**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MINNESOTA**

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| **Petitioner PETITIONER**,  Petitioner,  v.  **William BARR**, Attorney General;  **Chad WOLF**, Acting Secretary, Department of Homeland Security;  **Matthew ALBENCE**, Acting Director, Immigration and Customs Enforcement;  **Peter BERG**,[[1]](#footnote-2) Director, St. Paul Field Office Immigration and Customs Enforcement; and  **[Joel BROTT**, Sheriff, Sherburne County,]  **[Kurt FREITAG**, Sheriff, Freeborn County,]  **[Eric HOLIEN**, Sheriff, Kandiyohi County,]  **[Jason KAMERUD**, Sheriff, Carver County,]    Respondents. | Civil No.: 20-cv-\_\_\_\_\_\_\_  **PETITION FOR WRIT OF HABEAS CORPUS**  **8 U.S.C. § 1231**  **28 U.S.C. § 2241** |

1. **INTRODUCTION**
2. Respondents are unlawfully detaining Petitioner, Name, under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1231. Respondents are currently unlawfully and unreasonably subjecting Petitioner to post-order detention, with no likelihood of removal in the reasonably foreseeable future. Respondents have detained Petitioner, most recently, since February 7, 2018, when he was detained at a regularly-scheduled check-in with ICE and had his order of release revoked by Respondents. Respondents have detained Petitioner for over 21 months, including over 9 months under § 1231.
3. Petitioner was detained when he arrived at the U.S.-Mexico border, on May 20, 2010, seeking asylum after the terrorist organization Al-Shabaab killed his brother and threatened to kill him in Mogadishu, Somalia. His asylum application was denied on May 11, 2011, because he could not prove his identity. His removal order became administratively final on June 10, 2011, when the period to submit an appeal expired. He was released on an Order of Supervision on October 3, 2011, and remained in that status until he was detained again on February 7, 2018. Soon after Petitioner was taken into custody, he filed a motion to reopen his immigration proceedings on the basis of changed country conditions in Somalia and his recent marriage to a lawful permanent resident, whose naturalization application was recommended for approval but has been unlawfully delayed. That motion was denied by an Immigration Judge. Petitioner appealed the denial to the Board of Immigration Appeals. DHS did not file an appeal brief and has not disputed the grounds for appeal. The appeal remains pending, but the BIA granted Petitioner a rare emergency stay of removal on March 28, 2018, just hours before the deportation flight left for Somalia, suggesting that there is merit to the appeal.
4. There are three possible outcomes for his appeal, none of which will result in his lawful deportation in the foreseeable future. First, if his appeal is denied, Petitioner will file a petition for review in the Ninth Circuit Court of Appeals, in which jurisdiction his immigration case originated, which will trigger an automatic stay of removal for at least 91 days. *See De Leon v. INS*, 115 F.3d 643 (9th Cir. 1997); Ninth Cir. Gen. Order 6.4(c)(1). After that time, the Circuit Court will determine whether to lift or continue the stay pending briefing and a decision. Second, if the appeal is granted, the BIA could grant the motion to reopen and remand the case to the Immigration Judge to be heard on the merits, which would vacate the removal order. Thereafter, there would be no final order of removal until the Immigration Judge renders a decision and any appeals are resolved.[[2]](#footnote-3) Third, alternatively, the BIA could vacate the denial of the motion to reopen and remand the motion to the Immigration Judge to reconsider with instructions. This would presumably implicate a new stay of removal. Thus, once the appeal is resolved, however it is resolved, Petitioner will still not be removable.
5. Petitioner was detained pursuant to § 1225(b) for 386 days and then pursuant to § 1231, following his removal order, for 115 days. His current detention pursuant to § 1231 has persisted for 149 days with no end in sight. Petitioner has now been detained by ICE for a total of 650 days, with 264 days of post-order detention in the aggregate.
6. Until such time as a decision is made, Petitioner is subject to an administratively final order of removal and continues to be held pursuant to § 1231. Because the pending appeal is a collateral challenge, the stay is not a stay under the plain meaning of § 1231(a)(1)(B)(ii) and thus the removal period has not restarted since May 11, 2011. *See* *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 922, 923–24 (D. Minn. 2006); 8 C.F.R. § 241.4(b)(1).
7. On or about May 2, 2018, ICE conducted a regular custody review for Petitioner. Exh. EE. Despite recognizing that a stay of removal is in place, ICE appears to have determined that removal was likely in the reasonably foreseeable future on the basis of the final order of removal and ICE’s purported possession of a valid travel document.[[3]](#footnote-4) *Id.* Additionally, the Decision to Continue Detention does not appear to acknowledge any evidence favoring supervised release, including compliance with the prior Order of Supervision for over six years, lack of criminal record beyond traffic and parking violations, family ties, employment history, meritorious claims, procedural posture of the case, or any other factors related to danger to the community or flight risk, even though ICE was provided with this information. *See* 8 C.F.R. § 241.4(e), (f); Bruning Decl. at ¶ 13.
