IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

YURIY FAUSTOV,	:	**CIVIL NO. 1:13-CV-1018**
	:	
Petitioner,	:	**(Judge Jones)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
JANET NAPOLITANO, et al.,	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of the Case

This case involves a habeas corpus petition filed by Yuriy Faustov, a native of the Ukraine. While both the petitioner and the respondents allude in their pleadings to prior contentious immigration proceedings in this matter,[1] the scope of our review of this case is bound and defined by a simple undisputed fact. Faustov became subject to a final order of removal on February 28, 2013, when the petitioner permitted a grant

[1]For his part, Faustov complains about a period of unreasonable delay in obtaining a final removal order and argues, at length, the merits of his removal claims. Respondents, in turn, detail a lengthy history of criminal misconduct by Faustov and suggest that Faustov has criminally resisted removal. Given the undisputed fact that Faustov is now subject to a final order of removal, we find it unnecessary to delve into these competing factual narratives regarding what transpired prior to the entry of this final removal order.

of voluntary departure to expire, after Faustov failed to post a $500 bond or provide a passport to immigration officials.

Since the entry of this final removal order some four months ago immigration officials have been diligently seeking to remove Faustov, in the face of almost constant resistence to removal by the petitioner. Thus, on March 5, 2013, immigration officials performed a review of Faustov's file based on his request for release. (Doc. 9, Ex. I, Memorandum on Request for Release.) At that time it was noted that Faustov was under a final order of removal as of February 28, 2013, and, despite given numerous opportunities to assist in obtaining a passport or travel documents, Faustov had repeatedly failed to do so. (Id.) Accordingly, on March 7, 2013, Faustov was placed by immigration officials on Failure to Comply status. (Id., Ex. H, Clark Decl., ¶ 4.) On March 12, 2013, assistance was then requested from the immigration headquarters travel document unit and the U.S. Department of State in an effort to obtain travel documents for Faustov, since Faustov's use of five different aliases in prior consulate encounters had complicated this process. (Id. ¶ 5.) As part of these efforts, on March 12, 2013, Faustov was provided an application for a travel document and was advised to complete it; however, Faustov refused to fill out the application. (Id. ¶ 6.) On March 27, 2013, Faustov was again presented a travel document

application and was asked to complete it; however, Faustov again refused to complete the document. (Id. ¶ 9.)

Despite Faustov's resistence, immigration officials were able to secure travel documents for the petitioner. On April 1, 2013, the Ukrainian consulate contacted immigration officials and informed them that they were able to identify Faustov as a Ukrainian citizen, with the name of Yuriy Skyba. (Id., ¶ 9.) The consulate then issued a travel document for Faustov. (Id.)

Faustov was initially scheduled for removal on April 26, 2013; however, this reservation was canceled at the airlines' request due to the fact that they already had one detainee booked on the flight and their policy was to only allow one detainee per flight. (Id. ¶ 10.) The reservation was re-scheduled for May 8, 2013. (Id.) On May 8, 2013, Faustov was escorted to the flight, but physically resisted and threw himself to the ground, rather than board the aircraft, stating that he did not have to leave the United States because he had a pending habeas petition. (Id., ¶ 11.)

Faustov was again scheduled for removal on May 15, 2013; however, just prior to his removal this effort was postponed because Faustov filed a complaint with immigration officials alleging that he was assaulted by the officers who escorted him to this May 8 removal attempt. (Id., ¶ 12.) Due to this outstanding complaint, Faustov's removal has been postponed until this claim can be investigated. (Id.) Once

this investigation has been completed Faustov will be scheduled for removal. (Id. ¶ 13.)

It is against this background that Faustov filed the instant petition in April 2013, and a companion habeas corpus petition, both of which alleged that Faustov: (1) has been in custody an unreasonable length of time without a bond hearing; (2) should not be subjected to mandatory detention; (3) should be granted United States citizenship; and (4) should not be removed to the Ukraine because he fears for his safety upon his return. The respondents have now filed a response to this petition, (Doc. 9.), and Faustov has filed a traverse, (Doc. 10.), repeating his claims relating both to his current detention and to the ultimate merits of his claims contesting this removal. Accordingly, this matter is now ripe for resolution.

