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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Fred Gelee,)	CIV-10-388-PHX-PGR (MHB)
Petitioner,)	REPORT AND RECOMMENDATION
vs.)	
Katrina Kane, et al.,)	
Respondents.)	

TO THE HONORABLE PAUL G. ROSENBLATT, UNITED STATES DISTRICT JUDGE:

Petitioner Fred Gelee (A094-568-327), who is represented by counsel, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. (Doc. 1.) Petitioner is a native and citizen of Liberia, who entered the United States as a refugee in December of 2003. (Doc. 11, Exh. 1.) On December 14, 2007, the Arizona Superior Court of Pima County convicted Petitioner of Armed Robbery and Possession of a Deadly Weapon. (Doc. 11, Exh. 2.) On February 5, 2010, Petitioner was taken into custody by Immigration and Customs Enforcement (“ICE”) and, according to Petitioner, was being held because he failed to apply for and acquire lawful permanent residence within one year of his entry in the United States as required by 8 U.S.C. § 1159(a).¹ (Doc. 5.) The Department of Homeland

¹ Respondents claim that Petitioner was never detained under § 1159, but rather was detained pursuant to 8 U.S.C. § 1226(c) for having been convicted of a crime involving moral turpitude.

1 Security (“DHS”) served Petitioner with a Notice to Appear (“NTA”) on February 8, 2010.
2 (Doc. 11, Exh. 4.) The NTA charged Petitioner with removability under the Immigration and
3 Nationality Act (“INA”) § 212(a)(2)(A)(i)(I), referencing Petitioner’s 2007 conviction for
4 Armed Robbery. (Doc. 11, Exh. 4.) On March 18, 2010, Petitioner applied to the United
5 States Citizenship and Immigration Service (“CIS”) to adjust his status from refugee to
6 lawful permanent resident. (Doc. 15, Exh. 1.) Petitioner also submitted an application
7 seeking to waive grounds for excludability. (Doc. 15, Exh. 1.) CIS denied both applications
8 on April 23, 2010. (Doc. 15, Exh. 1.) Petitioner was, subsequently, ordered removed to
9 Liberia on August 25, 2010, and detained under 8 U.S.C. § 1231 pending removal. (Doc. 19,
10 Exh. 4.)

11 Under § 1159(a), a refugee who has been physically present in the United States for
12 at least one year and has not acquired permanent resident status must “return or be returned
13 to the custody of the Department of Homeland Security for inspection and examination for
14 admission to the United States as an immigrant.” (Doc. 5.) According to Petitioner, ICE
15 interprets 8 U.S.C. § 1159(a) to authorize the indefinite detention of any refugee who has not
16 become a lawful permanent resident within one year of entry. (Doc. 5.)

17 Petitioner argues that ICE’s interpretation of § 1159(a) violates the Constitution of the
18 United States and the INA and that no statutory or regulatory authority otherwise exists to
19 authorize his continued detention. (Doc. 5.) Petitioner claims that his detention violates his
20 Fifth Amendment rights to both substantive and procedural due process. (Doc. 5.) He also
21 claims that his detention is not authorized by the INA. (Doc. 5.) Petitioner seeks an order
22 compelling his immediate release from custody. (Doc. 5.)

23 On September 2, 2010, Magistrate Judge David K. Duncan issued an Order denying,
24 *inter alia*, Petitioner’s amended motion to consolidate. (Doc. 16.) In its Order, the Court
25 stated:

26 The Court agrees with the government that neither consolidation of the cases
27 nor a stay and transfer to a single judge is appropriate, and will deny the
28 motions to consolidate. ...

1 The government is correct that although the thirteen petitioners initially filed
2 habeas petitions seeking immediate release from custody, alleging that their
3 continued detention was unlawful, in all thirteen cases their current status
4 differs from that described in their original petitions. Specifically, either the
5 authority under which the petitioners are being detained by the government has
6 changed or their custody status has changed.

7 (Doc. 16 at 4-5.)

8 Regarding the instant Petitioner, the Court found that according to the most recent
9 information in the ICE database, Petitioner has been issued a final order of removal, waived
10 his right to appeal, and remains in custody pursuant to § 241 of the Act (8 U.S.C. § 1231)
11 pending final removal. (Doc. 16 at 4-5.)

12 Accordingly, it appearing that the authority under which Petitioner is being detained
13 by the government has changed, the Court ordered Petitioner to show good cause why this
14 action should not be dismissed as moot. (Doc. 17.) On September 19, 2010, Petitioner filed
15 his Response to Order to Show Cause. (Doc. 18.)

16 Petitioner first argues that this case “falls squarely within the ‘capable of repetition
17 yet evading review’ exception to mootness.” Specifically, he contends that the evidence
18 overwhelmingly establishes that Respondents have a longstanding policy of detaining
19 refugees under 8 U.S.C. § 1159, but states that since the average length of detention under
20 § 1159 is less than the amount of time required to adjudicate a habeas petition, he and other
21 refugees will be deprived of any opportunity to seek judicial review of their detention. In
22 other words, Petitioner asserts that a finding of mootness in the instant case will permit
23 Respondents to indefinitely continue its policy of arbitrarily detaining refugees for months
24 with no civil or criminal charges and no access to bond.

25 Next, Petitioner alleges that even if this Court were to find that Respondents have
26 discontinued the policy of detaining refugees under § 1159, the “voluntary cessation”
27 exception to mootness applies. Petitioner states that the mere cessation of illegal activity in
28 response to pending litigation does not moot a case unless the party alleging mootness can
show that the allegedly wrongful behavior could not reasonably be expected to recur.

1 Petitioner claims that on November 10, 2009, Respondents issued an internal
2 memorandum purporting to clarify their policy on the detention of unadjusted refugees,
3 claiming that unadjusted refugees shall be issued a NTA and placed in removal proceedings
4 within 72 hours of apprehension.² Petitioner complains that this memorandum falls far short
5 of meeting Respondents' burden to persuade the court that the challenged conduct cannot
6 reasonably be expected to recur because the memorandum is unenforceable insofar as it
7 violates current Board of Immigration Appeals ("BIA") and circuit case law and because
8 Respondents have failed to comply with their own memorandum.

9 On September 29, 2010, Respondents filed a Reply to Response to Order to Show
10 Cause. (Doc. 19.)

11 Initially, Respondents argue that because Petitioner has been issued a final order of
12 removal and remains in custody pursuant to 8 U.S.C. § 1231 pending final removal, his
13 habeas petition alleging that his previous detention was unauthorized is now moot since there
14 is no current case or controversy before the Court. To the extent Petitioner contends that he
15 or others may again be subject to detention under § 1159, Respondents state that Petitioner
16 has received a final order of removal and has failed to demonstrate that he will again be

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18 ² On November 10, 2009, Katrina S. Kane, Field Office Director of the Phoenix Field
19 Office, Office of Detention and Removal Operations, issued a guidance memorandum
20 clarifying Field Office policy regarding custody decisions of unadjusted refugees. (Doc. 19,
21 Exh. 1.) The memorandum explained that decisions concerning detention must be made in
22 accordance with 8 U.S.C. § 1226 and 8 C.F.R. § 287.3(d), which requires that, in the absence
23 of an emergency or other extraordinary circumstances, a determination must be made within
24 48 hours whether to release an alien or place him in removal proceedings. (Doc. 19, Exh.
25 1.) Additionally, on May 10, 2010, James Chaparro, ICE's Executive Director of
26 Enforcement and Removal Operations, issued a guidance memorandum to all ICE Field
27 Offices throughout the United States. (Doc. 19, Exh. 2.) The memorandum clarified that an
28 unadjusted refugee's failure to adjust status alone is not a sufficient ground to place him in
removal proceedings or a proper ground for detention, and further stated that unadjusted
refugees must be detained in accordance with 8 U.S.C. § 1226 and 8 C.F.R. § 287.3(d), and
a determination must be made within 48 hours whether to release the alien or place him in
removal proceedings if a violation of the INA can be established that is unrelated to the
alien's failure to adjust. (Doc. 19, Exh. 2.)