8. The Supreme Court has held that it is presumptively reasonable for the government to detain a noncitizen with a final order of removal for six months or less.[[4]](#footnote-5) *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). “After this 6-month period, 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.* “[T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.” *Id.* at 699–700.
9. Here, the removal period began to run on June 10, 2011, 30 days after the removal order was entered. § 1231(a)(1)(A). Petitioner’s detention during this removal period has reached 264 days. Petitioner has an appeal of the denial of his motion to reopen pending before the BIA, for which there is no timetable for a decision.[[5]](#footnote-6) Even when the appeal is decided, there is no decision the BIA can make that will result in removal being reasonably foreseeable, as described *supra*.
10. Alternatively, even “if removal is [found to be] reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period.” *Zadvydas*, 533 U.S. at 700. This was not considered by ICE in deciding to continue detaining Petitioner. Evidence of his successful compliance with his Order of Supervision, his lack of criminal record, and other indicators of risk were outright ignored. *See* 8 C.F.R. § 241.4(e), (f).
11. To remedy this unlawful detention, Petitioner seeks declaratory and injunctive relief in the form of immediate release from detention and the return to his previous Order of Supervision.
12. **JURISDICTION AND VENUE**
13. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (federal question), § 1361 (federal employee mandamus action), § 1651 (All Writs Act), and § 2241 (habeas corpus); Art. I, § 9, cl. 2 of the U.S. Constitution (“Suspension Clause”); 5 U.S.C. § 702 (Administrative Procedure Act); and 28 U.S.C. § 2201 (Declaratory Judgment Act). Because Petitioner seeks to challenge his custody as a violation of the Constitution, laws, or treaties of the United States, jurisdiction is proper in this court. Federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas petitions by noncitizens challenging the lawfulness of their detention. *See* *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) (“[T]he primary federal habeas corpus statute, 28 U.S.C. § 2241, confers jurisdiction upon the federal courts to hear these cases.”); *Moallin v. Cangemi*, 427 F.Supp.2d 908, 920–21 (D. Minn. 2006).
14. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (e)(1)(B), and 2241(d) because Petitioner is detained within this District. Venue is also proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(A) because some of the Respondents are headquartered within this District.
15. **PARTIES**
16. Petitioner NAME is a native and citizen of Somalia. Petitioner presented himself at the formal border crossing at San Ysidro, California, in order to apply for asylum in 2010. Petitioner came to the U.S. after his brother was murdered and Al-Shabaab called him to tell him they would kill him next. He was subsequently denied asylum in 2011, and was released later that year on an Order of Supervision. He was detained again by ICE on February 7, 2018, in order to execute the final order of removal. He filed a motion to reopen at the Immigration Court, which denied his motion. He then appealed the denial to the Board of Immigration Affairs, which issued a stay of removal but has not yet decided the appeal. Before he was redetained, his wife was recommended for approval of her naturalization application, but USCIS has not made a final decision within the legally-mandated time period. Petitioner’s wife also filed an immigrant visa petition on his behalf, which USCIS has also not yet acted upon.
17. Respondent William Barr is being sued in his official capacity as the Attorney General of the United States and the head of the Department of Justice, which encompasses the Board of Immigration Appeals and the immigration judges as a subunit—the Executive Office for Immigration Review. Attorney General Barr shares responsibility for implementation and enforcement of the immigration laws, including detention statutes, along with Respondent Wolf. Attorney General Barr is a legal custodian of Petitioner. Attorney General Barr’s official address is 950 Pennsylvania Avenue NW, Washington, D.C. 20530.
18. Respondent Chad Wolf is being sued in his official capacity as the Acting Secretary of the Department of Homeland Security. In this capacity, Acting Secretary Wolf is responsible for the administration of the immigration laws pursuant to § 103(a) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1103(a), routinely transacts business in the District of Minnesota, supervises the St. Paul ICE Field Office, and is legally responsible for pursuing Petitioner’s detention and removal, and as such is a legal custodian of Petitioner. Secretary Wolf’s official address is 245 Murray Lane SW, Washington, D.C. 20528.
19. Respondent Matthew Albence is being sued in his official capacity as the Acting Director of Immigration and Customs Enforcement, a sub-unit of the Department of Homeland Security. In that capacity, Acting Director Albence has supervisory capacity over ICE personnel in Minnesota, and he is the head of the agency that retains legal custody of Petitioner. Acting Director Albence’s official address is 500 12th Street SW, Washington, D.C. 20536.