Because we find that Faustov's current post-removal detention is specifically authorized by statute and falls well within the presumptively reasonable 6-month period prescribed by the United States Supreme in Zadvydas v. Davis, 533 U.S. 678 (2001), we believe–at present–that Faustov's continued detention is justified. Accordingly, it is recommended that this petition be denied without prejudice.

III. Discussion

A. Faustov's Post-Removal Detention Does Not Yet Raise Constitutional Concerns

In this case, Faustov's order of removal became final on February 28, 2013. As an alien under a final order of removal, Faustov's detention is now governed by a set of statutory and constitutional rules. First, by statute, aliens like Faustov, who are subject to final removal orders, may be detained under 8 U.S.C. § 1231(a), which directs the Attorney General to remove such aliens within 90 days of the entry of a removal order. 8 U.S.C. § 1231(a)(1)(A). The statute then commands that "[d]uring the removal period the Attorney General shall detain the alien." 8 U.S.C. § 1231(a)(2). For purposes of our analysis of any post-final order period of detention, this statutory ninety-day "removal period" during which detention is mandatory begins on the date the order of removal becomes administratively final. See 8 U.S.C. § 1231(a)(1)(B)(I).

In this case, Faustov has been held for approximately 110 days since his removal order became administratively final. Of this brief period of detention, the initial 90 days of detention were not only authorized by law, they were actually compelled by the statute. 8 U.S.C. § 1231(a)(2). As for Faustov's remaining, current, brief term of post-removal detention, nothing about this on-going detention presently violates the petitioner's constitutional rights.

For aliens awaiting removal, like the petitioner, the contours of those rights are now defined by the United States Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001). In Zadvydas, the United States Supreme Court extended due process protections to aliens awaiting removal from the United States, while generally sustaining the validity of the initial mandatory detention period for such aliens during the ninety-day removal period prescribed by 8 U.S.C. § 1231(a)(1)(A). Beyond this initial 90-day period the court concluded that: "we think it practically necessary to recognize some presumptively reasonable period of detention." Id. at 701.

The court then observed that:

> While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months . . . . Consequently, for the sake of uniform administration in the federal courts, we recognize that period. 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. And for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.

Id. at 701.

Taken together, 8 U.S.C. § 1231(a)(1)(A) and Zadvydas create a statutory and constitutional framework for protecting the rights of aliens who are detained pursuant to administratively final removal orders. Under this framework, such aliens shall be detained for the first 90 days of the removal period and further detention beyond this 90-day period will be presumed reasonable up to a period of 6 months, at which time aliens subject to final removal orders must either be removed, or be given bail consideration.

However, when calculating these detention periods for purposes of analyzing post-removal delay claims brought by immigration detainees two principles must be kept in mind. First, delays attributable to the recalcitrance of the immigration detainee, and his refusal to cooperate with immigration officials, are not to be considered by the courts in making these determinations regarding whether a detainee has experienced excessive delays in deportation. Thus, where an alien refuses to cooperate with the authorities in affecting his removal he cannot cite the delay in removal which he caused as grounds for habeas relied. As this court has observed:

> [A]n "alien cannot assert a viable constitutional claim when his indefinite detention is due to his failure to cooperate with the INS's efforts to remove him." Pelich v. I.N.S., 329 F.3d 1057, 1061 (9th Cir.2003). In [such] a case, the Court[s] determined that the continued detention of the alien was due to his own conduct: . . . Thus, the [court] has interpreted INA § 241(a)(1)(C) after Zadvydas to permit continued detention of a removable alien "so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents." Lema v. INS, 341 F.3d 853,

> 857 (9th Cir.2003). Similarly, district courts to consider this issue ask whether the petitioner has the "keys to his freedom," Pelich, 329 F.3d at 1060, to determine whether he is preventing his own removal pursuant to INA § 241(a)(1)(C). See, e.g., Clark v. Ashcroft, No. 03-3320, 2003 WL 22351953 at *3-4 (E.D.Pa. Sept. 16, 2003)(alien initially misrepresented his country of origin, but later gave his true name and identity; the government showed no evidence of non-cooperation since that time); Rajigah v. Conway, 268 F.Supp.2d 159, 165-66 (E.D.N.Y.2003) (finding no bad faith failure to cooperate where alien made truthful statements to Guyanese ambassador regarding his intent to file another court action, which the government considered failure to comply); Seretse-Khama v. Ashcroft, 215 F.Supp.2d 37, 51-53 (D.D.C.2002) (alien's truthful statements to Liberian officials that he did not wish to return to Liberia did not amount to bad faith failure to cooperate since it was not the reason for failure to issue travel documents; rather, it was their concern for his lack of ties to that country); Powell v. Ashcroft, 194 F.Supp.2d 209, 210 (E.D.N.Y.2002) (repeated inconsistencies regarding alien's identity "demonstrably hampered the INS in carrying out his removal"). Thus, this court must carefully examine the record to determine petitioner's part in his continued detention.

