable conditions unless the government shows by clear and convincing evidence that [he] presents a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future." (Id. at 3-4).

Pursuant to Judge Hatter's Order, a bond hearing was conducted before IJ D. D. Sitgraves who ordered petitioner released on $5,000.00 bond in a written decision issued on February 9, 2007. (See Reply, Exh. 10 at 7-11). Specifically, the IJ found that the "government . . . admitted

in court that [petitioner] is not a serious danger[]" and failed to show that petitioner is a flight risk. (Id. at 10-11). Accordingly, the IJ determined that the government failed to meet its burden of proof of establishing by clear and convincing evidence that petitioner "is a risk of flight or a danger." (Id. at 11). The IJ concluded that the government "only provided . . . speculation during [the] hearing as to how long it would take in the foreseeable future to finally resolve[petitioner]'s case in favor of the government with the pending petitions before the Ninth Circuit." (Id.).

Petitioner posted bond and was released on or about February 9, 2007. (See Supp. Mem. at 1-2 & Reply, Exh. 10 at 7-11). The government has appealed the IJ's order to the BIA. (See Supp. Mem., Exh. C at 1-3). In addition, the government appealed Judge Hatter's Order granting petitioner a preliminary injunction to the Ninth Circuit. (See id. at 1). Both appeals are currently pending. (See id.).

DISCUSSION

In his Petition, petitioner challenges his detention, (Petition at 7), and raises the following claims for federal habeas relief:

1. Petitioner's detention violates the INA because the statute under which he is detained does not authorize detention beyond the brief period necessary to complete removal proceedings and does not authorize detention where there is no significant likelihood of removal in the reasonably foreseeable future. (Petition at 14).

2. Petitioner's detention violates the INA because the statute under which he is detained does not authorize detention for a prolonged period of time without a hearing to determine whether his prolonged detention is justified. (Id. at 14-15).

3. Petitioner's prolonged detention without a hearing violates his right to be free from prolonged non-criminal detention without adequate justification and sufficient procedural safeguards as guaranteed by the Due Process Clause. (Id. at 15).

4. Petitioner's detention violates the Due Process Clause because it has become so prolonged that it is no longer reasonably related to its purpose of effectuating his removal. (Id.).

5. Petitioner's prolonged detention violates his right to be free from arbitrary detention as guaranteed by the International Covenant on Civil and Political Rights. (Id. at 16).

I. SUBJECT MATTER JURISDICTION.

Before addressing petitioner's contentions, the court must consider whether it has jurisdiction to reach the merits of the Petition. See Nadarajah v. Gonzales, 443 F.3d 1069, 1075 (9th Cir. 2006) (holding that although neither party raised the question of the court's jurisdiction to consider a § 2241 petition, the court is "obligated to consider it *sua sponte*[]") (citing Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-02, 104 S.Ct. 1805, 1809-10 (1984) (italics in original). Although the REAL ID Act of 2005[4] ("REAL ID Act") divests this court of jurisdiction over habeas petitions challenging orders of removal, see Puri v. Gonzalez, 464 F.3d 1038, 1041 (9th Cir. 2006), district courts retain subject matter jurisdiction over § 2241 petitions challenging the legality of an alien's detention. See Nadarajah, 443 F.3d at 1075 ("By its terms, the jurisdiction-stripping provision [of the REAL ID Act] does not apply to federal habeas corpus provisions that do not involve final orders of removal."); Hernandez v. Gonzales, 424 F.3d 42, 42-43 (1st Cir. 2005) (per curiam) (The REAL ID Act was "not intended to 'preclude habeas review over challenges to detention that are independent of challenges to removal orders.'") (quoting H.R. Rep. No. 109-72 (2005), as reprinted in 2005 U.S.C.C.A.N. 240, 300); see also Zadvydas v. Davis, 533 U.S. 678, 688, 121 S.Ct. 2491, 2498 (2001) ("§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to" detention after the 90-day "removal-period" defined in 8 U.S.C. 1231(a)(1)).