20. Respondent Peter Berg is being sued in his official capacity as the Field Office Director for the St. Paul Field Office for ICE within DHS. In that capacity, Field Director Berg has supervisory authority over the ICE agents responsible for detaining Petitioner. The address for the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, Minnesota 55111.
21. Respondent Joel Brott is being sued in his official capacity as the Sheriff of Sherburne County, Minnesota. In that capacity, Sheriff Brott is responsible for the Sherburne County Jail—a detention facility under contract with ICE and the physical location where Petitioner is currently in custody. The address for Sherburne County Jail is 13880 Business Center Drive NW, Elk River, Minnesota, 55330.
22. **EXHAUSTION**
23. Petitioner has exhausted his administrative remedies as required by law. Judicial action is his only remedy. Petitioner is being detained despite his removal being significantly unlikely in the foreseeable future. Petitioner completed a custody review with ICE, which ignored evidence favoring release under 8 C.F.R. § 241.4 and arbitrarily decided to continue detaining him. There is no appeal process for custody decisions in this situation. He is collaterally challenging his removal at the BIA, which has not yet rendered a decision. As a result, there is currently no removal order that Petitioner can appeal through the judicial review provisions of 8 U.S.C. § 1252.
24. No statutory exhaustion requirement applies to Petitioner’s claim of unlawful detention.
25. The immigration court does not have jurisdiction to order Petitioner released.
26. No administrative remedies currently exist under the law to challenge post-order detention where there is no reasonable likelihood that removal will occur in the foreseeable future.
27. **FACTUAL ALLEGATIONS & PROCEDURAL HISTORY**
28. Petitioner is a 30-year-old native and citizen of Somalia. *See* Exh. B; Exh. D; Exh. K.
29. Petitioner fled Somalia after his brother was murdered by Al-Shabaab and called him to tell him he was next. The following morning, Petitioner, with the help of family, hired a smuggler to get him out of Somalia and left Mogadishu. Petitioner travelled through numerous countries before arriving at the U.S. border on May 20, 2010. He presented himself as an asylum seeker to immigration officials, and he was taken into custody pending resolution of his asylum case. *See* Exh. B; Exh. C; Exh. D.
30. On May 11, 2011, Petitioner was ordered removed and denied asylum by an Immigration Judge at the Los Angeles Detained Immigration Court. The IJ issued only a summary removal order in writing. Exh. A. A more substantive decision was made orally, but there are no transcripts in the agency’s records of either the hearings or the decision. The audio recording of the hearing indicates that the primary reason for the asylum denial was not the merits of his claim but his inability to prove his identity to the IJ’s satisfaction under the REAL ID Act. *See* Bruning Decl. at ¶ 11. Petitioner testified at his hearing that he took a copy of his birth certificate—one side in Somali, one side in English—when he fled Mogadishu. Before he left Somalia, he photocopied his birth certificate and scanned a copy into his email. In South America, one of his bags, containing his original birth certificate, was stolen. When he arrived at the border, immigration officials took his photocopied birth certificate. His first attorney apparently received a copy of the birth certificate from DHS during proceedings, but then lost it. She was able to obtain a copy of the English-language birth certificate by having a fellow detainee provide Petitioner’s email log-in information to a friend on the outside, who then faxed the English-language birth certificate to counsel. The attorney then submitted the birth certificate, with fax headers, to the Immigration Court on September 14, 2010. *See* *id.* at ¶ 10; Exh. F. DHS then submitted the Somali-language birth certificate on April 11, 2011, but would not state in court where it had received it from or whether it also had an English-language copy. Petitioner’s second attorney, at the hearing, was unable to explain where the English-language version came from, why it was in two languages, whether both were created at the same time, or whether both were produced on the same piece of paper. After an adjournment, the attorney logged into Petitioner’s email account and downloaded both copies of the birth certificate that was scanned in, and submitted those to the court on April 15, 2011, along with a printout of the email they were attached to, dated consistently with Petitioner’s testimony.[[6]](#footnote-7) The IJ did not accept this filing as the attorney was a witness. The attorney then had a paralegal access the email and be present in court to testify as to how she accessed the birth certificates; these were submitted to the court on May 11, 2011, along with an English translation of the Somali-language birth certificate. The IJ questioned why the English-language birth certificate had typos and was not an exact translation of the Somali side, and on this basis alone found that Petitioner could not make out an asylum claim, denied his application, and ordered him removed to Somalia that same day. Bruning Decl. at ¶ 11.