Abdel-Muhti v. Ashcroft, 314 F.Supp.2d 418, 427-28 (M.D.Pa.,2004).

In addition, cases construing Zadvydas recognize that the presumptively reasonable six-month detention period described by the Supreme Court is just that–a presumptively reasonable period of detention. It is not an ironclad time frame within which aliens must be removed, or released. Moreover, echoing the Supreme Court's observation that "[t]his 6-month presumption, of course, does not mean that every alien not removed must be released after six months," id. at 701, courts have concluded that an alien who has been held longer than six months awaiting removal

still bears an initial burden of proof to secure release pending removal. In such instances, "in order to state a claim under Zadvydas the alien not only must show post-removal order detention in excess of six months but also must provide evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Akinwale v. Ashcroft, 287 F.3d 1050, 1052 (11th Cir. 2002). See, e.g., Rodney v. Mukasey, 340 F. App'x 761, 764 (3d Cir. 2009); Encarnacion-Mendez v. Attorney General, 176 F. App'x 251, 254 (3d Cir. 2006); Joseph v. United States, 127 F. App'x 79, 81 (3d Cir. 2005). In instances where an alien is unable to produce evidence demonstrating good cause to believe that there is no significant likelihood of removal in the reasonably foreseeable future, courts have frequently sustained continuing periods of detention pending removal well beyond the six-month time frame described as presumptively reasonable by the Supreme Court in Zadvydas, reasoning consistent with Zadvydas that: "[t]his 6-month presumption, . . ., does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas, 533 U.S. at 701. See, e.g., Joseph v. United States, 127 F. App'x 79 (3d Cir. 2005) (11 months); Sun v. Holder, No. 10-2186, 2010 WL 5391279 (M.D. Pa. Dec. 22, 2010)(10 months); Joseph v. Lowe, No. 10-1222, 2010 WL 3835872 (M.D.

Pa. Sept. 24, 2010) (10 months); Boyce v. Holder, 09-2254, 2010 WL 817482 (M.D. Pa. March 9, 2010)(18 months); Robinson v. District Director, No. 09-637, 2009 WL 3366439 (M.D. Pa. Oct. 19, 2009) (1 year); Brown v. Attorney General, No. 09-313, 2009 WL 2225431 (M.D. Pa. July 23, 2009) (10 months); Aishrat v. Mukasey, No. 08-786, 2008 WL 3071003 (M.D. Pa. Aug. 1, 2008) (10 months); Cyril v. Bureau of Immigration and Customs Enforcement, No. 05-2658, 2006 WL 1313857 (M.D. Pa. May 11, 2006) (10 months); Nma v. Ridge, 286 F.Supp.2d 469 (E.D.Pa. 2003)(11 months).

While this legal framework affords substantial protections to aliens, like Faustov, who are subject to final removal orders, application of these legal standards to this case provides no grounds for affording habeas relief to the petitioner at this time. Faustov's removal order became final on February 28, 2013. Thereafter, he was subject to the first 90-day mandatory detention period set by statute, 8 U.S.C. § 1231(a)(2), and his post-removal detention falls well within the 6-month presumptively reasonable time frame defined by the Supreme Court in Zadvydas. Furthermore, given Faustov's resistence to removal none of the post-removal delay in this case can be attributed to the respondents. Instead, responsibility for that delay appears to rest exclusively with Faustov. Finally, given the success of immigration

officials in obtaining travel documents for Faustov, Faustov's removal to the Ukraine is now both likely and imminent.

