

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

OWEN BARRINGTON REDWAY,

Petitioner,

Civ. No. 16-8678 (KM)

v.

CHARLES GREEN,

Respondent.

OPINION

KEVIN MCNULTY, U.S.D.J.

I. INTRODUCTION

The petitioner, Owen Barrington Redway, is an immigration detainee currently lodged at the Essex County Correctional Facility in Newark, New Jersey. He is proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. For the following reasons, the habeas petition will be denied without prejudice.

II. BACKGROUND

Mr. Redway is a native and citizen of Jamaica. He entered the United States in 1978. Mr. Redway was previously convicted in New Jersey of possession of a weapon for a unlawful purpose. On September 5, 2015, he was placed into immigration detention.

On March 28, 2016, Mr. Redway was ordered removed by an Immigration Judge (“IJ”). Mr. Redway appealed that order to the Board of Immigration Appeals (“BIA”). The BIA dismissed Mr. Redway’s appeal on August 25, 2016. (See Dkt. No. 7-1)

Mr. Redway filed this habeas petition in November, 2016. He seeks his immediate release from immigration detention on reasonable bail or an order of supervision. Respondent filed a response in opposition to the habeas petition on December 16, 2016. On January 19, 2017, this matter was reassigned from District Judge Salas to me.

Respondent's initial response did not address whether petitioner was entitled to habeas relief under *Zadvydas v. Davis*, 533 U.S. 678 (2001). Therefore, on January 24, 2017, I ordered respondent to file a supplemental response. On February 2, 2017, respondent did so, and the petitioner's time to file a supplemental reply has now expired, so the matter is fully briefed.

III. DISCUSSION

A. Review of Bond Denial

I first dispose of a preliminary issue. Mr. Redway filed an earlier federal habeas corpus petition. (See No. 16-2005). In that case, I granted Mr. Redway's request for a bond hearing before an IJ. (See *id.* Dkt. No. 4) An IJ denied release on bond on June, 16, 2016. (See *id.* Dkt. No. 6 at p.3)

I will liberally construe Mr. Redway's habeas petition as also seeking this Court's review of the IJ's denial of bond in June 2016. This Court can—and did—order a bond hearing, but it does not have the power to second guess the discretionary decision of the IJ to deny Mr. Pena's release on bond. *See* 8 U.S.C. 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien, or the grant, revocation, or denial of bond or parole.") (emphasis added); *Reeves v. Johnson*, No. 15-1962, 2015 WL 1383942, at *3 (D.N.J. Mar. 24, 2015) ("The present petition might be liberally construed as containing a claim that the IJ erred in finding Petitioner to be a flight risk because he has been a law-abiding citizen for many years after his criminal conviction. This Court, however, does not have jurisdiction over discretionary agency decisions.") (citing *Pisciotta v. Ashcroft*, 311 F. Supp. 2d 445, 454 (D.N.J. 2004) (Greenaway, J.)). Furthermore, there is no allegation by petitioner that he did not have a bona fide bond

hearing before the IJ. *See Harris v. Herry*, 2013 WL 2884191, at *1 (D.N.J. July 26, 2013) (“After a bona fide bond hearing, the immigration judge might grant, or deny, release on bond. I would not have the power to overrule such a denial of release after a bona fide hearing.”) Therefore, Mr. Redway fails to show that he is entitled to habeas relief with respect to his bond denial by the IJ.

B. Pre-removal Immigration Detention

I move on to Mr. Redway’s petition for release from immigration detention on bond because of the length of time he has been in pre-removal immigration detention. The Attorney General has the authority to detain aliens in removal proceedings before the issuance of a final order of removal. This period of detention is known as the “pre-removal” period. Detention of an alien in the pre-removal period is governed by Section 1226 of Title 8 of the United States Code. Section 1226(a) permits the Attorney General to detain or release an alien pending a decision on whether the alien is to be removed from the United States:

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

- (1) may continue to detain the arrested alien; and
- (2) may release the alien on—
 - (A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General;
 - (B) conditional parole; ...

8 U.S.C. § 1226(a). “Except as provided in subsection (c)” is included because, under Section 1226(c), certain criminal aliens are subject to mandatory pre-removal detention:

The Attorney General shall take into custody any alien who—

- (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

- (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(a)(ii), (A)(iii), (B), (C), or (D) of this title,
- (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
- (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1).

In *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit established a framework for analyzing the permissibility of pre-removal detention:

[Title 8, United States Code, Section] 1226(c) contains an implicit limitation on reasonableness: the statute authorizes only mandatory detention that is reasonable in length. After that, § 1226(c) yields to the constitutional requirement that there be a further, individualized, inquiry into whether continued detention is necessary to carry out the statute's purpose.... Should the length of [an alien's] detention become unreasonable, the Government must justify its continued authority to detain him at a hearing at which it bears the burden of proof.