31. Petitioner did not appeal the decision at the time. Exh. U.
32. On October 3, 2011, Petitioner was released on an Order of Supervision. Exh. G.
33. Petitioner thereafter lived freely in the U.S. for over 6 years without incident. He regularly appeared at his scheduled check-ins. *Id.* He has no criminal record other than traffic and parking violations. Exh. FF. He is married to a lawful permanent resident, and they have a U.S. citizen child, born in August 2017. *Id.* He also maintained the same job for over 5 years.
34. Petitioner’s wife filed a naturalization application with USCIS on November 17, 2016. On December 11, 2017, she completed her interview with USCIS, passing the language and civics tests, and the immigration officer recommended her for approval. Exh. I. After waiting 169 days without a decision, she filed a complaint in this Court pursuant to 8 U.S.C. § 1447(b) alleging unlawful delay. To date, UCSIC has not issued a decision and this Court has not yet acted on her complaint.
35. Petitioner’s wife filed an I-130 Petition for Alien Relative with USCIS on September 12, 2017. Exh. H. Because she filed as a lawful permanent resident, the petition is subject to a waitlist. However, if and when she naturalizes, the petition is immediately upgradable to an immediate relative petition, and Petitioner would—as an “arriving alien”—immediately be eligible to adjust his status to that of a lawful permanent resident through USCIS. 8 C.F.R. §§ 245.2(a)(1); 1245.2(a)(1). Petitioner would also need the immigration court to reopen and terminate proceedings to allow USCIS to act on his application for adjustment. The Ninth Circuit has repeatedly held that the immigration courts should generally grant reopening to provide arriving aliens the opportunity to pursue adjustment before USCIS. *Singh v. Holder*, 771 F.3d 647, 652–53 (9th Cir. 2014); *Kalilu v. Mukasey*, 548 F.3d 1215, 1218 (9th Cir. 2008) (“Without a reopening or a continuance, an alien is subject to a final order of removal, despite the fact that he may have a *prima facie* valid I-130 or adjustment application pending before USCIS.”).
36. On February 7, 2018, at his scheduled check-in, Petitioner was detained again by ICE. Petitioner was transported to the Alexandria Staging Facility in Louisiana for imminent removal. Petitioner was initially told that the deportation flight would leave by the end of February. Exh. N. On February 21, 2018, Petitioner filed a motion to reopen with the Los Angeles Detained Immigration Court. That motion asserted the exception to the normal deadline for “changed country conditions” under 8 C.F.R. § 1003.23(b)(4)(i). Exh. J; Exh. U. Petitioner asserted a claim to protection in the form of asylum based on harm he feared if returned to Somalia, and requested reopening in order to pursue adjustment of status through his wife’s petition, noting the exceptional circumstances involving the delay in her naturalization case. Exh. J.; Exh. U. Petitioner also submitted a motion to stay removal. The motion was assigned to a new IJ, as the original IJ was no longer at that court.
37. On February 22, 2018, the new IJ denied Petitioner’s stay motion on the basis that “[t]he Court reviewed the entire ROP [record of proceedings]. The Court made an adverse credibility finding. The Respondent did not appeal the IJ’s decision.” Exh. O. Petitioner and counsel did not receive the decision until February 26, 2018.
38. Petitioner filed an interlocutory appeal of the stay denial to the BIA on February 28, 2018. Exh. P. The notice of appeal argued that the stay was denied on an impermissible basis and not on the merits of the motion to reopen. *Id.*
39. On March 2, 2018, the IJ discovered on further review of the record of proceedings that he was Deputy Chief Counsel for DHS at the time of Petitioner’s original proceedings, and his name was on DHS filings in the case. Thus, he rescinded the stay denial and recused himself from the case. Exh. Q; Exh. R. Petitioner and counsel received those orders on March 6, 2018, and moved the BIA to withdraw its interlocutory appeal as moot. It was actually withdrawn on March 20, 2018.
40. Later on March 2, 2018, the third IJ again denied Petitioner’s stay motion. Exh. S. The court did not mail the decision to counsel until March 5, 2018; it still had not arrived until March 9, 2018, at which time counsel requested that the court fax the decision to him; and counsel did not receive proper service of the decision until March 12, 2018. *Id.* All the while, Petitioner was told that he could be put on a flight to Somalia any day. Exh. Z. A flight purportedly scheduled for March 1, 2018, was cancelled due to weather conditions; Petitioner was told another flight was scheduled for March 15, 2018. *See* Exh. Z. The IJ’s order, in its entirety, denied the stay motion “[u]pon consideration of Respondent’s Motion for a Stay of Removal and all evidence of record.” Exh. S.
41. Petitioner again appealed the stay denial on March 11, 2018, to the BIA, and again alleging that the denial was made on an improper basis. Exh. T.
42. On March 13, 2018, the IJ denied Petitioner’s motion to reopen. Exh. U. The first basis for denial was that country conditions have not changed materially, in part, because Al-Shabaab existed in 2011 and it exists now; in other words, current conditions represent a continuation of violence rather than a material change. *Id.* The second reason was that