On these facts we find that Faustov simply has not made a valid claim that he has been subjected to an unconstitutionally excessive period of post-removal delay. Indeed, far from being unconstitutionally excessive, the current post-removal detention falls within periods sanctioned by statute and by the Supreme Court. Therefore, this brief detention does not raise concerns of constitutional dimension warranting habeas relief at this time. See Hendricks v. Reno, 221 F. App'x 131 (3d Cir. 2007)(affirming denial of habeas petition where court found delay from date of administratively final deportation order was less than 3 months).

Finally, in this petition Faustov invites us to re-visit and adjudicate issues relating to the merits of his removal proceedings. This we cannot do. In cases like this, where an immigration detainee is seeking a judicial finding that he should not be removed from the United States, such a claim can only be brought through a petition filed with the United States Court of Appeals. In 2005, Congress enacted the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, codified at 8 U.S.C. § 1252, which eliminated the district courts' habeas corpus jurisdiction over final removal orders in almost all cases. This principle applies with particular and specific force to habeas

corpus petitions by criminal aliens who wish to challenge their removal from the United States on its merits, which is precisely what Faustov seeks to do in this case.

This issue was addressed by the United States Court of Appeals for the Third Circuit in Jordon v. Attorney General of the United States, 424 F.3d 320 (3d Cir. 2005). In Jordon, the appellate court held that, under the REAL ID Act, such claims could not be brought by habeas corpus petitions but rather must be presented to the court of appeals. As the court of appeals observed:

> Several provisions of 8 U.S.C. § 1252 (both pre- and post-REAL ID Act) make the courts of appeals, not district courts, the first and often last judicial arbiter of nationality claims . . . . The REAL ID Act, which became law just days after argument in this case on May 11, 2005, allows us to avoid the dense thicket of habeas jurisdiction over nationality claims. The REAL ID Act amended 8 U.S.C. § 1252 in several pertinent respects. First and foremost, it made petitions for review filed with the court of appeals the "sole and exclusive means for judicial review of" most orders of removal, including the order of removal at issue here. *See* 8 U.S.C. § 1252(a)(5) (1999 & Supp.2005); Bonhometre v. Gonzales, 414 F.3d 442, 445 (3d Cir.2005). In so doing, the Act expressly eliminated district courts' habeas jurisdiction over removal orders. Id.; see also Kamara v. Attorney General of the United States, 420 F.3d 202, 208 (3d Cir.2005). At the same time, the Act also enlarged our jurisdiction, stating that none of its provisions "which limit [ ] or eliminate [ ] judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D) (2005); Bonhometre, 414 F.3d at 445. We have explained that this amendment evidences Congress's "intent to restore judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders. This now permits all aliens, including criminal aliens, to obtain review of constitutional claims and questions of law upon filing of a petition for

> review with an appropriate court of appeals." Papageorgiou v. Gonzales, 413 F.3d 356, 358 (3d Cir.2005).

Jordon v. Attorney General of United States, 424 F.3d 320, 326-27 (3d Cir. 2005). See, e,g., Chuva v. Attorney General, 424 F. App'x 176 (3d Cir. 2011)(district court properly dismissed habeas corpus petition which raised derivative citizenship claim, in favor of REAL ID Act review by court of appeals); Perez v. Attorney General, 391 F. App'x 1000 (3d Cir. 2010)(appellate court review of derivative citizenship claim); Rodrigues v. Attorney General, 321 F. App'x 166 (3d Cir. 2009)(same).

In sum, Faustov's request to adjudicate claims of citizenship or other issues relating to the merits of the removal order entered here fall beyond the habeas corpus jurisdiction of this court. Instead, those claims must under the REAL ID Act be addressed to the court of appeals. Therefore, to the extent that Faustov seeks to contest the merits of this removal order it is recommended that the instant petition for writ of habeas corpus be dismissed without prejudice to the filing of a proper petition with the court of appeals.[2]

[2]The parties mutually acknowledge that Faustov has filed such a petition with the United States Court of Appeals for the Third Circuit which, to date, has not deemed it necessary or appropriate to stay Faustov's removal.

IV. Recommendation

For the foregoing reasons, upon consideration of this Petition for Writ of Habeas Corpus, IT IS RECOMMENDED that the Petition be DENIED without prejudice to renewal at such time, if any, that the delay and detention may become unreasonable and excessive.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 17th day of June 2013.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge