

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CHEN CHAUN CAN	:	
Petitioner	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-5147
JANET RENO, Attorney General of the United States, et al.	:	
Respondents	:	

**MEMORANDUM AND ORDER**

YOHN, J. January      , 2000

Petitioner Chen Chaun Can, an alien subject to a final order of removal entered on April 10, 1997, by the Immigration and Naturalization Service [“INS”] for removal to a country that refuses to readmit him, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. In this petition, Chen argues that his indefinite detention violates his right to due process. After considering this petition, Magistrate Judge Scuderi recommended that it be denied based on the Third Circuit’s recent decision in *Ngô v. INS*, 192 F.3d 390 (3d Cir. 1999). Through counsel, Chen objected to the recommendation and argued for a different interpretation of *Ngô*. The court will accept Magistrate Judge Scuderi’s Report and Recommendation and will deny Chen’s petition.

## **I. Background<sup>1</sup>**

Petitioner Chen is a native of the People's Republic of China. He entered the U.S. illegally on May 1, 1993. In October, 1995, the INS commenced deportation proceedings against him.

On November 28, 1995, Chen was arrested in New York for grand larceny. He had in his possession a green card that he admitted had been taken from the victim of an armed robbery. Chen claimed, however, that he was not the robber and was merely holding the green card for the robber. Less than five months later, Chen was arrested for criminal possession of a loaded revolver. Again, Chen claimed that he was just holding it for someone else.

On June 4, 1996, Chen was convicted of both the larceny and the gun charges and sentenced to imprisonment for a term of one to three years. He served roughly eight months. On his parole in February, 1997, Chen was detained by the INS. After a removal hearing, an immigration judge entered an order of deportation on April 10, 1997. This order became final the same day because Chen waived his appeal. Chen has remained in custody since February 10, 1997, because China has not yet issued the necessary travel documents.

Chen filed his petition on October 19, 1999. He claims that his indefinite detention violates his right to due process. He seeks to be released until the INS can effect his return to China.

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<sup>1</sup>The following background information is derived from Chen's petition and the accompanying exhibits (Doc. No. 1) and the magistrate judge's report and recommendation (Doc. No. 6).

## II. Legal Standard

Title 28 U.S.C. § 636(b)(1) requires a district court to “make a de novo determination of those portions of the [magistrate judge’s] recommendations to which objection is made.” It further allows the court to “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*; see *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 91 (3d Cir. 1992).

## III. Discussion

Chen claims that his indefinite detention violates his right to due process because the INS never afforded him an individualized review of his custody status after the ninety-day removal period, as it was required to do by law. See Pet. for the Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (Doc. No. 1) [“Pet.”] at 20-22. In considering these claims, Magistrate Judge Scuderi set forth the standard for judging the constitutionality of Chen’s confinement, as it was articulated by the Third Circuit in *Ngo*:

“[T]here is no constitutional impediment to the indefinite detention of an alien with a criminal record under a final order of exclusion, deportation, or removal if (1) there is a possibility of his eventual departure; (2) there are adequate and reasonable provisions for the grant of parole; and (3) detention is necessary to prevent a risk of flight or a threat to the community.”

Report and Recommendation of Nov. 23, 1999 (Doc. No. 6) [“Rep’t & Rec.”] at 7-8 (footnote omitted) (quoting *Ngo*, 192 F.3d at 397). He then applied this test to Chen’s detention.

Magistrate Judge Scuderi reasoned that there was a possibility of Chen’s eventual departure because there was no indication that repatriation to China was any less possible than *Ngo*’s repatriation to Vietnam, which the Third Circuit found possible in *Ngo*. See Rep’t & Rec.

at 7 n.7 (citing *Ngo*, 192 F.3d at 398). Magistrate Judge Scuderi then decided that the provisions for the granting of Chen's parole were adequate and reasonable and that the necessity of Chen's detention to prevent risk of flight or threat to the community would be appropriately considered. *See id.* at 9. The reason for this decision was the fact that the INS was going to begin review of Chen's custody on December 2, 1999, and would review his status every six months thereafter pursuant to the INS's new Interim Rules.<sup>2</sup> *See id.* Consequently, Magistrate Judge Scuderi concluded that Chen's continued detention was constitutional and recommended that Chen's petition be denied.

