

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JASWANT SINGH,

Petitioner,

v.

MICHAEL CHERTOFF, Secretary Dept.
of Homeland Security, et al.,

Respondents.

No. CV-07-0380-FVS

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

THIS MATTER comes before the Court on Petitioner's Petition For Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. (Ct. Rec. 3). Petitioner is represented by Martin Resendez Guajardo. Respondents are represented by Audrey Benison Hemesath and Ada E. Bosque.

PROCEDURAL HISTORY

Petitioner, currently in the custody of the Bureau of Immigration and Customs Enforcement ("ICE"), has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner is being detained at Sacramento County Main Jail pending removal from the United States. The petition alleges that the continued detention of Petitioner violates his substantive and procedural due process rights under the Due Process Clause of the Fifth Amendment to the Constitution and is a violation of Respondents' statutory authority. (Ct. Rec. 3). On April 4, 2007, Respondents filed a response to the petition for writ of habeas corpus. (Ct. Rec. 8). On April 28, 2007,

1 Petitioner filed a traverse. (Ct. Rec. 9). A supplement to
2 Petitioner's traverse was filed on February 25, 2008. (Ct. Rec. 14).
3 Respondents filed a supplement to their response on December 2, 2008.
4 (Ct. Rec. 19). The matter is now before the Court.

5 **BACKGROUND**

6 Petitioner is a native and citizen of India who was ordered
7 deported *in absentia* on October 26, 1993. Petitioner's motion to
8 reopen was denied by an Immigration Judge on August 14, 2002.
9 Petitioner filed a second administrative motion to reopen on July 5,
10 2006. This second motion was denied by an Immigration Judge, and the
11 denial was affirmed by the Board of Immigration Appeals on December
12 19, 2006. On January 3, 2007, a petition for review of this decision
13 was filed with the Ninth Circuit and is presently pending. Pursuant
14 to his request, Petitioner received a stay of deportation in
15 conjunction with his petition for review.

16 Petitioner has been in custody since June 7, 2006, and the Ninth
17 Circuit's stay has been in effect since January 3, 2007. On January
18 24, 2007, ICE conducted a post-order detention custody review and
19 determined that Petitioner was to remain in custody as the delay in
20 his deportation was due to the Ninth Circuit's stay. On October 2,
21 2008, Petitioner received a bond hearing before an Immigration Judge.
22 (Ct. Rec. 19 at 1). The Immigration Judge denied bond. (Ct. Rec. 19,
23 Exh. A).

24 **DISCUSSION**

25 A federal court may only grant a petition for writ of habeas
26 corpus if the petitioner can show that "he is in custody in violation

1 of the Constitution" 28 U.S.C. § 2241(c)(3). A habeas corpus
2 petition is the correct method for a prisoner to challenge the
3 "legality or duration" of his confinement. *Badea v. Cox*, 931 F.2d
4 573, 574 (9th Cir. 1991), quoting *Preiser v. Rodriguez*, 411 U.S. 475,
5 485 (1973); Advisory Committee Notes to Rule 1 of the Rules Governing
6 Section 2254 Cases. However, the petition must "allege facts
7 concerning the applicant's commitment or detention," 28 U.S.C. § 2242,
8 and the petitioner must make specific factual allegations that would
9 entitle him to habeas corpus relief if they are true. *O'Bremski v.*
10 *Maass*, 915 F.2d 418, 420 (9th Cir. 1990).

11 Title 8 U.S.C. § 1231(a)(1) provides generally that except as
12 otherwise provided in that section, when an alien is ordered removed,
13 the Attorney General shall remove the alien from the United States
14 within a period of ninety days, the "removal period." Title 8 U.S.C.
15 § 1231(a)(6) provides:

16 An alien ordered removed who is inadmissible under section 1182
17 of this title, removable under section 1227(a)(1)(C), 1227(a)(2),
18 or 1227(a)(4) of this title or who has been determined by the
19 Attorney General to be risk to the community or unlikely to
comply with the order of removal, may be detained beyond the
removal period and, if released, shall be subject to the terms of
supervision in paragraph (3).

20 In addition to those aliens found to be risks to the community or
21 unlikely to comply with the order of removal, aliens subject to this
22 detention provision include inadmissible aliens, criminal aliens,
23 aliens who have violated their non-immigrant status conditions, and
24 aliens removable for certain national security or foreign relations
25 reasons. *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 2498
26 (2001).

1 In *Zadvydas*, the United States Supreme Court found that the
2 habeas corpus statute grants federal courts the authority to determine
3 whether post-removal-period detention is pursuant to statutory
4 authority. *Zadvydas*, 121 S.Ct. at 2491. In *Zadvydas*, in order to
5 avoid serious doubts as to the constitutionality of § 1231(a)(6), the
6 Court interpreted it not to permit indefinite detention, but rather to
7 limit an alien's post-removal-period detention to a period reasonably
8 necessary to bring about the alien's removal from the United States.
9 *Zadvydas*, 121 S.Ct. at 2498. The Court determined that aliens, with
10 the exception of excludables, who had been ordered removed had a
11 liberty interest in being released subject to supervision which was
12 strong enough to raise a serious question as to whether, irrespective
13 of the procedures used, the Constitution permits detention that is
14 indefinite and potentially permanent. *Id.* at 2502. Once removal is
15 no longer reasonably foreseeable, continued detention is no longer
16 authorized by the statute. *Id.* at 2503. The authority of the
17 government to detain is thus coextensive with the reasonable
18 likelihood of removal, and the question of the extent of that
19 authority is for the federal judiciary to decide in proceedings
20 pursuant to 28 U.S.C. § 2241(c)(3). *Id.* at 2503-2504. With respect
21 to the process that this Court is to follow, the Court instructed:

22 In answering that basic question, the habeas court must ask
23 whether the detention in question exceeds a period reasonably
24 necessary to secure removal. It should measure reasonableness
25 primarily in terms of the statute's basic purpose, namely
26 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. In that case, of course, the alien's release may and
should be conditioned on any of the various forms of supervised
release that are appropriate in the circumstances, and the alien

1 may no doubt be returned to custody upon a violation of those
2 conditions. See *supra*, at 2501 (citing 8 U.S.C. §§ 1231(a)(3),
3 1253 (1994 ed., Supp. V); 8 C.F.R. § 241.5 (2001)). And if
4 removal is reasonably foreseeable, the habeas court should
5 consider the risk of the alien's committing further crimes as a
6 factor potentially justifying confinement within that reasonable
7 removal period. See *supra*, at 2499.