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[4] On May 11, 2005, the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," Pub. L. No. 109-13, 119 Stat. 231, became law. Division B of the Act is referred to as the "REAL ID Act of 2005" ("REAL ID Act"). Id. Section 106 of the REAL ID Act amends portions of INA § 242, 8 U.S.C. § 1252, and changes the scope of judicial review of removal orders. Lotawa v. Gonzalez, 2006 WL 3251799, at *1 (E.D. Cal. 2006), report & recommendation adopted by 2007 WL 30567 (E.D. Cal. 2007). Under the changes to the INA effected by § 106 of the REAL ID Act, a petition for review to the court of appeals is the exclusive means of judicial review of an administrative order of removal, deportation, or exclusion. See INA § 242(a)(5) & (b)(9), 8 U.S.C. § 1252(a)(5) & (b)(9). "The plain language of Section 106 thus divests the district court of jurisdiction in habeas corpus cases involving challenges to a final order of removal, deportation, or exclusion, and places exclusive jurisdiction for judicial review of such orders in the federal appeals court for the district in which the removal order was issued." Lotawa, 2006 WL 3251799, at *1; accord Puri v. Gonzales, 464 F.3d 1038, 1041 (9th Cir. 2006).

Moreover, "an appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits – i.e., the merits are not matters 'involved in the appeal.'" G&M Inc. v. Newbern, 488 F.2d 742, 746 (9th Cir. 1973); accord Webb v. GAF Corp., 78 F.3d 53, 55 (2d Cir. 1996) (per curiam) (holding that although the filing of a notice of appeal ordinarily divests the district court of jurisdiction over issues decided in the order being appealed, the appeal of a preliminary injunction did not divest the district court of jurisdiction to enter a permanent injunction). As a result, the government's appeal of Judge Hatter's preliminary injunction does not preclude this court from issuing a ruling on the merits of the instant Petition. Accordingly, this court has jurisdiction under § 2241 to consider petitioner's challenge to the lawfulness of his detention by ICE.

II. DETENTION CLAIM.

A. Controlling Detention Statute.

Petitioner contends that his detention is governed by 8 U.S.C. § 1226. (Petition at 2; see also Reply at 4). Section 1226 states that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States[,]" and that the Attorney General may elect to continue to detain the arrested alien or release the alien subject to certain conditions. See 8 U.S.C. § 1226(a) & (c). Section 1226(c)(1)(B) provides that where an alien "is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title," the Attorney General "shall take" the alien into custody. Section 1227(a)(2)(B)(i) states that, "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." Because petitioner was convicted of possession of less than 40 grams of marijuana, a controlled substance, the applicable provision governing his detention is § 1226(c).[5]

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[5] Petitioner repeatedly refers to his conviction as possession of less than 30 grams of marijuana, (see, e.g., Diouf Decl. at ¶ 6 & Reply at 1), and stated at oral argument that the plea agreement petitioner entered into provides that his conviction was for possession of less than 30

The government contends that petitioner's detention is controlled by 8 U.S.C. § 1231. (Return at 7). Section 1231(a) states that except as otherwise provided in that section, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period'). . . . [¶] During the removal period, the Attorney General shall detain the alien." 8 U.S.C. 1231(a)(1)(A) & (C). An alien who has been ordered removed, and who has been determined by the Attorney General to be "unlikely to comply with the order of removal," may be detained beyond the removal period. Id. at § 1231(a)(6). If, however, "the removal period is judicially reviewed and if a court orders a stay of the removal of the alien," the removal period begins on "the date of the court's final order." Id. at § 1231(a)(1)(B)(ii).

Here, it is undisputed that petitioner's petitions for review of his final order of removal are pending before the Ninth Circuit, and that a stay of removal is in effect. (See Petition at 5; id., Exh. 2 & Return at 5-6). Section 1231 authorizes the Attorney General to detain aliens during, and in certain circumstances beyond, the "removal period," but if a court orders a stay of removal, the removal period does not begin until "the date of the court's final order." 8 U.S.C. § 1231(a)(1)(B)(ii). Because that date has not arrived, the removal period has not begun, and therefore, § 1231 does not govern petitioner's detention.

Section 1226, on the other hand, authorizes the Attorney General to detain an alien pending a determination of removability, and makes detention mandatory if the alien has committed certain

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grams. (See Transcript of Hearing Re: Petition ("Hearing Trans.") at 17-18). In addition, the government indicated at oral argument that it believes petitioner is being detained as a "visa-overstay." (See id. at 18-19). However, the only evidence in the record establishes that petitioner was convicted of possession of less than 40 grams of marijuana, (see Return, Exh. 5 at 30-31), and neither party has provided any evidence indicating otherwise. Thus, the court will analyze the legality of petitioner's detention under §1226(c).

Moreover, petitioner's detention based upon his other charged offenses of overstaying his student visa (8 U.S.C. § 1227(a)(1)(B)) and failing to voluntarily depart (8 U.S.C. § 1227(a)(1)(C)(i)) is governed by 8 U.S.C. § 1226(a). Because detention under § 1226(a) is permissive, as opposed to mandatory under § 1226(c), the court's analysis regarding the legality of petitioner's mandatory detention as a criminal alien is also applicable if he is being held permissively. If petitioner is entitled to release from mandatory detention, it follows that he is also entitled to release from permissive detention.

criminal offenses. See 8 U.S.C. § 1226(c). Here, the statutory removal period has not yet begun and, because petitioner has been charged with, among other things, removability as a criminal alien, petitioner is being detained under § 1226. See Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (reversing and remanding with instructions to release a petitioner on bail, who had been detained pending appeal for two years and eight months under § 1226(c), unless an IJ determined after a hearing that the government had proved that the petition was a flight risk or danger to the community); see also id. at 1243-50 & n. 7 (Tashima, J., concurring) (noting that petitioner was detained under § 1226 because "this court has stayed his removal pending its review of the BIA's decision[]" and therefore the petitioner "has not entered his 90-day removal period under" § 1231(a)); Kothandaraghipathy v. DHS, 396 F.Supp.2d 1104, 1107 (D. Ariz. 2005) (holding that because the Ninth Circuit had granted petitioner a stay of removal, his "current detention is pursuant to the pre-removal order detention statute, 8 U.S.C. § 1226, rather than the post-removal order detention statute, 8 U.S.C. § 1231").

B. Legality of Petitioner's Detention under 8 U.S.C. §1226(c).

Relying on the principles articulated by the Ninth Circuit in Nadarajah, petitioner argues that he is entitled to immediate release from detention because "no statute authorizes his prolonged and indefinite detention[.]" (Petition at 8). In Nadarajah, the Ninth Circuit ordered an alien released who had been detained pursuant to 8 U.S.C. §§ 1225(b)(1)(B)(ii) and (b)(2)(A),[6] one of "the general immigration detention statutes," for more than five years pending a final determination of removability. 443 F.3d at 1076 & 1084. The petitioner remained in detention "without any established time line for a decision on when he may be released from detention." Id. at 1075.

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[6] In relevant part, § 1225(b)(1)(B)(ii) states that, "[i]f the [asylum] officer determines at the time of the interview [upon arrival in the United States] that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum[,]" and § 1225(b)(2)(A) provides that, "in the case of an alien who is an applicant for admission, 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 proceeding under section 1229a of this title."

"[C]onsistent with the construction given by the Supreme Court to similar statutes," the Ninth Circuit held that "the general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period." Nadarajah, 443 F.3d at 1078 & 79 (citing Zadvydas, 533 U.S. at 701, 121 S.Ct. at 2504-05).[7] Rather,

> the detention must be for a reasonable period, and only if there is a "significant likelihood of removal in the reasonably foreseeable future. After a presumptively reasonable six-month detention, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."

Id. at 1079-80 (quoting Zadvydas, 533 U.S. at 701, 121 S.Ct. at 2505). The Ninth Circuit concluded that its statutory construction analysis was "bolstered by considering the immigration statutes as a whole[,]" and in particular by reference to the Patriot Act provisions authorizing the detention of suspected terrorists or other threats to national security for more than six months, subject to specific limitations and procedural protections not provided for in the general immigration detention statutes. Nadarajah, 443 F.3d at 1078-80.

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[7] In Zadvydas, the Supreme Court

> reasoned that a statute permitting indefinite detention of an alien would raise a serious constitutional problem under the Fifth Amendment's Due Process Clause. Applying the constitutional avoidance doctrine in order to avoid this potential problem, *Zadvydas* held that § 1231(a)(6), read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal and does not permit indefinite detention. *Zadvydas* then concluded that once removal is no longer reasonably foreseeable, continued detention is no longer authorized by § 1231(a)(6). [¶] . . . [U]nder *Zadvydas*, a presumptively reasonable period of post-removal detention is limited to six months, and that after this period expires, an alien must be released if there is no significant likelihood of removal in the reasonably foreseeable future.