1 subjected to detention pursuant to § 1159. Further, Respondents argue that Petitioner’s
2 habeas petition seeks relief solely for himself and allege that Petitioner should not be
3 permitted to cast his habeas petition as a generic challenge to an alleged improper policy
4 claiming that this case falls within the “capable of repetition yet evading review” exception.
5 In any event, Respondents state that DHS has issued written guidance (memoranda issued
6 on November 10, 2009 and May 10, 2010) explaining that ICE must make decisions
7 surrounding the detention of unadjusted refugees in accordance with 8 U.S.C. § 1226 and 8
8 C.F.R. § 287.3(d), which requires that – in the absence of extraordinary circumstances – a
9 determination must be made within 48 hours whether to release an alien or place him in
10 removal proceedings.

11 As to Petitioner’s “voluntary cessation” argument, Respondents contend that, contrary
12 to Petitioner’s assertions, the guidance memoranda and evidence of compliance with the
13 memoranda establish that the allegedly wrongful behavior could not reasonably be expected
14 to recur. Respondents claim that Petitioner’s allegation that the memoranda are
15 unenforceable as violative of current BIA and circuit case law is erroneous, and argue that
16 Petitioner has failed to present any evidence that Respondents have not complied with the
17 memoranda.

18 The case or controversy provision of Article III, § 2 of the Constitution “subsists
19 through all stages of federal judicial proceedings, trial and appellate The parties must
20 continue to have a ‘personal stake in the outcome’ of the lawsuit.” Spencer v. Kemna, 523
21 U.S. 1, 7 (1998) (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 477-478 (1990)).
22 This means that, throughout the litigation, Petitioner “must have suffered, or be threatened
23 with, an actual injury traceable to the [Respondent] and likely to be redressed by a favorable
24 judicial decision.” Id. (quoting Lewis, 494 U.S. at 477). Whether a case does not meet the
25 case or controversy requirements of Article III, and is thus moot, is a question of federal law
26 upon which the federal court “must pronounce final judgment.” Liner v. Jafco, 375 U.S. 301,
27 304 (1964) (citing Love v. Griffith, 266 U.S. 32 (1924)).

1 A claim which is rendered moot may, nonetheless, survive dismissal if it is “capable
2 of repetition yet evading review.” Spencer, 523 U.S. at 17. Such a claim, however, is only
3 recognized in “exceptional situations.” City of Los Angeles v. Lyons, 461 U.S. 95, 109
4 (1983). Two criteria must be fulfilled: (1) the action which the claim challenges must be “in
5 its duration too short to be fully litigated prior to its cessation or expiration,” and (2) there
6 must be a “reasonable expectation” that “the same complaining party [will] be subject to the
7 same action again.” Weinstein v. Bradford, 423 U.S. 147, 149 (1975). “Reasonable
8 expectation” does not refer to a “mere physical or theoretical possibility,” but to a
9 “demonstrated probability.” Murphy v. Hunt, 455 U.S. 478, 482 (1982).

10 Under another recognized exception, the “voluntary cessation” doctrine, the mere
11 cessation of illegal activity in response to pending litigation does not moot the case unless
12 the party alleging mootness can show that the “allegedly wrongful behavior could not be
13 expected to recur.” Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,
14 528 U.S. 167, 189 (2000). This responsibility on the part of the defendant to overcome the
15 exception to the mootness doctrine has been characterized as “stringent” and a “formidable
16 burden.” Friends of the Earth, 528 U.S. at 189-90. Defendants have been found to satisfy
17 their burden by, for example, submitting an affidavit disavowing any intent to ever repeat the
18 challenged conduct. See, e.g., Picrin-Peron v. Rison, 930 F.2d 773, 776 (9th Cir.1991)
19 (declaration of director of Los Angeles district office of INS swearing to statement that
20 habeas petitioner would continue to be paroled and would not be re-detained absent his
21 reinvolvement with criminal justice system); see also Lane v. Williams, 455 U.S. 624, 629
22 n.8 (1982) (habeas petition found moot upon State’s representation in its brief that petitioner
23 had been “totally discharged,” and upon Court’s “understanding that the State may not
24 subject [petitioner] to any further detention or restraint”).

25 In the instant matter, the Court finds that Petitioner fails to demonstrate that his habeas
26 claims fall under either exception to mootness. Regarding the “capable of repetition yet
27 evading review” exception, Petitioner has not shown that he will again be subjected to
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1 detention under 8 U.S.C. § 1159. Although Petitioner alleges that “a finding of mootness ...
2 will permit ICE to indefinitely continue its policy of arbitrarily detaining refugees for
3 months,” Petitioner must do more than merely speculate about future possibilities.³ Again,
4 he must show a “‘reasonable expectation’ or ‘demonstrated probability’ that [this] same
5 controversy will recur” between him and the Government. Murphy, 455 U.S. at 482. Here,
6 the record indicates that Petitioner has been issued a final order of removal and remains in
7 custody pursuant to 8 U.S.C. § 1231 pending removal. The facts of Petitioner’s case,
8 therefore, directly controvert his speculative premise that he is potentially subject to
9 detention under § 1159 in the future.

10 Moreover, as set forth in Respondents’ Reply, ICE has issued written guidance
11 (memoranda issued on November 10, 2009 and May 10, 2010) explaining that decisions
12 surrounding the detention of unadjusted refugees must be made in accordance with 8 U.S.C.
13 § 1226 and 8 C.F.R. § 287.3(d), which requires that – in the absence of extraordinary
14 circumstances – a determination must be made within 48 hours whether to release an alien
15 or place him in removal proceedings. (Doc. 19, Exhs. 1, 2.) The memoranda establishing
16 the policy regarding the detention of unadjusted refugees further demonstrate that any
17 attempt by Petitioner to speculate about possible improper future detention fails.

18 Despite his final order of removal and detention pursuant to § 1231 pending removal,
19 Petitioner cites United States v. Brandau, 578 F.3d 1064 (9th Cir. 2009) and United States v.
20 Roblero-Solis, 588 F.3d 692 (9th Cir. 2009), apparently to support his position that the
21 alleged “ongoing policy” of indefinitely detaining unadjusted refugees pursuant to § 1159
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25 ³ While Petitioner argues for an exception to the mootness doctrine on behalf of
26 himself and “other refugees,” in his habeas petition, Petitioner expressly seeks relief solely
27 for himself. (Doc. 1 at 8) (seeking “an Order declaring that Petitioner’s detention by
28 Respondents is contrary to law and unconstitutional,” and “an Order that Respondents
immediately release Petitioner”).

1 is sufficient to render the instant matter a live controversy because “other refugees” will be
2 affected by the policy. The Court is not persuaded.

3 In Brandau, the Ninth Circuit remanded the defendants’ challenge to a policy of full
4 shackling at initial court appearances adopted by the Eastern District of California in order
5 to determine mootness by conducting an evidentiary hearing on the nature of the current
6 shackling policy in the various district courts in the Eastern District. See 578 F.3d at 1065-
7 68. Although the full shackling policy had been changed in writing after the defendants
8 made their initial appearances to allow for individualized determinations as to whether full
9 shackling was necessary, the Court of Appeals was unable to determine whether, in practice,
10 there was an “ongoing policy” of full shackling, or full shackling without individualized
11 determinations, and whether the same shackling policy applied to in-custody and out-of-
12 custody defendants. See id.

13 In Roblero-Solis, the Ninth Circuit considered whether the procedure adopted by the
14 District of Arizona for taking pleas en masse complied with Rule 11 of the Federal Rules of
15 Criminal Procedure. See 588 F.3d at 693-98. Prior to engaging in the Rule 11 analysis, the
16 court *sua sponte* raised the question of whether the specific appeals of the defendants in
17 question were moot since each defendant had served his sentence and had been deported.
18 See id. In finding that the illegal entry defendants’ challenge to the district court procedure
19 was not moot, the court found that the defendants faced various adverse consequences such
20 as longer periods during which they would be ineligible to enter legally and that their
21 sentences were so short that no appeal was practicable. See id.

