

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

FADIL KACANIC,	:	CIVIL ACTION
	:	
PETITIONER,	:	
	:	
V.	:	
	:	
KENNETH ELWOOD, DISTRICT	:	
DIRECTOR, IMMIGRATION AND	:	
NATURALIZATION SERVICE, et. al.,	:	
	:	
RESPONDENT.	:	NO. 02-8019

**OPINION**

Newcomer, S.J.

November , 2002

Currently, before the Court is the Petitioner's Petition for Writ of Habeas Corpus. The Petitioner has been ordered deported from the United States. He claims that his continued detention pending his final removal from the country is contrary to the laws of the United States.<sup>1</sup> For the following reasons, the Petition will be granted.

**I. Factual Findings**

Based on the testimony and exhibits submitted to this Court at a hearing on this matter held on October 31, 2002, the Court finds the following to be the facts relevant to this case.

The Petitioner came to the United States from

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<sup>1</sup>The Petitioner only challenges his continued detention not the merits of his deportation.

Yugoslavia in 1978. He became a Lawful Permanent Resident of the United States in 1980. In March of 2000, he pleaded guilty in the Northern District of California to three felonies involving credit card fraud.<sup>2</sup> He was sentenced to three years imprisonment followed by three years of supervised release.

After serving thirty-three months of his sentence, he was taken into custody by the INS and a Notice to Appear was issued stating that he was subject to deportation. The INS held a deportation hearing on November 8, 2001. Following that hearing, the Immigration Judge ordered that the Petitioner be removed to Montenegro. Following this final order, the INS continued to detain the Petitioner. The Petitioner has now spent a full year in custody following his final order of removal.

The INS has tried to obtain travel papers to allow the Petitioner to return to Yugoslavia.<sup>3</sup> On January 2, 2002, the INS dispatched a letter to the Yugoslavian Consulate in Washington,

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<sup>2</sup>Specifically the Petitioner pleaded guilty to violations of 18 U.S.C. §§ 371 (Conspiracy), 1029(a)(2)(Use of Unauthorized Access Devices), and 1029(a)(5)(Using another Person's Access Device). Gov. Ex. 8.

<sup>3</sup>The Petitioner was born in Montenegro, a country that was, at that time, part of the Socialist Federal Republic of Yugoslavia. Since 1978 the original Yugoslavia disbanded into separate republics, but Montenegro was recently reunified into what is now called the Federal Republic of Yugoslavia. The Petitioner claims that the "new" Yugoslavian Republic is not a successor state to the "old" republic, and that the Petitioner never became a citizen of the "new" republic. Therefore, the Petitioner argues, it is highly unlikely that the "new" republic will grant him travel papers. Because our decision rests on other considerations, we do not need to decide the issue of whether the "new" republic is a successor state at this time.

D.C. This correspondence provided the Petitioner's biographical information, including: his place and date of birth; information about his parents; his last permanent residence in Yugoslavia; and information regarding his Yugoslavian passport.<sup>4</sup> In addition, this letter contained photos of the Petitioner and his fingerprints. The Petitioner was unable to provide any other identification which his deportation officer felt would facilitate travel papers, such as, a birth certificate or a passport. Accordingly, this letter represents all of the information regarding the Petitioner that the INS has submitted to the Yugoslavian Consulate.

Following this letter, the INS did not receive any decision regarding travel documents for the Petitioner. On February 15, 2002, the Petitioner's deportation officer, Mr. Sheron, spoke with his contact at the Yugoslavian Consulate, Ms. Vesna Robovic.<sup>5</sup> Ms. Robovic informed Officer Sheron that any decision would take at least three months. Officer Sheron did not ask why the decision would take so long.

Officer Sheron did not attempt to contact the Consulate again until May 10, 2002. On that day he called the Consulate at

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<sup>4</sup>The Petitioner was issued a passport by the Yugoslavian Consulate in 1982. The Petitioner, however, is no longer in possession of this passport.

<sup>5</sup>The deportation officers working at the York facility, are each assigned to work on obtaining travel papers from specific geographic regions. Mr. Sheron is in charge of obtaining papers for detainees that are being deported back to European nations. Therefore, Mr. Sheron has worked with Ms. Robovic and the Yugoslavian Consulate in the past, and anticipates having to work with them again in the future.

9:20 PM. Unsurprisingly, no one answered at that hour. He next called on June 24, 2002, again receiving no answer.<sup>6</sup> Following this call, he attempted to send a fax requesting an update on the Petitioner's status. This fax could not be completed.