Tuan Thai v. Ashcroft, 366 F.3d 790, 794 (9th Cir. 2004) (internal quotation marks, citations and brackets omitted) (italics in original) (citing Zadvydas, 533 U.S. at 689-90 & 699, 121 S.Ct. at 2498-99 & 2503-04).

Characterizing "the six-month period as the touchstone of reasonableness[,]" the Ninth Circuit observed that "the Supreme Court has given further guidance as to what it considers to be a 'reasonable' length of detention for aliens" convicted of a crime and detained under § 1226(c) pending a determination of removability. Nadarajah, 443 F.3d at 1080 (citing Demore v. Kim, 538 U.S. 510, 513 & 529-31, 123 S.Ct. 1708, 1712 & 1720-21 (2003)). In Demore, petitioner filed a habeas petition challenging the constitutionality of § 1226(c)'s mandatory detention provision. In upholding the constitutionality of the mandatory detention provision, the Supreme Court emphasized that petitioner did not dispute "the validity of his prior convictions" or "INS' conclusion that he is subject to mandatory detention under § 1226(c)." Demore, 538 U.S. at 513-14, 123 S.Ct. at 1712. The Supreme Court concluded that "the government could detain aliens who had been convicted of a crime for 'the brief period necessary for their removal proceedings[,]'" and although the alien in that case "had been detained for over six months, which was 'somewhat longer than the average[,]'" the Supreme Court "viewed that 'temporary' confinement as permissible." Nadarajah, 443 F.3d at 1080 (quoting Demore, 538 U.S. at 513 & 530-31, 123 S.Ct. at 1712 & 1721); see also id. at 1081 & n. 4 ("There is no indication anywhere in *Demore* that the Court would countenance an indefinite detention[,]" and "references to the brevity and limited nature of the confinement are found throughout *Demore*.") (italics in original); cf. Zadvydas, 533 U.S. at 699, 121 S.Ct. at 2504 (absent special circumstances, an alien ordered removed whose removal is not reasonably foreseeable may not be indefinitely detained, but only for "a period reasonably necessary to secure removal"); Tijani, 430 F.3d at 1242 (interpreting § 1226(c) as precluding protracted detention where petitioner contests removability).

In Nadarajah, the Ninth Circuit reasoned that the petitioner's detention was "more akin to the situation in *Zadvydas*," which involved "'indefinite' and 'potentially permanent[]'" detention. 443 F.3d at 1080 (quoting Zadvydas, 533 U.S. at 690-91, 121 S.Ct. at 2498-99) (italics in original). The Nadarajah Court stated that "*Demore* endorses the general proposition of 'brief' detentions, with a specific holding of a six-month period as presumptively reasonable[and, thus, a] detention of nearly five years – ten times the amount of time the Supreme Court has considered acceptable

absent a special showing – is plainly unreasonable under any measure[,]" including § 1226(c). Id. (italics in original).

Nadarajah does not cite Tijani's brief opinion holding unlawful an alien's prolonged detention under § 1226, but the holdings of the two cases are consistent. To avoid deciding the constitutionality of § 1226(c) as applied to the petitioner in that case, who had been detained for more than two years and eight months pending a direct appeal of his order of removal, Tijani construed

> the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens. Two years and eight months of process is not expeditious; and the foreseeable process in this court, where the government's brief in Tijani's appeal of the removal was only filed last month after two extensions of time, is a year or more.

430 F.3d at 1242. Tijani held that the petitioner was entitled to release unless the government provided him with a bond hearing and established that he was a flight risk or a danger to the community.[8] See id. In a concurring opinion examining the merits of the petitioner's claim, Judge Tashima concluded, among other things, that the petitioner was entitled to be released because his detention was unreasonable under Demore and Zadvydas. See id. at 1249-50 (Tashima, J., concurring).