Chen did not object to the determination that there was a possibility of his eventual departure. Instead, he argued that Magistrate Judge Scuderi had misapplied *Ngo*. Chen objected to the recommendation because "the parole process is not yet complete and there is no assurance that the process provided to the Petitioner will meet the 'rigorous review' standard established by *Ngo*."<sup>3</sup> Pet'r's Exceptions to Rep't & Rec. (Doc. No. 7) ["Pet'r's Exceptions"] ¶ 4. As a result,

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<sup>2</sup>These Interim Rules were announced at the oral argument for *Ngo* and are attached as an appendix to the *Ngo* opinion. *See Ngo*, 192 F.3d at 400.

<sup>3</sup>Chen also claimed that his custody status review could be impacted by misinformation about his criminal past contained in the government's response to his petition. Specifically, he states that, although he was actually convicted of only grand larceny and criminal possession of a weapon, "[t]he Respondent, in its response to Petitioner's petition asserts that the Respondent [sic] was convicted of robbery and could be deemed to be an armed robber." Pet'r's Exceptions ¶ 6.

Chen's claim is problematic in two ways. First, the government's response contains no language to the effect that Chen was convicted of robbery. The closest the government gets to such a statement is the following: "[A] rational reviewer might conclude from the evidence that Chen is an armed robber." Gov't's Resp. to Pet. for Writ of Habeas Corpus (Doc. No. 5) ["Gov't's Resp."] at 5.

Second, the government's statement does not constitute misinformation of any sort. Given the circumstances surrounding Chen's arrests, the government is absolutely correct that a rational reviewer could reach this conclusion. Thus, there is no indication that Chen's custody

Chen argues that *Ngo* requires “that this court grant his request for habeas corpus, subject to the Respondent’s establishment that it has provided the rigorous review required.” *Id.* ¶ 7. He claims that an order to that effect would be “in line with that issued in *Ngo*.” *Id.* Chen is incorrect in his assertion that *Ngo* requires the court to grant his petition.

In *Ngo*, the Third Circuit noted the importance of periodic review of custody status and emphasized that “grudging and perfunctory review is not enough to satisfy the due process right to liberty, even for aliens.” 192 F.3d at 398. The *Ngo* court went on to state, however, that conscientious application of the INS’s Interim Rules would “provide reasonable assurance of fair consideration of a petitioner’s application for parole pending removal.” *Id.* at 399.

In resolving *Ngo*, the Third Circuit did not grant the habeas petition subject to the INS establishing that the rigorous review dictated by the Interim Rules had already taken place. Instead, the habeas petition was “granted and the petitioner released unless within 30 days the INS *begins* the review process for petitioner under the Interim Rules set out in the Appendix to this opinion.” *Id.* (emphasis added). The Third Circuit held that due process was satisfied by the commencement of review, not its completion. Thus, despite Chen’s argument to the contrary, *Ngo* does not dictate that the court must grant Chen’s petition absent a showing that the review of his custody status has been completed and did, in fact, comply with the Interim Rules.

Chen admits that the parole review process has begun. *See* Pet’r’s Exceptions ¶ 4. He in no way suggests, however, that this review process did not, does not, or will not comply with the Interim Rules. Absent some indication of noncompliance with the Interim Rules, there is no violation of Chen’s right to due process.

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status review will be impacted by any misinformation.

#### **IV. Conclusion**

Because there is no indication that Chen's right to due process was violated, the court will adopt the Report and Recommendation of Magistrate Judge Scuderi and will deny Chen's petition for a writ of habeas corpus without prejudice to Chen's right to refile the petition should the INS fail to comply with the Interim Rules. An appropriate order follows.

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**ORDER**

YOHN, J.

AND NOW, this     day of January, 2000, upon consideration of the petition for a writ of habeas corpus and the exhibits thereto (Doc. No. 1), the response to the petition (Doc. No. 5), the magistrate judge's report and recommendation (Doc. No. 6), and the petitioner's objections thereto (Doc. No. 7), IT IS HEREBY ORDERED that the report and recommendation is APPROVED and ADOPTED and the petition for a writ of habeas corpus is DENIED WITHOUT PREJUDICE to the petitioner's right to refile the petition should the INS fail to comply with the Interim Rules (or permanent regulations at least as favorable to him).

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William H. Yohn, Jr.