**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MINNESOTA**

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| **John SMITH**,  Petitioner,  v.  **William BARR**, Attorney General;  **Chad WOLF**, Acting Secretary, Department of Homeland Security;  **Tony PHAM**, Senior Official Performing the Duties of the Director, Immigration and Customs Enforcement;  **Marcos CHARLES,** Director, St. Paul Field Office, Immigration and Customs Enforcement; and  **Kurt FREITAG**, Sheriff, Freeborn County,  Respondents. | Civil No.: 20-cv-2584  **PETITION FOR WRIT OF HABEAS CORPUS**  **8 U.S.C. § 1231**  **28 U.S.C. § 2241** |

1. **INTRODUCTION**
2. Petitioner, John Smith (“Mr. Smith”) received an administratively final order of removal to Burma (also known as Myanmar) on or about June 15, 2020 and has been unlawfully detained by Respondents under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1231, in excess of 180 days, despite no reasonable likelihood that he can be removed to Burma in the foreseeable future. Mr. Smith therefore seeks a writ of habeas corpus to remedy his prolonged unlawful detention by the Department of Homeland Security (“DHS”) and its agents within Immigration and Customs Enforcement (“ICE”).
3. Mr. Smith’s detention period of over 180 days under 8 U.S.C. § 1231 exceeds the statutory removal period and the presumptively reasonable period for removal under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).
4. Respondents have denied Mr. Smith’s release following 90-day and 180-day post-order custody reviews with no apparent end in sight to his detention. Although a removal flight to Burma departed on November 16, 2020, ICE did not attempt to remove Mr. Smith on this flight.
5. On information and belief, Respondents currently have no plan or ability to execute the removal of Mr. Smith to Burma, and, even if it did, his removal is even less likely to occur in the foreseeable future given the continued dangers of the COVID-19 pandemic and restrictions on commercial travel to Burma. Another chartered flight is unlikely for some time, given the recent flight and the small number of removals to Burma each year.
6. Without the intervention of this Court, Petitioner believes that Respondents will continue to detain him indefinitely, without regard for the mandates of the U.S. Constitution, the Immigration and Nationality Act, and the agencies’ own rules and regulations.
7. As a result, Respondents’ continued detention of Mr. Smith under 8 U.S.C. § 1231 is unlawful and violates § 1231 and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.
8. To remedy this unlawful detention, Mr. Smith seek declaratory and injunctive relief in the form of immediate release from detention on reasonable conditions determined by ICE pursuant to 8 C.F.R. § 241.5.
9. **JURISDICTION AND VENUE**
10. 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).
11. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (e)(1), and 2241(d) because Petitioner was detained within this District, some of the Respondents reside and/or are headquartered within this District, and a substantial part of the events and omissions giving rise to the claim occurred within this District.
12. **PARTIES**

**PETITIONER**

1. **Petitioner John Smith** is a native and citizen of Burma, and a member of the Karen ethnic minority. Mr. Smith was admitted to the United States as a refugee on and subsequently adjusted his status to that of a lawful permanent resident. Mr. Smith was detained by ICE on or about March 26, 2020. Mr. Smith was ordered removed on May 15, 2020, and reserved appeal. The period for appeal expired on or about June 15, 2020 and he did not file an appeal. He was not represented by an attorney. Mr. Smith has been held in continued post-order detention forover 180 days. Mr. Smith is currently detained at Freeborn County Jail in Albert Lea, Minnesota.

**RESPONDENTS**

1. **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 the Petitioner. Attorney General Barr’s official address is 950 Pennsylvania Avenue NW, Washington, D.C. 20530.
2. **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 the Petitioner’s detention and removal, and as such is a legal custodian of the Petitioner. Acting Secretary Wolf’s official address is 245 Murray Lane SW, Washington, D.C. 20528.
3. **Respondent Tony Pham** is being sued in his official capacity as the Senior Official Performing the Duties of Director (“SOPDD”) of Immigration and Customs Enforcement, a sub-unit of the Department of Homeland Security. In that capacity, SOPDD Pham has supervisory capacity over ICE personnel in Minnesota and Arizona, and he is the head of the agency that retains legal custody of the Petitioner. SOPDD Pham’s official address is 500 12th Street SW, Washington, D.C. 20536.
4. **Respondent Marcos Charles** 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 Office Director Charles has supervisory authority over the ICE agents responsible for detaining the Petitioner. The St. Paul Field Office retains primary authority over Petitioner’s case. The address for Field Office Director Charles and the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, Minnesota 55111.
5. **Respondent Kurt Freitag** is being sued in his official capacity as the Sheriff of Freeborn County, Minnesota. In that capacity, Sheriff Freitag is responsible for the Freeborn County Jail—a detention facility under contract with ICE and the physical location where the Petitioner is in custody. The address for Sheriff Freitag and the Freeborn County Jail is 411 South Broadway Avenue, Albert Lea, Minnesota 56007.
6. **EXHAUSTION**
7. 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 has completed custody reviews with ICE, which ignored ICE’s inability to remove him and arbitrarily decided to continue detention. There is no appeal process for custody decisions in this situation.
8. No statutory exhaustion requirement applies to Petitioner’s claim of unlawful detention.
9. The immigration court does not have jurisdiction to order Petitioner released.
10. No administrative remedies currently exist under the law to challenge indefinite post-order detention where there is no reasonable likelihood that removal will occur in the foreseeable future.
11. **FACTUAL ALLEGATIONS & PROCEDURAL HISTORY**