Despite [his] removal order, Respondent has remained in the United States for over six years. He now seeks reopening so that he may again apply for asylum, withholding of removal, and CAT relief or so that he may adjust status through his wife. . . . [T]hough Respondent argues that he is eligible for relief based on a Form I-130, Petition for Alien Relative (Form I-130), filed by his lawful permanent resident wife on September 12, 2017, there is no evidence that the petition has been granted or that a visa is immediately available as his wife has not yet naturalized. Moreover, even if a visa were to become available, Respondent’s potential relief is based on a marriage that occurred May 17, 2017, approximately six years after the Court ordered Respondent removed. To allow Respondent to use this equity, acquired long after the entry of his removal order, would undermine the immigration laws.

*Id.*

1. Following this decision, Petitioner was transferred to the West Texas Detention Facility. While there, other Somali and East African detainees who were to be deported together suffered extensive abuse by guards, including sexual assault, denial of medical treatment, and racial abuse. *See* Exh. V; Exh. W; Exh. X. Petitioner himself was denied medical treatment and witnessed abuse of other detainees. Exh. V; Exh. W; Exh. X. A coalition of nonprofit organizations and law school clinics requested discretion from ICE on March 22, 2018, on account of the abuse and the need for witnesses to not be deported while an investigation was ongoing. Exh. V; Exh. Z.
2. Petitioner in turn appealed the denial of his motion to reopen on March 23, 2018. Exh. Y. Petitioner alleged that the IJ’s decision was legally erroneous in that the “changed conditions” standard used was explicitly rejected by the Ninth Circuit, in cases the IJ cited for the opposite proposition, and that the IJ ignored Ninth Circuit case law favoring reopening to apply for adjustment and ruled counter to the Immigration and Nationality Act’s policy goal of family unity. *Id.*
3. Petitioner is currently detained at Sherburne County Jail in Elk River, Minnesota, since April 17, 2018. During his original proceedings, he was detained at Mira Loma Detention Center in Lancaster, California, and the Theo Lacy Facility in Orange, California. When he was redetained by ICE in February 2018, he was initially detained at Freeborn County Jail in Albert Lea, Minnesota, then transferred to the Alexandria Staging Facility in Alexandria, Louisiana, then the West Texas Detention Center in Sierra Blanca, Texas, then Coastal Bend Detention Center in Robstown, Texas, then the El Paso Processing Center in El Paso, Texas, and then finally Sherburne County Jail.
4. Respondents completed Petitioner’s 90 day custody review on May 2, 2018. Respondents assert that ICE is in possession of a valid travel document, which neither Petitioner nor the undersigned have ever seen or know anything about. After acknowledging the pending appeal and the stay of removal, the decision summarily concluded that “removal is likely in the reasonably foreseeable future,” based solely on the alleged existence of a travel document, without any discussion of when removal may occur. Exh. EE.
5. Prior to the custody review, on April 30, 2018, the undersigned spoke to Petitioner’s ICE deportation officer regarding the review. The undersigned informed the officer of the unlikelihood of release, his family and community ties, his work history, lack of criminal record, and compliance with the Order of Supervision over almost 7 years. Bruning Decl. at ¶ 13. None of this information is contained in the Decision to Continue Detention, beyond a single boilerplate sentence stating that the “decision was made based on a review of your file and/or your personal interview and consideration of any information you submitted to ICE’s reviewing officials.” Exh. EE.
6. Another custody review is due August 6, 2018. *Id.*
7. As of the date of this filing, Petitioner has spent 650 days in ICE custody, with over 260 days of post-order detention.
8. Petitioner has exhausted his administrative remedies. No other court of competent jurisdiction has the authority to order the release of Petitioner.
9. **LEGAL FRAMEWORK**
   1. **STATUTORY & REGULATORY FRAMEWORK**
10. Under 8 U.S.C. § 1231, noncitizens with a final order of removal shall be removed from the United States within a period of 90 days. 8 U.S.C. § 1231(a)(1)(A).
11. The beginning of the 90-day removal period is determined by the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

*Id.* at § 1231(a)(1)(B). Where a noncitizen has collaterally challenged removal, such as through a motion to reopen, the underlying removal order remains administratively final unless and until the challenge results in the vacatur of the removal order and proceedings are reopened. *See* *Jamal v. Sessions*, No. 5:18-06015-CV-RK, 2018 U.S. Dist. LEXIS 47577, 2018 WL 1440609, at \*2 (W.D. Mo. Mar. 22, 2018) (“Because, here, Petitioner's case is not being judicially reviewed and is not subject to a court-ordered stay, but rather is subject to an administrative stay on collateral appeal, the Court declines to find that Petitioner's ‘removal period’ has not started under section 1231(a)(1)(B)(ii).”); *see also* 8 C.F.R. § 241.4(b)(1).

1. During the removal period, the noncitizen may be detained, and may not be released under any circumstances if found inadmissible or deportable on criminal or national security grounds. § 1231(a)(2).
2. If the noncitizen is not removed during the 90-day period, he or she “shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien”

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien’s nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien’s conduct or activities that the Attorney General prescribes for the alien.

§ 1231(a)(3).

1. The removal period may be extended beyond 90 days and the noncitizen may remain detained if the noncitizen frustrates his or her removal. § 1231(a)(1)(C).
2. Alternatively, the noncitizen may be detained beyond the 90 days if he or she is inadmissible under § 1182 or removable under various sections of § 1227, or determined to be a risk to the community or unlikely to comply with the order of removal. § 1231(a)(6); 8 C.F.R. § 241.4(a).
   1. **AGENCY REVIEW OF CUSTODY**
3. DHS may release an alien if the alien demonstrates that he or she is not a danger to the community or a flight risk. *Id.* at § 241.4(d)(1); *see* *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 913–14 (D. Minn. 2006) (describing agency review process). DHS must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

*Id.* at § 241.4(e).

1. “The following factors should be weighed in considering whether to recommend further detention or release of a detainee:”

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to -

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

*Id.* at § 241.4(f).

1. When § 241.4 of the regulations was promulgated by the now-defunct INS in 2000, it stated that the regulation “has the procedural mechanisms that...courts have sustained against due process challenges.” Detention of Aliens Ordered Removed, 65 Fed. Reg. 80281, 80283 (Dec. 21, 2000). INS cited to several court decisions from the Third, Fifth, and Tenth Circuits setting out procedural due process requirements for long-term post-order detention. *Id.*; *see also* *Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) (holding that “the process due even to excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight”).
2. Courts have found that the agency’s failure to follow its own regulations and failure to exercise discretion is enforceable against the agency. *See* *INS v. St. Cyr*, 533 U.S. 289, 307 (2001) (allowing a habeas court to hear challenges to failure to exercise discretion); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). “In response to Zadvydas, the regulations governing post-removal-order detention were amended to comply with the Constitutional concerns illuminated in Zadvydas. The amended regulations, 8 C.F.R. §§ 241.13 and 241.4, reflect the concerns of the Zadvydas Court and provide necessary procedural safeguards to ensure the detention of an alien beyond the removal period comports with due process requirements. Because these regulations confer important rights upon aliens ordered removed, DHS is bound by these regulations.” *Bonitto v. Bureau of Immigration & Customs Enforcement*, 547 F. Supp. 2d 747, 757 (S.D. Tex. 2008); *see also* *D’Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 394 (W.D.N.Y. 2009) (quoting *Bonitto*). “The regulations involved here do not merely facilitate internal agency housekeeping, but rather afford important and imperative procedural safeguards to detainees.” *Bonitto*, 547 F. Supp. 2d at 756 (citing *United States v. Caceres*, 440 U.S. 741, 759, 760 (1979)). “While ICE does have significant discretion to detain, release, or revoke aliens, the agency still must follow its own regulations, procedures, and prior written commitments in the Release Notification.” *Rombot v. Souza*, 296 F. Supp. 3d 383, 388–89 (D. Mass. 2017).
   1. **PROLONGED DETENTION**
3. The Due Process Clause of the Fifth Amendment requires that “[n]o person shall . . . be deprived of liberty . . . without due process of law.” “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Zadvydas*, 533 at 690 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). In the context of immigration detention, at a minimum, detention must “bear[] a reasonable relation to the purpose for which the individual [was] committed.” *Id.* (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). If “detention’s goal is no longer practically attainable,” detention becomes unreasonable and therefore violates the Fifth Amendment right to due process. *Id.*
4. The Fifth Amendment Due Process Clause also requires that Respondents follow procedures that are adequate to establish that detention is both statutorily and constitutionally valid. *See* *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (“due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.”).
5. Under the canon of constitutional avoidance, no immigration detention statute should be construed in a way that would violate the Constitution where it is “fairly possible” to avoid doing so. *Zadvydas*, 533 U.S. at 689.
6. In *Zadvydas*, the Supreme Court held that, while the statute provides for a removal period of 90 days, post-order detention up to 180 days was presumptively reasonable. *Id.* at 701. After six months, the burden is on the government to rebut a showing by the noncitizen “that there is no significant likelihood of his removal in the reasonably foreseeable future.” *Id.* “[W]hat constitutes the ‘reasonably foreseeable future’ shrinks as the total period of postremoval confinement grows.” *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 915 (D. Minn. 2006).
7. A grant of reopening and remand to the Immigration Court would not cure Petitioner’s detention of its unconstitutionality. Upon reopening, Petitioner could be detained pursuant to § 1225(b), which provides for mandatory detention, or § 1226(a), which allows for bond. Petitioner cannot predict which authority he would be detained under upon reopening, as that decision appears to lie exclusively within the discretion of DHS.
8. This Court has on several occasions agreed that § 1226(c)—functionally identical to § 1225(b)—does not allow for indefinite detention. *Bah v. Cangemi*, 489 F.Supp.2d 905, 920 (D. Minn. 2007) (Schiltz, J.) (“This Court believes that allowing unlimited pre-removal-period detention under § 1226 would be inconsistent with the reasoning underlying *Zadvydas*.”); *Moallin v. Cangemi*, 427 F.Supp.2d 908, 926 (D. Minn. 2006) (Nelson, J.) (applying principles of *Zadvydas* to § 1226(c) detention); *Phan v. Brott*, No. 17-cv-432-DWF-HB, 2017 WL 4460752, 2017 U.S. Dist. LEXIS 165060 (D. Minn. Oct. 5, 2017) (granting petition for habeas corpus for petitioner detained pursuant to § 1226(c) after reopening granted); *Tindi v. Sec’y, Dep’t of Homeland Sec.*, No. 17-cv-3663-DSD-DTS, 2018 WL 704314 (D. Minn. Feb. 5, 2018) (same, in context of stay by Circuit Court); *cf.* *Davies v. Tritten*, No. 17-cv-3710-SRN-SER (Sept. 25, 2017) (stating that “[a]ll circuit courts of appeal who have addressed the question have read *Demore* and *Zadvydas* to impose a reasonableness requirement on detention before a final removal order,” but denying petition because detention was extended to eight months by an “unusual mistake,” a missing transcript).
9. The Court, the government, and immigration advocates alike have recognized that detention may force aliens to give up meritorious claims in order to get out of jail. *See* *Demore*, 538 U.S. at 530 n.14 (“Respondent contends that the length of detention required to appeal may deter aliens from exercising their right to do so. As we have explained before, however, the legal system is replete with situations requiring the making of difficult judgments as to which course to follow.”) (internal citations omitted); *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) (“Court ordered release cannot help but encourage dilatory and obstructive tactics by aliens.”); Gov't Supp. Br., *Jennings v. Rodriguez*, No. 15-1204, 2017 U.S. S. Ct. Briefs LEXIS 308, 2017 WL 430387, at \*13 (Jan. 31, 2017) (“Of course, the government allows aliens in immigration detention pending removal proceedings to end those proceedings, at any time, by accepting a final order of removal, qualifying for voluntary departure, or, in some circumstances, by simply returning home.”); Br. of Amici Curiae Americans for Immigrant Justice, *id.*, 2017 U.S. S. Ct. Briefs LEXIS 454, 2017 WL 564164 at \*29–30 (Feb. 10, 2017) (“As the stories of our clients and community members illustrate, acceptance of deportation in order to escape prolonged detention imposes life-altering burdens on constitutional liberties. These include the ability to care for family, live in the home one has purchased, and contribute to longtime communities.”); *id.* at \*4–5 (“The government's position gravely undervalues the serious liberty interests at stake in this case. It ignores the unique harms caused by prolonged detention, above and beyond those caused by one's placement in removal proceedings. Its position effectively permits the punitive conditions of prolonged detention to coerce people into giving up their meritorious claims.”).
10. **CAUSES OF ACTION**