C. Length of Detention.

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[8] Tijani is distinguishable from Nadarajah in that the latter ordered the petitioner released on conditions set by the Attorney General, while the former observed that petitioner be given a bond hearing (or be released if a bond hearing was not timely held). However, it is clear from Nadarajah that no useful purpose would have been served by conducting a bond hearing because the court also held that: (1) ICE abused its discretion in denying the petitioner parole in the United States because there was no facially plausible evidence that his detention was in the public interest or that his release posed a risk to national security; (2) humanitarian release was warranted on health grounds because the petitioner's health was deteriorating in custody; and (3) the petitioner also was entitled to release pending appeal under Fed. R. App. P. 23(b) because he had shown both a probability of success on the merits and that the balance of hardships tipped in his favor. 443 F.3d at 1082-84.

Under Nadarajah, petitioner's continued prolonged detention is not authorized by the statute under which he is detained. Like the petitioner in Nadarajah, petitioner has been detained for nearly two years, almost four times longer than the six-month period described by the Ninth Circuit as presumptively reasonable under the general immigration detention statutes. (See Return, Exh. 13 at 44-45 (petitioner taken into custody by ICE on March 29, 2005) & Supp. Mem., Exh. B at 5 (petitioner released from custody on bond on or about February 9, 2007); see also Tijani, 430 F.3d at 1242 (holding that a detention of over two years and eight months was not within the authority conferred by § 1226(c)); Welch v. Ashcroft, 293 F.3d 213, 227 (4th Cir. 2002), abrogated on other grounds by Demore, 538 U.S. at 516, 123 S.Ct. at 1713 (holding that 14 months in detention is five months longer than the 90 days allowed under § 1231(a)(2) and, therefore, "outside any range that comports with due process").

As explained above, the Ninth Circuit's reading of Demore indicates that § 1226(c), like § 1225(b), should be construed to prohibit indefinite detention and to contain the same reasonableness limitations on detention as § 1225(b). See Nadarajah, 443 F.3d at 1078 ("[T]he general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period."). The Ninth Circuit interpreted Demore to stand for the proposition that a "brief" detention of no more than six months is presumptively reasonable for aliens detained under § 1226(c). See id. at 1080-81 & n. 4. Although § 1226(c) makes the pre-removal period of detention of "criminal aliens" mandatory, § 1226(c) is not one of the specialized provisions authorizing detention for longer than six months of terrorists and other national security threats which the Ninth Circuit distinguished from the "general immigration detention statutes" subject to the reasonableness limitations described in Nadarajah.

The government contends that the length of petitioner's detention should not weigh in favor of his release because he "has acted to prevent his removal from the United States by filing two petitions for review in 2005 and seeking (and obtaining) a stay of removal." (Return at 8). The government argues that these acts suspend or toll the removal period under 8 U.S.C. § 1231(a)(1)(C) and, therefore, petitioner's continued detention is authorized. (See id. at 7-8).

The government's contention is unpersuasive. First, it would be anomalous and inconsistent to conclude that seeking judicial review and obtaining a stay of removal are "acts to prevent" removal that can lead to suspension of the removal period under § 1231(a)(1)(C) when the preceding paragraph of the same statute expressly provides that "[i]f the removal order is judicially reviewed" and "if a court orders a stay of removal," the removal period does not even begin until that process in complete, on the date the court issues its final order. 8 U.S.C. § 1231(a)(1)(B)(ii).

Second, § 1231 governs detention during and after the "removal period" of aliens who have been ordered removed. As explained above, petitioner's removal period has not begun and, therefore, his detention is governed by § 1226. See supra at § II.A. Because the removal period has not yet begun, petitioner's direct appeals and the issuance of a stay of removal cannot have suspended or tolled the removal period under § 1231(a)(1)(C).