**PETITIONER JOHN SMITH**

1. Petitioner John Smith is a 41-year-old native of and citizen of Burma. *See* Ex. A at 1. Mr. Smith is a member of the Karen ethnic group. Mr. Smith was admitted to the United States as a refugee and subsequently became a lawful permanent resident of the United States, retroactive to the date of his original entry.
2. ICE detained Mr. Smith and placed him in removal proceedings on or about March 26, 2020.
3. Mr. Smith appeared *pro se* in Immigration Court and applied for asylum, withholding of removal, and protection under the Convention Against Torture.
4. On May 15, 2020, the Immigration Judge denied his applications for relief and ordered him removed to Burma. Appeal was reserved.
5. Mr. Smith did not file an appeal, and the period for appeal expired on or about June 15, 2020. Ex. C at 1. The order became administratively final and the removal period began to run that same day. *Id.*
6. Mr. Smith remains in ICE detention.
7. Mr. Smith’s detention was reviewed by ICE after 90 and 180 days. After his 90-day review, ICE decided to continue detention based on there purportedly being a significant likelihood of removal in the reasonably foreseeable future. Ex. A at 1.
8. Mr. Smith does not know if a travel document has been issued for him by the Burmese government. *See* Ex. A at 1 (“ICE has obtained travel documents in cases similar to yours and is awaiting issuance of such a document pending verification of your identity by Myanmar.”).
9. ICE has not attempted to remove Mr. Smith to Burma or any other country.
10. Mr. Smith has not purposefully or intentionally acted to prevent his removal.
11. Mr. Smith has been detained at Freeborn County Jail in Albert Lea, Minnesota, since March 26, 2020.

**REPATRIATION FLIGHTS TO BURMA**

1. Visa sanctions are currently in place against Burma, and the country is currently listed as a “recalcitrant country” by ICE, as “refusing to allow charter removal flights into the country, and denials or delays in issuing travel documents.” ICE, “Visa Sanctions Against Two Countries Pursuant to Section 243(d) of the Immigration and Nationality Act” (Aug. 13, 2020), *available at* https://www.ice.gov/visasanctions (accessed Aug. 24, 2020); *see also* DHS, “DHS Announces Implementation of Visa Sanctions” (July 10, 2018), *available at* https://www.dhs.gov/news/2018/07/10/dhs-announces-implementation-visa-sanctions (accessed Aug. 24, 2020).
2. On March 30, 2020, the Burmese government suspended all international commercial flights into the country, and the suspension has been extended month by month, and is currently in effect until at least December 31, 2020. U.S. Embassy in Burma, “COVID-19 Information” (Dec. 16, 2020), *available at* https://mm.usembassy.gov/covid-19-information (accessed Dec. 18, 2020).
3. On or about October 28, 2020, at least seven other Burmese citizens were transported from Minnesota to the Florence Service Processing Center (“Florence SPC”) in Florence, Arizona. Mr. Smith was not among them.
4. On or about November 16, 2020, a chartered removal flight was executed to Burma. At least five Burmese citizens were removed on that flight, but presumably more. Two Burmese citizens who were supposed to be removed on that flight were not, due to COVID-19 exposure, and have since been released.
5. The November 16, 2020 flight was the first removal flight to Burma since at least March 2020.
6. In Fiscal Year 2019, the most recent year data is available, ICE removed 29 individuals to Burma. *See* U.S. Immigration and Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report* (2019), *available at* https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf.
7. Given that a removal flight just left, and the small number of removals to Burma each year, it is unlikely that another flight will be planned in the near future.
8. The current travel restrictions imposed by the Burmese government make it just as unlikely that removals to Burma will be effectuated by commercial flight in the near future.
9. Mr. Smith has exhausted his administrative remedies. No other court of competent jurisdiction has the authority to order the release of the Mr. Smith.
10. Without the intervention of this Court, Mr. Smith is guaranteed to spend months, if not a year or longer, detained pursuant to § 1231, even though ICE is unable to remove him.
11. **LEGAL FRAMEWORK**
    1. **STATUTORY & REGULATORY FRAMEWORK**
12. 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).
13. 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).