8 We recognize, as the Government points out, that review must take
9 appropriate account of the greater immigration-related expertise
10 of the Executive Branch, of the serious administrative needs and
11 concerns inherent in the necessarily extensive INS efforts to
12 enforce this complex statute, and the Nation's need to "speak
13 with one voice" in immigration matters. (Citation omitted.) But
14 we believe that courts can take appropriate account of such
15 matters without abdicating their legal responsibility to review
16 the lawfulness of an alien's continued detention.

17 Ordinary principles of judicial review in this area recognize
18 primary Executive Branch responsibility. They counsel judges to
19 give expert agencies decisionmaking leeway in matters that invoke
20 their expertise. See *Pension Benefit Guaranty Corporation v. LTV*
21 *Corp.*, 496 U.S. 633, 651-652, 110 S.Ct. 2668, 110 L.Ed.2d 579
22 (1990). They recognize Executive Branch primacy in foreign
23 policy matters. See *Container Corp. of America v. Franchise Tax*
24 *Bd.*, 463 U.S. 159, 196, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983).
25 And they consequently require courts to listen with care when the
26 Government's foreign policy judgments, including, for example,
the status of repatriation negotiations, are at issue, and to
grant the Government appropriate leeway when its judgments rest
upon foreign policy expertise.

Id. at 2504.

In order to further uniform administration in the federal courts
and to limit the frequency with which courts would be faced with
difficult judgments regarding matters which are the subject of
executive expertise, the Court adopted six months as a period within
which detention is presumptively reasonable. *Id.* at 2504-2505. The
Court instructed:

After this [six]-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. And for
detention to remain reasonable, as the period of prior post-
removal confinement grows, what counts as the "reasonably

1 foreseeable future" conversely would have to shrink. This [six]-
2 month presumption, of course, does not mean that every alien not
3 removed must be released after six months. To the contrary, an
4 alien may be held in confinement until it has been determined
5 that there is no significant likelihood of removal in the
6 reasonably foreseeable future.

7 *Id.*

8 Here, Petitioner has been held in continuous post-removal custody
9 by ICE since June 7, 2006. Nevertheless, the Court concludes that
10 Petitioner's request for habeas relief should be denied for three
11 reasons.

12 First, as noted above, Petitioner has a petition for review
13 currently pending before the Ninth Circuit and a stay of removal in
14 conjunction with that petition has been administered pursuant to
15 Petitioner's request. Although the 90-day removal period generally
16 begins to run upon the entry of a final order of removal, 8 U.S.C. §
17 1231(a)(1)(A), Petitioner, by seeking a stay and further review, has
18 acted to prevent his removal. The removal period is extended beyond
19 the 90-day period when the alien acts to prevent his removal, and the
20 alien "may" remain in detention during such extended period. 8 U.S.C.
21 § 1231(a)(1)(C). Once the Ninth Circuit issues a decision and
22 dissolves the stay, the removal period begins anew and the agency has
23 90 days to remove the alien. 8 U.S.C. § 1231(a)(1)(B)(ii). The 90-
24 day removal period has been suspended in this case; therefore,
25 Petitioner's continued detention is appropriate.

26 Second, Petitioner is not entitled to post-removal release under
Zadvydas. As discussed above, pursuant to *Zadvydas*, after the six-
month presumptively reasonable period expires, an alien still must
demonstrate there is no significant likelihood of removal in the

1 reasonably foreseeable future in order to obtain release. *Zadvydas*,
2 121 S.Ct. at 2503. Here, Petitioner has failed to demonstrate that
3 his removal is not reasonably foreseeable. In fact, it appears the
4 only obstacle preventing Petitioner's removal at present is the
5 judicial stay he obtained in concert with his petition for review
6 before the Ninth Circuit. Petitioner cannot now be heard to complain
7 about circumstances which he has created. Petitioner's continued
8 detention is not unreasonable under *Zadvydas*.

9 Third, Petitioner has received the relief he requested in the
10 petition (Ct. Rec. 3)¹ and alternatively requested in Petitioner's
11 traverse (Ct. Rec. 9)². On October 2, 2008, Petitioner received a
12 bond hearing before an Immigration Judge. (Ct. Rec. 19 at 1).
13 Petitioner was denied bond by the Immigration Judge. (Ct. Rec. 19,
14 Exh. A). Although Petitioner was not granted a release by the
15 Immigration Judge, Petitioner's request for relief in the instant
16 petition, a custody redetermination hearing before an immigration
17 judge with the authority to release him on reasonable bond, is now
18 moot.

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22 ¹The petition requests that the Court "[i]ssue a writ of
23 habeas corpus directing the Respondents to immediately schedule
24 the Petitioner for an individualized custody redetermination
hearing." (Ct. Rec. 3 at 21).

25 ²Petitioner's traverse alternatively "prays for an order
26 from this Court directing the Respondent to schedule the
Petitioner for a custody redetermination hearing before an
immigration judge with the authority to release him on reasonable
bond." (Ct. Rec. 9 at 7).