Third, even assuming § 1231 applies to petitioner's case, it expressly authorizes extending the removal period and an alien's detention beyond the 90 days only "if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal." 8 U.S.C. § 1231(a)(1)(C). Nothing in that statutory language suggests that an alien's exercise of his right to seek judicial review of an order of removal qualifies as "conspir[ing] or act[ing] to prevent" his removal within the meaning of the statute, which specifically applies to aliens who fail or refuse to act in "good faith" in effecting their removal. Moreover, "the word 'conspires' connotes secret, improper or unlawful action," and thus the remaining text of this section "imbue[s the phrase] 'acts to prevent' with a tincture of bad faith, dishonestly, or improper behavior," rather than contemplating additional detention for "an alien from seeking legal avenues of relief in a court of competent jurisdiction." Arevalo v. Ashcroft, 260 F.Supp.2d 347, 349 (D. Mass. 2003), vacating as moot on other grounds, 386 F.3d 19 (1st Cir. 2004) (holding that an alien who "simply exercises her statutory rights" by seeking a stay of deportation pending appeal did not "act to prevent" her removal under § 1231(a)(1)(C), and collecting cases). Here, although petitioner refused ICE's attempt to deport him on May 3, 2005, (see Return, Exh. 14 at 45-49), the IJ's decision found that

petitioner did not act in bad faith in refusing to depart because he was not notified of the departure in advance and had no money or clothing. (See Reply, Exh. 10 at 9-10); cf. Pelich v. INS, 329 F.3d 1057, 1060 (9th Cir. 2003) (concluding that Zadvydas "does not save an alien who fails to provide requested documentation to effectuate his removal[because t]he reason is self-evident: the detainee cannot convincingly argue that there is no significant likelihood of removal in the reasonably foreseeable future if the detainee controls the clock[]"); Lema v. INS, 341 F.3d 853, 856 (9th Cir. 2003) (holding that "when an alien refuses to cooperate fully and honestly with officials to secure travel documents from a foreign government, the alien cannot meet his or her burden to show there is no significant likelihood of removal in the reasonably foreseeable future[]").

When an alien petitions for judicial review of a removal order, it is virtually certain that his or her appeal will delay removal for some period of time even if it does not succeed in preventing it. However, to suggest that petitioner therefore "holds the keys" to his release from detention ignores the reality that the petitioner's conduct is merely one factor among many that affects the length of the judicial review process. See Ly v. Hansen, 351 F.3d 263, 272 (6th Cir. 2003) (Explaining that, in a case involving detention of a criminal alien under § 1226(c), "appeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him. Further, although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take.").

Here, petitioner was proceeding pro se when he filed his petitions for review, which provides a reasonable explanation as to why his first three petitions were dismissed for procedural defects and does not demonstrate that petitioner acted with the intent to delay his deportation. Further, once petitioner filed a procedurally adequate petition for review, the Ninth Circuit granted his motion for a stay of removal, (see Petition, Exh 2), which supports a finding that the petitions were not frivolous.[9] The court recognizes that it "must be sensitive to the possibility" that a

[9] A grant of a motion for a stay of removal is not automatic; it is granted only if petitioner

removable alien may engage in "dilatory tactics" in order to "compel a determination" that his detention was unreasonably long. See Ly, 351 F.3d at 272 (although alien's application for relief from removal and his need for a rescheduled hearing were partly responsible for prolonging his detention, those filings did not justify the overall length of detention). Still, there is no indication that petitioner has acted in bad faith to delay his deportation by filing petitions for review.

In sum, petitioner has shown that his detention for nearly two years was excessive and unauthorized by the controlling statute, 8 U.S.C. § 1226(c). See Tijani, 430 F.3d at 1242 (holding that a detention of over two years and eight months was not within the authority conferred by § 1226(c)); Welch, 293 F.3d at 227 (holding that 14 months in detention is five months longer than the 90 days allowed under § 1231(a)(2) and, therefore, "outside any range that comports with due process").

D. Likelihood of Petitioner's Removal.

Petitioner contends that his removal is not reasonably foreseeable for two reasons. First, he argues that the Ninth Circuit may well reverse his removal order and remand his case for further administrative proceedings because his petitions for review advance meritorious arguments that petitioner is prima facie eligible for adjustment of status based on his marriage to an United States citizen and that the only reason he was unable to adjust appears to be because his attorney failed to file the appropriate papers.[10] (See Petition at 8-9). Second, petitioner asserts that regardless of the likelihood of prevailing on his petitions for review, his removal is not significantly likely to occur in the reasonably foreseeable future because there is no time frame for a decision by the Ninth Circuit. (See id. at 9).