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. **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 § 1231 “limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.” *Id.* At 689–90. “Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority.” *Id.* at 699. “In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal.” *Id.* “[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.” *Id.* at 699–700. If continued detention is unreasonable, “the alien’s release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances.” *Id.* at 700.
7. 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); *see also Zadvydas*, 533 U.S. at 701.
8. Courts have generally found no significant likelihood of removal in five types of cases:

(1) where the detainee is stateless and no country will accept [him or her]; (2) where the detainee’s country of origin refuses to issue a travel document; (3) where there is no repatriation agreement between the detainee’s native country and the United States; (4) where political conditions in the country of origin render removal virtually impossible; and (5) where a foreign country’s delay in issuing travel documents is so extraordinarily long that the delay itself warrants an inference that the documents will likely never issue.

*Ahmed v. Brott*, No. 14-cv-5000 (DSD/BRT), 2015 WL 1542131, at \*4 (D. Minn. Mar. 17, 2015) (collecting cases), *report and recommendation adopted*, 2015 WL 1542155 (Apr. 7, 2015). “In other words, for there to be no significant likelihood of removal in the foreseeable future, there must be some indication that the government is either unwilling or, due to seemingly insurmountable barriers, incapable executing an alien’s removal.” *Id.*

1. In some cases, this Court has found that diligent efforts on the part of ICE and the foreign government to produce travel documents, paired with the regular occurrence of repatriation flights, demonstrates a significant likelihood of removal in the foreseeable future. *See, e.g.*, *Ahmed*, 2015 WL 1542131, at \*4 (“Where, as here, ICE has made diligent and reasonable efforts to obtain travel documents, the alien’s native country ordinarily accepts repatriation, and that country is acting on an application for travel documents, most courts conclude that there is a significant likelihood of removal in the foreseeable future.” (internal quotation marks omitted)); *Jaiteh v. Gonzales*, No. 07-cv-1727, 2008 WL 2097592, at \*2–3 (D. Minn. Apr. 28, 2008) (“If travel documents are pending before a foreign government, and a consular official suggests that the documents are forthcoming, this Court cannot find no significant likelihood of removal.”).
2. However, where the government’s only evidence of the likelihood of removal “consists almost entirely of generalities and hypothetical statements,” such as where the country of removal “has *not* told ICE that it would *not* issue a travel document” or simply that the country’s “issuance of travel documents is historically slow,” the government has not met its burden of demonstrating that removal is significantly likely in the reasonably foreseeable future. *Bah v. Cangemi*, 489 F.Supp.2d 905, 923 (D. Minn. 2007). “Where a foreign country delays issuance of travel documents for an extraordinarily long period, it is possible to infer . . . that the documents will not issue at all, and thus that there is no significant likelihood of removal.” *Jaiteh*, 2008 WL 2097592, at \*3.
3. The COVID-19 global pandemic does not fit neatly into the *Ahmed* framework for analyzing the likelihood of removal, but it has nevertheless created new barriers to removal that could lead to indefinite detention. At least in certain countries, “worldwide travel restrictions due to the global COVID-19 pandemic[] make it nearly certain that ICE will not be able to [execute a removal] for the foreseeable future.” *Balza v. Barr*, No. 6:20-cv-866, 2020 WL 6143643, at \*5 (W.D. La. Sept. 17, 2020). Courts around the country are recognizing that, “[a]lthough DHS certainly is not the cause of COVID-19-related delays, neither is [the detainee], and the pandemic has not suspended his constitutionally-protected liberty interests.” *Aung v. Barr*, No. 20-CV-681-LJV, 2020 WL 4581465, at \*3 (W.D.N.Y. Aug. 10, 2020) (finding that Burmese citizen’s “deportation might occur in ten days, ten months, or ten years” and concluding that there is “good reason to believe that there is no significant likelihood of [the petitioner’s] removal in the reasonably foreseeable future); *see also* *Edwards v. Barr*, No. 4:20cv350-WS-MAF, 2020 WL 6747737 (N.D. Fla. Oct. 14, 2020), *report and recommendation adopted*, 2020 WL 6746622 (Nov. 17, 2020); *Knox v. Acuff*, No. 20-cv-822-NJR, 2020 WL 5893521 (S.D. Ill. Oct. 5, 2020).
4. **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*. Petitioner has been detained more than 180 days under 8 U.S.C. § 1231.
3. Although Petitioner has complied with all instructions by ICE and has not acted to prevent his removal, Respondents were not able to remove him on the last flight to Burma, and are not likely to be able to remove him in the coming months.
4. Therefore, 8 U.S.C. § 1231 does not authorize further detention of Petitioner as removal is not 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 the Petitioner, his detention is arbitrary and unreasonable, and therefore in violation of the Fifth Amendment’s guarantee of Due Process.

**PRAYER FOR RELIEF**

WHEREFORE, the 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. Grant the Petitioner a writ of habeas corpus directing the Respondents to immediately release Petitioner from custody with any conditions deemed necessary pursuant to 8 C.F.R. § 241.5; and
5. Grant any and all further relief this Court deems just and proper.

DATED: December 18, 2020 Respectfully submitted,

/s *John Bruning*

John Bruning (MN #0399174)

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