**COUNT ONE: VIOLATION OF 8 U.S.C. § 1231 – PROLONGED DETENTION**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. Petitioner’s detention has exceeded the six-month presumptive threshold under *Zadvydas*, as he has now been detained for 264 days under § 1231, and a total of 650 days in Respondents’ custody.
3. Although Respondents purportedly possess a valid travel document for Petitioner, Respondents are legally prohibited from removing Petitioner, while his appeal is pending at the BIA. Once that appeal is determined, there is no possible outcome where Petitioner would become removable as a result. If the BIA grants reopening, his removal order will be vacated. If the BIA remands to the Immigration Court, it should do so with a stay in place. If the BIA denies the appeal, Petitioner will receive an automatic stay from the Circuit Court as soon as he can file a petition for review. There is no other outcome. There is no definite timeframe for the BIA to issue a decision; it could be tomorrow, or it could be a year from now. Added to the uncertainty of when that decision will be made, Petitioner’s removability will depend on the actions of at least one other court, and the time for that decision will be uncertain as well.
4. Therefore, 8 U.S.C. § 1231 does not authorize detention of Petitioner as removal is no longer likely to occur in the reasonably foreseeable future.

**COUNT TWO: VIOLATION OF FIFTH AMENDMENT**

**SUBSTANTIVE DUE PROCESS**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. The Fifth Amendment Due Process Clause protects against arbitrary and indefinite detention by the executive branch. *Zadvydas*, 533 U.S. at 699.
3. Due process requires that detention be reasonably related to its purpose and accompanied by adequate procedures to ensure that detention is serving its legitimate goals. *See* *Zadvydas*, 533 U.S. at 690-91. As removal is no longer reasonably foreseeable for Petitioner—in fact, it is a near impossibility—his detention is arbitrary and unreasonable, and therefore in violation of the Fifth Amendment’s guarantee of Due Process.

**COUNT THREE: VIOLATION OF THE FIFTH AMENDMENT**

**PROCEDURAL DUE PROCESS**

1. Due process is further violated by Respondents’ failure to follow its regulations and failure to exercise discretion in issuing its Decision to Continue Detention under *Accardi*. Petitioner and counsel provided Respondents with sufficient information and evidence to meet the criteria and factors enumerated in 8 C.F.R. §§ 241.4(e) and (f). This information was ignored, and the decision to continue detention appears to have been made solely on the basis of a purported travel document. However, 8 C.F.R. § 241.4(e)(1) makes clear that a travel document alone, where removal is not practicable, is insufficient to bar release. *See also* *id.* at § 241.13(f) (outlining factors to consider when determining whether removal is likely in the reasonably foreseeable future). Such a decision is therefore not in line with agency regulations, and constitutes both a violation of procedural due process and an arbitrary and capricious exercise of agency authority.

**COUNT FOUR: VIOLATION OF THE FOURTH AMENDMENT**

1. Petitioner re-alleges and incorporates by reference the paragraphs above.
2. The Fourth Amendment prohibits unreasonable seizures and does not allow the detention of individuals without a sufficient legal reason. The Government must always justify civil detention. If civil detention is no longer justified by a legal reason, such detention is unconstitutional.
3. Civil detention in the immigration context has been permitted when it is to make sure that an individual appears at removal proceedings or to make sure that an individual will appear for removal. As removal is not reasonably foreseeable for Petitioner, the Constitution does not permit it.
4. Because Petitioner has not been released despite his removal not being reasonably foreseeable, lack of dangerousness, and lack of flight risk, his continued detention violates the Fourth Amendment.
5. His detention further violates the Fourth Amendment as he was and has been improperly subjected to continued detention in violation of agency regulations.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner asks this Court for the following relief:

1. Assume jurisdiction over this matter;
2. Expedite consideration of this action pursuant to 28 U.S.C. § 1657 because it is an action brought under chapter 153 (habeas corpus) of Title 28;
3. Pursuant to 28 U.S.C. § 2243 issue an order directing the Respondents to show cause within 3 days why the writ of habeas corpus should not be granted;
4. Order Respondents to produce to the Court and Petitioner any valid travel document for Petitioner in their possession;
5. Order Respondents to produce to the Court and Petitioner evidence of any upcoming charter or commercial flight to Petitioner’s country of removal;
6. Grant Petitioner a writ of habeas corpus directing the Respondents to immediately release Petitioner from custody and return him to the conditions of his Order of Supervision;
7. Award reasonable attorney fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) upon submission of such application; and
8. Grant any and all further relief this Court deems just and proper.

DATED: July 5, 2018 Respectfully submitted,

/s *John Bruning*

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1. Petitioner is aware that Respondent Berg will soon leave, or may have already left, his position as Director of the St. Paul Field Office but does not have information about his successor. Respondent Berg’s successor should be substituted pursuant to Fed. R. Civ. P. 25(d). [↑](#footnote-ref-2)
2. *If* Petitioner’s case is reopened, Petitioner’s detention would convert to § 1225(b) or § 1226(a), but reopening would not make Petitioner’s continuing detention under a new authority suddenly make such detention reasonable or lawful. *See Bah v. Cangemi*, 489 F. Supp. 2d 905, 917 (D. Minn. 2007) (“It does not necessarily follow, however, that the government can continue to confine [the petitioner].”). [↑](#footnote-ref-3)
3. Neither Petitioner nor undersigned counsel have seen this purported travel document, nor do they know what day it was issued or when it expires. Petitioner has attempted, unsuccessfully, to obtain confirmation of its existence and relevant dates from the Somali Embassy. Bruning Decl. at ¶ 16–17. [↑](#footnote-ref-4)
4. Generally, the petitioner must have been detained for the full six months before filing a petition for writ of habeas corpus. *See Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002); Report & Recommendation, *Lee v. ICE*, No. 16-cv-4270 (DSD/HB), 2017 U.S. Dist. LEXIS 153133, at \*9–10 (D. Minn. July 21, 2017), *adopted by* 2017 WL 4174463, 2017 U.S. Dist. LEXIS 151922 (D. Minn. Sept. 19, 2017); *Mehighlovesky v. U.S. Dep’t of Homeland Security*, No. 12-CV-0902 (RHK/JJG), 2012 WL 6878901, at \*2 (D. Minn. Dec. 7, 2012) (collecting cases). Petitioner acknowledges that the aggregation of post-order detention periods has not been fully addressed by this Court or others. *See* Report and Recommendation, *Mohamed v. Sessions*, No. 16-cv-3828-SRN-BRT, 2017 U.S. Dist. LEXIS 164576, at \*5 n.2 (D. Minn. Sept. 14, 2017) (finding aggregate period of 8 months to give rise to *Zadvydas* habeas claim where Respondents did not argue claim was premature, but dismissing petition as moot), *adopted by* 2017 U.S. Dist. LEXIS 1633546 (D. Minn. Oct. 3, 2017); *Nma v. Ridge*, 286 F. Supp. 2d 469, 476 n. 9 (E.D. Pa. 2003) (avoiding question of whether to aggregate prior 4-year period of post-order detention based on finding that removal was likely in reasonably foreseeable future). The closest this Court, or any court to the best of Petitioner’s knowledge, has come to addressing this issue squarely, is through the “unencumbered time” approach, which “aggregates all time during which the alien was in removal and post-removal status.” Report and Recommendation, *Tindi v. Sec’y, Dep’t of Homeland Sec.*, No. 17-cv-3663-DSD-DTS, 2017 U.S. Dist. LEXIS 216993, at \*8 (D. Minn. Dec. 8, 2017), *adopted by* 2018 U.S. Dist. LEXIS 18472 (D. Minn. Feb. 5, 2018); *see also* *Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007). Alternatively, at least one court in this Circuit has allowed the petitioner to rebut the presumption that post-order detention less than six months is reasonable. *Jamal v. Sessions*, No. 5:18-06015-CV-RK, 2018 U.S. Dist. LEXIS 47577, at \*6 (W.D. Mo. Mar. 22, 2018). Because Petitioner here has been detained during the removal period in excess of six months, this question need not be reached by this Court. [↑](#footnote-ref-5)
5. Based on a review of the undersigned’s recent decisions from the BIA, on average, it takes 199 days for the BIA to issue a decision following the IJ’s decision; the median is 162 days. *See* Bruning Decl. at ¶ 20. Assuming these numbers are useful, Mr. Ibrahim is still facing several more months of detention before the BIA issues a decision. [↑](#footnote-ref-6)
6. This filing is included behind Exhibit BB. [↑](#footnote-ref-7)