22 Unlike Brandau, the 2010 promulgation of written DHS guidance governing the
23 detention of unadjusted refugees demonstrates the absence of an ongoing policy of
24 indefinitely detaining unadjusted refugees pursuant to § 1159, and Petitioner fails to present
25 any evidence to indicate otherwise. Petitioner relies on: (1) a July 1, 2009 declaration of a
26 former Arizona immigration attorney who describes her first encounter with unadjusted
27 refugees in 2002 (Doc. 2, Exh. 2); (2) a February 10, 2008 article printed in the Arizona
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1 Daily Star on the practice of detaining unadjusted refugees (Doc. 2, Exh. 4); (3) a June 18,
2 2009 letter to Janet Napolitano regarding the policy of detaining refugees (Doc. 2, Exh. 3);
3 and (4) a December 2009 report from Human Rights Watch on the detention of unadjusted
4 refugees (Doc. 2, Exh. 10). Notwithstanding the apparent credibility concerns surrounding
5 Petitioner’s submissions, any declaration, article, letter, or report describing events which
6 pre-date the guidance memoranda issued by DHS fails to support an ongoing policy in 2010
7 of indefinitely detaining unadjusted refugees under § 1159.

8 Further, contrary to Roblero-Solis, in his habeas petition, Petitioner sought individual
9 relief in the form of release from alleged unauthorized, indefinite detention. Although he
10 claims that the average length of detention under § 1159 is less than the amount of time
11 required to adjudicate a habeas petition, he has not described any adverse consequences –
12 similar to the defendants in Roblero-Solis – stemming from the basis for his previous
13 detention. And, the Ninth Circuit in Roblero-Solis did not hold that an attenuated and
14 speculative possibility of future detention is sufficient to overcome mootness.

15 Because Petitioner cannot show that he will again be subjected to detention under 8
16 U.S.C. § 1159, and there is no evidence of any “ongoing policy” of alleged unlawful
17 detention, Petitioner fails to demonstrate that his habeas petition falls under the “capable of
18 repetition yet evading review” exception to mootness.

19 As to Petitioner’s contention that the “voluntary cessation” exception to mootness
20 applies to this case, the Court determines that Defendants have met their burden and
21 demonstrated that the “allegedly wrongful behavior could not be expected to recur.” In
22 support of their position, Respondents have submitted the guidance memoranda from DHS
23 laying out the nationwide policy that unadjusted refugees will not be detained for failure to
24 adjust status, as well as, a Declaration by Katrina S. Kane detailing the efforts undertaken to
25 ensure that DHS policy as described in the guidance memoranda is being implemented.
26 (Doc. 19, Exhs. 1, 2, 3.)

1 However, citing to Matter of Garcia-Alzugaray, 19 I. & N. Dec. 407 (BIA 1986) and
2 Romanishyn v. Attorney Gen. of the United States, 455 F.3d 175 (3d Cir. 2006), Petitioner
3 claims that even if Respondents have discontinued the policy of detaining refugees pursuant
4 to § 1159, this is not enough to render the Petition moot because he contends that the
5 memoranda are unenforceable insofar as they “violate[] current BIA and circuit case law by
6 placing refugees in removal proceedings prior to a decision by an immigration official on
7 inadmissibility.” The Court finds Petitioner’s argument, and cases in support thereof,
8 misplaced.

9 Since Petitioner’s applications to adjust his status from refugee to lawful permanent
10 resident and seeking to waive grounds for excludability were both denied (Doc. 15, Exh. 1),
11 his contention is inapplicable to him personally. To the extent Petitioner attempts to argue
12 that the memoranda are unenforceable in that they place other refugees in removal
13 proceedings prior to a decision by an immigration official on inadmissibility, his claim
14 similarly fails. As set forth previously, on May 10, 2010, James Chaparro, ICE’s Executive
15 Director of Enforcement and Removal Operations, issued a guidance memorandum to all ICE
16 Field Offices throughout the United States. (Doc. 19, Exh. 2.) In clarifying “when and under
17 what circumstances [ICE] Field Offices may detain refugees who have failed to adjust to
18 lawful permanent resident (LPR) status,” Chaparro stated, *inter alia*,

19 Accordingly, upon taking an unadjusted refugee into custody based upon a
20 reasonable belief that he or she is removable, the DRO Field Office first must
21 finalize its determination whether to place the individual in removal
22 proceedings under INA § 240 and, if so, whether to continue detention. A
23 refugee may not be placed in removal proceedings based on a failure to adjust
24 status or to apply for adjustment of status because an alien’s failure to adjust
25 status or apply for adjustment under INA § 209(a) is not a ground for
26 removability. Therefore, the only way DRO may place an unadjusted refugee
27 in [removal] proceedings is if a violation of the INA can be established that is
28 unrelated to the alien’s failure to adjust, such as fraud or a criminal conviction
that forms the basis for a charge under INA §§ 212 or 237.

(Doc. 19, Exh. 2 at 1-2.) This statement is entirely consistent with “current BIA and circuit
case law.” Specifically, in In re Smriko, 23 I. & N. Dec. 836, 842 (BIA 2005), the BIA
found “no merit to the respondent’s assertion that he is immune from removal on the basis

1 of his convictions for crimes involving moral turpitude because his refugee status has not
2 been terminated” under § 1157(c)(4). The agency noted that the statutes providing for
3 removal refer simply to “[a]ny alien” or “the alien” – they do not distinguish between aliens
4 admitted as refugees and any other aliens. See id. at 838 (citing 8 U.S.C. §§ 1227(a), 1229).
5 The BIA continued stating that the “consistent reference to ‘any alien’ in the statutory
6 provisions governing removal proceedings and the lack of mention of prior termination of
7 refugee status are strong indications that aliens admitted as refugees are subject to removal
8 proceedings without the preliminary step of terminating refugee status under section
9 207(c)(4).” Id. The BIA further explained that under § 1159, “a refugee whose admission
10 has not been terminated by the Attorney General is to be inspected and examined for
11 admission as an immigrant within the general framework for removal proceedings. Notably,
12 [DHS] is directed to consider the admissibility of such aliens pursuant to sections 235, 240,
13 and 241 of the Act, 8 U.S.C. §§ 1225, 1229a, and 1231 (2000). ... Section 240, in particular,
14 provides that an alien placed in removal proceedings may be charged with ‘any applicable
15 ground of inadmissibility under section 212(a) or any applicable ground of deportability
16 under section 237(a).’” Id. at 839.

17 The circuit courts have agreed with the BIA’s decision in In re Smriko and have held
18 that refugee status does not afford complete immunity from removal. See, e.g., Maiwand v.
19 Gonzales, 501 F.3d 101, 106-07 (2d Cir. 2007) (stating that “[e]ven if he retained his refugee
20 status, he would have remained subject to removal for committing a drug trafficking offense.
21 See 8 U.S.C. § 1159 (requiring refugees to ‘return or be returned to the custody of the
22 Department of Homeland Security [within a year of their entry] for inspection and
23 examination for admission to the United States as an immigrant in accordance with the
24 provisions of,’ *inter alia*, 8 U.S.C. § 1229a”)); Kaganovich v. Gonzales, 470 F.3d 894, 898
25 (9th Cir. 2006) (upholding the BIA’s interpretation in light of “statutory text allowing removal
26 of *any* alien” (emphasis in original)); Romanishyn, 455 F.3d at 185 (recognizing that “a
27 refugee may under some circumstances be removed even if his refugee status has not been
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1 terminated”). Thus, contrary to Petitioner’s assertions, the Court concludes that the guidance
2 memoranda are consistent with “current BIA and circuit case law.”

3 Petitioner, however, complains that even if the memoranda did not violate current case
4 law, Respondents have failed to comply with their own memoranda. As evidence of non-
5 compliance, Petitioner cites to Katrina S. Kane’s Declaration and states that in a related case
6 (Banjeglavic v. Kane, No. 2:09-cv-02523-NVW-ECV), Respondents detained an unadjusted
7 refugee on September 25, 2009, and had still not issued a NTA by December 3, 2009 – over
8 three weeks after the November 10, 2009 memorandum was issued. Petitioner claims that
9 this demonstrates that nearly one month after the issuance of the guidelines, Respondents
10 were in direct violation of their own policy.