Officer Sheron spoke with Ms. Robovic on June 26, 2002. During this conversation, she informed him that she did not know when a decision on the Petitioner would be made. Officer Sheron noted that obtaining travel papers "did not look likely soon." He also wrote a letter to INS Headquarters in Washington requesting assistance in obtaining travel documents. In this letter he stated that efforts have proven "fruitless" and he did "not know when permission may be issued."

On October 4, 2002, Mr. Sheron again contacted the Consulate. Officer Sheron spoke with Ms. Robovic's substitute at the Consulate, Alexander Stankovic. Mr. Stankovic stated that there had been no word on the Petitioner's travel papers. He then informed Officer Sheron that if travel papers were approved the INS would need to supply the names of any officers that would be accompanying the Petitioner back to Yugoslavia. He requested that some writing summarizing the status of Petitioner's travel papers be sent. On October 30, 2002, in preparation for the following day's hearing before this Court, Mr. Sheron again contacted the Consulate. No such writing has been produced.

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<sup>6</sup>At the hearing, Mr. Sheron was not sure whether there was an answering service at the Consulate.

## **II. Legal Standard**

### **A. Power of the Court to Grant the Remedy**

This case is before the Court on a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. The purpose of a writ under this section is to provide a remedy to those individuals who are detained contrary to the constitution or laws of the United States. Johnson v. Avery, 393 U.S. 483, 485-6 (1969). Although Congress has recently made considerable changes to immigration law, the writ of habeas corpus remains an available remedy to aliens seeking to challenge post-final-order detention. Zadvydas v. Davis, 533 U.S. 678, 687-8 (2001).

### **B. Jurisdiction**

Jurisdiction over this case is proper for two reasons. First, this Court has jurisdiction because the petitioner is currently in custody in this district. Ahrens v. Clark, 335 U.S. 188 (1948). Further, jurisdiction is also proper because the custodian of the Petitioner, Kenneth Elwood, District Director of the INS, is based within this district. Braden v. 30th Judicial Circuit, 410 U.S. 484, (1973).

### **C. Standard for Post-Final-Order Detention**

The immigration laws of the U.S. permit the INS to detain aliens following a final order of deportation. 8 U.S.C. §1231(West 2002). The statute provides for most aliens to be

detained for a period up to ninety days. 8 U.S.C. §1231(a)(1)(West 2002). The Government is also permitted to detain certain aliens after this period. 8 U.S.C. §1231(a)(6) (West 2002). The wording of the statute does not provide for a maximum period of post-final-order detention.<sup>7</sup>

The Supreme Court held in Zadvydas v. Davis, 533 U.S. 678 (2001), that a reasonableness limitation on post-final-order detention must be read into the statute. To allow a statute to authorize the Attorney General to hold a person indefinitely without trial, "would raise a serious constitutional problem." Id. at 690.<sup>8</sup> The congressional authorization of post-final-order detention must be limited to a reasonable period of time which is justified by the legitimate concerns of the INS, namely, the danger the alien poses to the community and the alien's risk of flight. Id. at 699-700. When detention exceeds the period of time "reasonably necessary to secure removal, then it is no longer authorized by the statute. Id. at 699. Recognizing that the Executive Branch has greater expertise when it comes to immigration, the Court held that any post-final-order detention

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<sup>7</sup> The statute provides that a criminal alien "may be detained beyond the removal period" if the Attorney General determines that the alien is a flight risk or a danger to the community. 8 U.S.C. 1231(a)(6)(West 2002).

<sup>8</sup>Holding a person indefinitely without trial raises obvious due process concerns. While aliens who are detained attempting to enter the U.S. illegally are not guaranteed the same rights under the constitution, aliens previously admitted into the country who are being expelled, such as the Petitioner, are entitled to Due Process Rights. Zadvydas, at 693 (citations omitted).

up to six months is presumptively reasonable and authorized by the statute. Id. at 701.

The Supreme Court went on to set up a framework to use when determining if post-final-order detention in excess of six months is permitted. First, the alien must provide "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas, 533 U.S. at 701. The burden then shifts to the Government to "respond with evidence to rebut that showing." Id. Because the Petitioner has been held in custody over the six-month presumptive period, our analysis will follow this approach.

### **III. Application of Zadvydas**

#### **A. There is Reason to Believe that there is No Significant Likelihood of the Petitioner Being Removed in the Reasonably Foreseeable Future**

The Court finds that the Petitioner has shown good reason to believe that he will not be removed in the reasonably foreseeable future. In reaching this conclusion this Court relied on the amount of time that the Petitioner has already spent in custody, the inaction of the Yugoslavian Embassy, and the admissions of the INS.

The Petitioner has currently spent one year in detention awaiting his removal. While the Supreme Court did not set a maximum time limit for post-final-order detention, it

stated that as the period of detention grows "what counts as the 'reasonably foreseeable future' conversely shrinks." Zadvydas, 533 U.S. at 701. In this case the period of detention is almost double what the Court considered presumptively reasonable. Accordingly, when deciding whether removal is likely in the reasonably foreseeable future the time remaining for the INS to effectuate the Petitioner's removal is relatively short. See Zhou v. Farquharson, 2001 U.S. Dist. Lexis 18239, at \*3-4 (D. Mass. Oct. 19, 2001)(finding that post-final-order detention of thirteen months violated Zadvydas).

Yugoslavian officials have not indicated that removal will occur in this relatively short period of time. The Government of Yugoslavia has been in possession of all the information the INS is capable of providing to it since January 2, 2002.<sup>9</sup> During that time, they have never stated that the Petitioner is likely to be granted travel papers. They have even been unable to tell the INS when a decision will be reached. Moreover, they have never offered any reason why obtaining travel papers in this case has taken longer than normal. Considering this lack of any definitive answer, or any indication that a definitive answer is likely soon, there is no legitimate reason to believe that removal will occur in the reasonably foreseeable

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<sup>9</sup>The INS has been unable to provide any of the additional documents that would be helpful in effectuating removal, such as a birth certificate or passport. There is no reason to believe that these documents will become available in the future.

future. See Mohamed v. Ashcroft, 2002 U.S. Dist. Lexis 16179, at \*3 (W.D. Wash. April 15, 2002)(finding that the lack of a definite answer from the foreign consulate indicated that no removal was likely in the reasonably foreseeable future); Okwilagwe v. INS, 2002 U.S. Dist. Lexis 3596, at \*9 (N.D. Texas March 2, 2002)(same).

The Government's own actions have shown that it believes that it is unlikely the Petitioner will be removed in the near future. On June 26, Officer Sheron noted on the INS Deportation Log that any grant of travel papers "does not look likely soon." Gov. Ex. 3. He wrote to INS Headquarters in Washington, stating that efforts to obtain travel documents have been "fruitless" and that the Yugoslavian Embassy "does not know when permission may be issued." Gov. Ex. 6. Additionally, the Petitioner was recently transferred from York to Bucks County Prison. The York facility is designed for short term detainees, while Bucks County holds aliens that are going to be in custody for longer periods of time. This action is an implicit admission that the INS foresees the Petitioner remaining in custody for the reasonably foreseeable future.

**B. The Government Has Failed to Rebut the Petitioner's Evidence**

According to Zadvydas, the Government must present competent evidence to rebut the Petitioner's showing that there

is no significant likelihood that removal will occur in the reasonably foreseeable future. Zadvydas, 533 U.S. at 701. The Government claims that several pieces of evidence show that the Petitioner is likely to be removed in the near future. We find that the Government's evidence does not warrant this conclusion.

First, the Government relied on the statement made by Mr. Stankovic that the INS would have to provide the names of any officers that would be accompanying the Petitioner back to Yugoslavia. If viewed out of context, this statement might be persuasive. However, considering that it was made immediately following a statement that no decision had been reached on the Petitioner's travel papers, it cannot be concluded that this statement is any indication that a decision one way or another is imminent.

The Government also sought to rely on a table showing that the INS has successfully removed aliens to Yugoslavia in the past. This table is not relevant to the instance case. It does not give any information on the number of aliens that were denied travel papers by Yugoslavia. See Sertse-Khama v. Ashcroft, 215 F.Supp.2d 37, 46 (D.D.C. 2002)(rejecting similar evidence for lack of information on the number of applicants for travel papers). Moreover, it lacks any individualized information about any of these aliens. For instance, there is no evidence as to how many of them had criminal histories, or how many of them were accepted despite having lived in the US for more than twenty

years, or how many of them lacked a Yugoslavian passport. Without any kind of information that would allow for a meaningful comparison of these removed aliens to the Petitioner's case, the table does not give any indication of whether or not the Petitioner will be removed in the near future.

Similarly, the Government argued that the lack of any institutional barriers to removal proves that release in this case is not warranted. Again, however, other aliens having been removed to Yugoslavia in the past is not a credible indication that this alien will be removed in the near future. See Ablahad v. Ashcroft, 2002 U.S. Dist. Lexis 17405, at \*3 (N.D. Ill. Sept. 6, 2002)(finding that evidence that aliens have in the past been deported to petitioner's country is not sufficient to carry the government's burden under Zadvydas); Mohamed, 2002 U.S. Dist. Lexis 16179 at \*3 (same); Sertse-Khama, 215 F.Supp.2d at \*49 (same).

Finally, the INS also argued that the Yugoslavian Government's failure to deny travel papers to the Petitioner makes his removal likely. It simply does not follow from the fact that Yugoslavia has not said "no" that they must be ready to say "yes" within the foreseeable future. That there remains some possibility of removal does not satisfy the Government's burden. See Zadvydas, 533 U.S. at 701 (requiring a showing that there is no prospect of removal is not allowed under the statute).

**C. The INS's Efforts to Obtain Travel Papers for the Petitioner**

The INS failed to make timely efforts to remove the Petitioner. This lack of effort only reinforces the conclusion that the Petitioner's removal is not likely to occur in the reasonably foreseeable future. See Zadvydas, 533 U.S. at 701 (rejecting merely good faith efforts of the INS as a guarantee that removal is likely); Sertse-Khama, 215 F.Supp.2d at \*50 (considering the INS's lack of effort); Zhou, 2001 U.S. Dist. Lexis 18239 at \*3(same).

This case is marked by several delays in INS activity. Specifically, from February 15, 2002, until May 10 the INS did nothing to check on the status of Petitioner's travel papers. When they failed to make any contact with the Consulate in early May, the INS simply put the matter aside for another month and a half before attempting to reach them again. After learning on June 26 that no decision had been reached, the INS again waited three months without checking on the status of travel papers.<sup>10</sup> Since receiving a request for assistance from Officer Sheron in June, INS headquarters has also failed to take any steps to help obtain papers. See Serste-Kohama, 215 F.Supp.2d at 46 (considering the INS Headquarters' failure to act). Perhaps even more disturbing, during the entire year the Petitioner has been

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<sup>10</sup>This time period is especially egregious considering the six month presumptive period of detention had expired on May 8, 2002.

awaiting removal the INS has never asked why his travel papers have not issued. The Government claims that it has not contacted the Consulate more frequently or asked why papers have not been issued because it fears upsetting the Yugoslavian Consulate. This Court does not doubt the INS's expertise in dealing with foreign consulates, however, it simply can not condone this level of diligence when a man is sitting in jail without due process.<sup>11</sup> The effort of the INS in this case only reinforces this Court's conclusion that removal in the near future does not seem likely.

#### **IV. The Petitioner's Supervised Release**

An alien that is released from INS custody while awaiting removal should be placed on some form of supervised release. Zadvydas v. Davis, 285 F.3d 398(5th Cir. 2002). In this case, the Petitioner has three years of supervised release remaining from his 2000 conviction. This form of release will assure his availability if and when the INS receives travel papers for the Petitioner.

#### **V. Conclusion**

For the above stated reasons the Petition for a Writ of

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<sup>11</sup>The INS did conduct a Post Order Custody Review of Petitioner's detention. This review, although scheduled in June, did not actually take place until September 18, 2002. This review is hardly a model of due process. There is no hearing, but merely a review of the INS file by a deportation officer, and the Petitioner bears the burden of showing that he should be released. In the Petitioner's case, the review was denied based on the Petitioner's failure to provide information. The Petitioner, however, produced a letter dated four months before the review requiring him to send his information to INS headquarters. It appears that the Petitioner followed this directive. The information he sent was kept in Washington, however, and never forwarded to the deportation officer in York who performed the review.

Habeas Corpus will be granted. An appropriate order is attached.

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	:	
RESPONDENT.	:	NO. 02-8019

**O R D E R**

AND NOW, this        day of November, 2002, upon consideration of the Petitioner's Petition for a Writ of Habeas Corpus, the Government's response and the evidence and arguments heard before this Court on October 31, 2002, said Petition is GRANTED. A WRIT OF HABEAS CORPUS is issued. The Respondent is ORDERED to release the Petitioner from the custody of the INS forthwith, and deliver him into the custody of the Director of the Bureau of Prisons so that he may serve the remainder of the sentence imposed on October 23, 2000, by the Northern District of California in Criminal Action 99-20214-03.

AND IT IS SO ORDERED

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Clarence C. Newcomer, S.J.