Under the circumstances, the court is convinced that petitioner's removal is not certain. First, the government does not challenge, (see, generally, Return at 1-10), petitioner's contention

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shows either the probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor. See Andreiu v. Ashcroft, 253 F.3d 477, 484 (9th Cir. 2001) (en banc); Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998) (per curiam).

[10] The government has made no attempt to respond to petitioner's contentions regarding the merits of his pending petitions for review. (See, generally, Return at 1-10).

that his case could be remanded for further administrative proceedings relating to an adjustment of status based on petitioner's marriage to a United States citizen. Of course, a remand would significantly extend the time that petitioner is in detention. In addition, a successful application for adjustment of status will effectively terminate the government's efforts to remove petitioner. See Welch, 293 F.3d at 217-18.

Second, with respect to petitioner's contention that his removal is not likely to occur in the near future because there is no time frame for a decision by the Ninth Circuit regarding petitioner's petitions for review, the Ninth Circuit docket sheet (which can be found on PACER) for Diouf, No. 06-71922, indicates that the petition for review was filed over a year ago and, on October 16, 2006, was consolidated with petitioner's second petition for review filed on August 15, 2006. Petitioner's opening brief was filed on May 31, 2007, respondent's brief was filed on October 17, 2007, and petitioner's reply brief was filed on November 9, 2007. During oral argument, the government argued that, although there is no timetable for a decision regarding petitioner's petitions for review, petitioner is not being held indefinitely because the Ninth Circuit will eventually decide petitioner's appeals. (See Hearing Trans. at 9).

The government's contention is unpersuasive. As an initial matter, the three new cases – two district court cases and one Ninth Circuit unpublished disposition – the government raised at oral argument are neither binding nor persuasive. See Singh v. Clark, 2007 WL 3046315 (W.D. Wash. 2007); Mboussi-Ona v. Crawford, 2007 WL 3026946 (D. Ariz. 2007); Beqir v. Clark, 220 F.App'x 469, 2007 WL 201108 (9th Cir. 2007) (unpublished per curiam memorandum) & 9th Cir. R. 36-3(a) (unpublished Ninth Circuit opinions are not precedent). With respect to Mboussi-Ona, the court did not cite or otherwise discuss Nadarajah, see, generally, 2007 WL 3026946, at *1-6, which, next to Tijani, is perhaps the most significant authority governing the disposition of the instant Petition. Further, the court respectfully disagrees with Mboussi-Ona's conclusion that the Ninth Circuit in Tijani did not intend to include the time the petitioner was in detention awaiting the disposition of his judicial appeal in calculating his total length of detention. 2007 WL 3026946, at *4. The Tijani Court clearly considered the time petitioner was detained during both the administrative and judicial review processes in assessing the reasonableness of his detention.

430 F.3d at 1242. Moreover, the court does not believe that including the judicial review time as part of the calculation in determining whether an alien's detention is reasonable would "mean that by merely seeking judicial review, every alien found removable would be entitled to an individualized bond hearing and possible release." Mboussi-Ona, 2007 WL 3026946, at *5. Under Tijani, only aliens who obtain a stay of removal would be eligible to be considered for release,[11] which is not automatic, as the government is still entitled to prove that detention remains justified. See Tijani, 430 F.3d at 1246 (Tashima, J., concurring).

Beqir, which is a very short memorandum decision, and Singh, were filed by pro se litigants. See Beqir, 220 F.App'x at 470, 2007 WL 201108, at *1; Singh, 2007 WL 3046315, at *1. Neither of these cases cited or discussed the Ninth Circuit's published decisions in Nadarajah and Tijani. See, generally, Beqir, 220 F.App'x at 469-71, 2007 WL 201108, at *1-2; Singh, 2007 WL 3046315, at *1-5. The court believes that Bequir and Singh are inconsistent with Nadarajah and Tijani to the extent they can be read to hold that detention pending administrative and judicial review is permissible because it has a definite termination point. See Nadarajah, 443 F.3d at 1081 ("Nor are we persuaded by the government's argument that because the Attorney General will someday review Nadarajah's case, his detention will at some point end, and so he is not being held indefinitely."); Tijani, 430 F.3d at 1242 (two years and eight months detention pending administrative and judicial review violates statutory right to expedited removal process); see also Welch, 293 F.3d at 227 ("Welch's detention pending a final removal order is similarly indefinite. Like the postorder detention in *Zadvydas*, Welch's detention features a clearly identifiable event marking completion of the detention period (i.e., issuance of a final order), but no clearly identifiable deadline by which that event must take place.") (italics in original).

Indeed, in Nadarajah, the Ninth Circuit rejected the government's argument that the petitioner was not being held indefinitely because, even though the Attorney General "will someday review [the petitioner's] case," and "his detention will at some point end, . . . [n]o one can

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[11] As indicated earlier, a stay of removal is not automatic; it requires a showing of either probability of success on the merits and the possibility of irreparable harm, or the existence of serious legal questions that tip the balance in petitioner's favor. See supra at n. 9.

satisfactorily assure us as to when that day will arrive." 443 F.3d at 1081. In Tijani, the court ordered the petitioner to be released or provided a bail hearing where he had been detained under § 1226(c) for more than two years and eight months, his petition for review was pending, the government had filed its answering brief only a month earlier, and "the foreseeable process in [the Ninth Circuit] . . . is a year or more." 430 F.3d at 1242. The circumstances of this case are analogous because even though petitioner's petitions for review at some point will be adjudicated, there is no timetable or date for disposition of his petitions or for effectuating his removal if he loses. Indeed, petitioner's reply brief was only filed a month ago in the Ninth Circuit case. Petitioner's removal therefore is not reasonably foreseeable, and his continued detention is not reasonably necessary to effect his removal. See Nadarajah, 443 F.3d at 1081 (relying partly on the absence of a timetable for decision to conclude that there was no significant likelihood of removal in the reasonably foreseeable future).

CONCLUSION

As discussed above, petitioner obtained a preliminary injunction granting him a bond hearing and was released on bond following a hearing before an IJ.[12] (See Supp. Mem. at 2 & Reply, Exh. 10 at 7-11). Thus, the government's contention that petitioner should not be released because he is a flight risk is unpersuasive in light of the IJ's conclusion that the government failed to meet its burden of proof to establish by clear and convincing evidence that petitioner presents a sufficient flight risk.[13] Specifically, the IJ found that petitioner's risk of flight did not justify his

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[12] The government asserted at oral argument that the IJ applied the incorrect standard at petitioner's bond hearing in determining whether he should be released from detention. (See Hearing Trans. at 31-37). The standard applied by the IJ at the bond hearing was derived from Judge Hatter's order granting petitioner's preliminary injunction, (see Court's Order of January 4, 2007, at 3-4), which is currently on appeal. This court is not in a position to review Judge Hatter's view of the appropriate standard to be applied by the IJ in determining whether petitioner should be released from detention.

[13] The government does not argue that petitioner should not be released because he poses a danger to the community. (See, generally, Return at 1-10). Indeed, the government conceded at the bond hearing before the IJ that petitioner does not pose a danger to the community. (See Reply, Exh. 10 at 10) ("The government even admitted in court that [petitioner] is not a serious danger."). Moreover, the IJ found that petitioner's only criminal conviction, possession of a small amount of marijuana, did not render him a danger to the community. (See id.).

prolonged detention because, although petitioner failed to appear for voluntary departure in 2005, petitioner provided credible testimony at the bond hearing that "he was given misinformation about his immigration proceedings and the consequences of failing to depart by his attorney. [Petitioner] appears to have had multiple problems with attorneys in the past and has filed a complaint with the State Bar. The fact that he has made multiple attempts to correct those mistakes by filing addition[al] motions or petitions in court does not make him a flight risk for purposes of bond." (Reply, Exh. 10 at 10). Moreover, the IJ found credible petitioner's explanation that he refused to depart when ICE agents brought him to the airport in 2003 because he was not notified in advance of his departure and had no money or clothing with him. (Id.).

In conclusion, petitioner's continued detention is not authorized by statute and, therefore, he is entitled to release.

This decision is not intended for publication.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order:

(1) Accepting and adopting this Report and Recommendation; and

(2) Directing that Judgment be entered granting the Petition and ordering petitioner released on the conditions already imposed by the IJ's Order dated February 9, 2007.

Dated this 19th day of December 2007.

/s/
Fernando M. Olguin
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.