656 F.3d at 235. *Diop* did not state a specific length of pre-removal-order detention beyond which a petitioner would be entitled to a bond hearing. *See id.* at 234; *see also Carter v. Aviles*, No. 13-3607, 2014 WL 348257, at *3 (D.N.J. Jan. 30, 2014) ("[T]he Third Circuit has not set a 'universal point' when mandatory detention under § 1226(c) is unreasonable.") (citing *Leslie v. Attorney Gen.*, 678 F.3d 265, 270-71 (3d Cir. 2012)); *Barcelona v. Napolitano*, No. 12-7494, 2013 WL 6188478, at *1 (D.N.J. Nov. 26, 2013) ("The Court of Appeals in *Diop* declined to adopt a rule that a hearing was required after a certain fixed amount of time in pre-removal detention.") (citation omitted). Instead, the Third Circuit noted that "[r]easonableness, by its very

nature, is a fact-dependent inquiry requiring an assessment of all of the circumstances of a particular case.” *Diop*, 656 F.3d at 234. A reasonableness determination “must take into account a given individual detainee’s need for more or less time, as well as the exigencies of a particular case.” *Id.* However, “the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [certain] thresholds.”

Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469, 474 (3d Cir. 2015) (quoting *Diop*, 656 F.3d at 232, 234). Indeed, in *Chavez-Alvarez*, the Third Circuit noted with respect to the circumstances of that particular case that sometime after six months, and certainly within a year, the burden to the petitioner’s liberties would outweigh any justification to detain the petitioner without a bond hearing. *See id.* at 478. A petitioner’s bad faith, too, has at least the potential to influence the determination of whether a bond hearing should be ordered. *See Chavez-Alvarez*, 783 F.3d at 476 (“Because we conclude that Chavez-Alvarez did not act in bad faith, we do not need to decide here whether an alien’s delay tactics should preclude a bond hearing.”).

This Court need not engage in a *Diop/Chavez-Alvarez* analysis at this time with respect to Mr. Redway’s immigration detention. As respondent notes, the BIA dismissed Mr. Redway’s appeal of the IJ’s removal order on August 25, 2016. Therefore, Mr. Redway is no longer in pre-order removal immigration detention, but is now in post-order removal immigration detention. *See* 8 C.F.R. § 1241.1(a) (an order of removal becomes final when the BIA dismisses the appeal). Therefore, the analysis under *Diop/Chavez-Alvarez* is no longer applicable to Mr. Redway’s case.

C. Post-removal Immigration Detention

That does not end the matter, however. Post-removal immigration detention, like pre-removal immigration detention, can become excessive at some point. Title 8 of the United States

Code Section 1231(a)(1)(A) states that, “except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the “removal period”).” *Id.* § 1231(a)(1)(A). The removal period begins on 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. § 1231(a)(1)(B). Federal regulations provide that:

An order of removal made by the immigration judge at the conclusion of the proceedings under section 240 of the Act shall become final:

- (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
- (b) Upon waiver of appeal by the respondent;
- (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;
- (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal; or
- (e) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

8 C.F.R. § 1241.1. Section 1231(a)(2) requires that the alien be detained during the ninety day post-removal order period. *See* 8 U.S.C. § 1231(a)(2). If the alien is not removed during that ninety-day period, then § 1231(a)(6) authorizes either continued detention or release on bond:

An alien ordered removed who is inadmissible under section 1982 of this title, under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a 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).

8 U.S.C. § 1231(a)(6).

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the United States Supreme Court held that § 1231(a)(6) “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.” 533 U.S. at 689. To state a habeas claim under § 2241, the petitioner must provide facts showing good reason to believe that there is no reasonable likelihood of his actual removal in the reasonably foreseeable future. *See Zadvydas*, 533 U.S. at 701. “*Zadvydas* does not delineate the boundaries of evidentiary sufficiency, but it suggests that an inversely proportional relationship is at play: the longer an alien is detained, the less he must put forward to obtain relief” *Alexander v. Attorney Gen. United States*, 495 F. App'x 274, 276-77 (3d Cir. 2012) (citing *Zadvydas*, 533 U.S. at 701). As a rule of thumb, the Supreme Court stated that six months is a presumptively reasonable period of post-removal detention under § 1231(a)(6). *See Zadvydas*, 533 U.S. at 701.

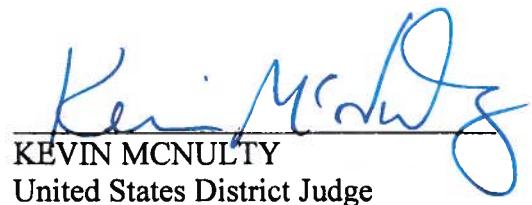
Mr. Redway's post-removal immigration detention began on August 25, 2016. Thus, Mr. Redway is still within the presumptively reasonable six-month period of post-removal immigration detention set forth in *Zadvydas*. To the extent that Mr. Redway could challenge his post-removal-order immigration detention, such a challenge is premature and will be denied without prejudice to a later application. *Accord Grossett v. Muller*, No. 13-0364, 2013 WL 6582944, at *3 (D.N.J. Dec. 13, 2013) (noting *Zadvydas* claim is premature if filed prior to expiration of six-month presumptively reasonable removal period); *Abdou v. Elwood*, No. 12-7720, 2013 WL 1405774, at *4 (D.N.J. Apr. 4, 2013) (same). Should the United States fail to

execute the order of removal within a reasonable time, a claim by Mr. Redway challenging his post-removal immigration detention may be reasserted.

IV. CONCLUSION

For the foregoing reasons, the habeas petition will be denied without prejudice. An appropriate order will be entered.

DATED: February 17, 2017



KEVIN MCNULTY
United States District Judge