11 The Court’s review of Kane’s Declaration reveals that on October 20, 2009, the ICE
12 Office of Chief Counsel in Arizona disseminated guidelines from the ICE Headquarters
13 Office of the Principal Legal Advisor concerning the arrest, detention, and processing of
14 unadjusted refugees to the Phoenix Field Office. (Doc. 19, Exh. 3.) In order to comply with
15 the guidelines, Kane directed every detention facility within her area of responsibility to
16 review their population rosters for the presence of unadjusted refugees, to place them in
17 removal proceedings, and, if appropriate, to release them from custody on a case-by-case
18 basis. (Doc. 19, Exh. 3.) On November 10, 2009, Kane issued the guidance memorandum
19 to all Arizona Detention and Removal Operations (“DRO”) personnel. (Doc. 19, Exh. 3.)
20 On December 3, 2009, DRO reviewed Petitioner Banjeglavic’s file and determined that the
21 circumstances of his specific case warranted his release. (Doc. 19, Exh. 3.) On December
22 4, 2009, DRO served Petitioner Banjeglavic with a NTA for violation of INA §§
23 212(a)(6)(A)(i) and 212 (a)(2)(B)(i). (Doc. 19, Exh. 3.) On that same date, DRO released
24 him from custody pursuant to an Order of Release on Recognizance. (Doc. 19, Exh. 3.) On
25 December 7, 2009, the detention facilities in Kane’s area of responsibility again reviewed
26 their population rosters for the presence of unadjusted refugees that might require issuances
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1 of NTAs and custody re-determinations. (Doc. 19, Exh. 3.) At that time, DRO did not find
2 any such refugees in its custody. (Doc. 19, Exh. 3.)

3 The Court finds that Petitioner Banjeglavic’s case demonstrates compliance with the
4 guidance memoranda. Although he was initially detained in excess of the time allotted, once
5 his file was reviewed – pursuant to the new guidelines – he was promptly released.

6 Petitioner, lastly, attempts to discredit Respondents alleging that “throughout the
7 course of this and similar petitions, Respondents have undertaken a series of actions that
8 suggest – through their timing as well as their substance – an effort to circumvent the present
9 litigation.” Petitioner states that “[i]n response to habeas petitions challenging detention with
10 no civil or criminal charges, Respondents – rather than refrain from detaining refugees – have
11 merely issued then Notices to Appear in violation of established case law.” Petitioner asserts
12 that “Respondents have even gone so far as to submit questionable evidence that purports to
13 prove that a refugee’s placement in removal proceedings occurred at a prior date and was
14 thus not a reaction to the filing of the habeas petition.” The Court finds Petitioner’s argument
15 vague and conclusory, and determines that Petitioner has failed to present any evidence
16 indicating that Respondents have failed to comply with DHS’s written guidance.

17 Thus, finding that DHS’s guidance memoranda is consistent with “current BIA and
18 circuit case law” and that Respondents have complied with their policy, the Court concludes
19 that Respondents have met their burden and demonstrated that the “allegedly wrongful
20 behavior could not be expected to recur.” The “voluntary cessation” exception to mootness
21 is inapplicable to this case.

22 Accordingly, in sum, the Court finds that Petitioner’s habeas petition no longer
23 presents a case or controversy within the meaning of Article III, § 2, of the Constitution.
24 Petitioner has been issued a final order of removal and remains in custody pursuant to 8
25 U.S.C. § 1231 pending removal. His habeas claims are moot, and none of the narrow
26 exceptions to the mootness doctrine apply to his case. The Court will recommend that
27 Petitioner’s Petition for Writ of Habeas Corpus be denied.

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IT IS THEREFORE RECOMMENDED that Petitioner’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) be **DENIED**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court’s judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Failure timely to file objections to the Magistrate Judge’s Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party’s right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge’s recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 13th day of December, 2010.


Michelle H. Burns
Michelle H. Burns
United States Magistrate Judge