

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

SELIM YACOUB,
Petitioner

CIVIL ACTION

v.

BUREAU OF IMMIGRATION &
CUSTOMS ENFORCEMENT,
Respondent

NO. 03-1765

MEMORANDUM AND ORDER

McLaughlin, J.

May 20, 2003

The pro se petitioner, Selim Yacoub, is an alien subject to removal from the United States. He alleges that because it is not significantly likely that he will be removed in the reasonably foreseeable future, his continued detention at York County Prison in York, Pennsylvania violates his due process rights. Pending before the Court is Mr. Yacoub's petition for a writ **of** habeas corpus pursuant to 28 U.S.C. § 2241, challenging the continued detention. The Court will deny the petition.

The relevant facts are as follows.¹ Mr. Yacoub is a native **of** Lebanon who legally entered the United States in 1978. In 1999, Mr. Yacoub pled guilty to aggravated felonies that made

¹ The facts are taken from the Court's memorandum and order dated August 14, 2002, denying Mr. Yacoub's second habeas corpus petition as supplemented by the parties in the present action. The second habeas corpus petition was filed in Yacoub v. Elwood, Civil Action No. 02-1480. The facts are not disputed by Mr. Yacoub or the government.

him subject to removal under 8 U.S.C. § 1227(a)(2). Upon his release from prison in September 2000, Mr. Yacoub was taken into custody by the Immigration and Naturalization Service ("INS") pursuant to 8 U.S.C. § 1226(c)(1), which provides that aliens removable because they committed aggravated felonies are to be taken into custody by the INS when they are released from prison.

After being released into INS custody, Mr. Yacoub challenged his removal on the grounds that removing him to Lebanon would violate Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. On January 31, 2002, the Bureau of Immigration Appeals ("BIA") determined that Mr. Yacoub was removable and that he was not entitled to a deferral of removal.

On March 22, 2002, Mr. Yacoub filed a habeas corpus petition with this Court challenging the BIA's decision.² Mr. Yacoub's second habeas corpus petition included a request for a stay of removal. Mr. Yacoub also filed a motion for a stay of removal on May 3, 2002. Neither request for a stay of removal was opposed by the government. On May 7, 2002, a stay of removal

² Mr. Yacoub's March 22, 2002 petition was his second habeas corpus petition. His first petition was filed on February 16, 2001 in Civil Action No. 01-809. The first petition was denied in a memorandum and order dated January 14, 2002. The reason the first petition was denied is that the BIA had not yet issued its decision on whether Mr. Yacoub was removable. Without a final removal order, there was nothing from which Mr. Yacoub could appeal to this Court regarding whether he was removable. See 8 C.F.R. §§ 3.39, 240.2, 240.14, 241.1.

was granted. The stay prevented the petitioner from being removed during the pendency of the litigation before the district court and for the period described by the Federal Rules of Appellate Procedure for the time in which to take an appeal.

On August 14, 2002, the petition for a writ of habeas corpus was denied because the Court lacked jurisdiction to review the BIA decision. On October 4, 2002, the petitioner filed a notice **of** appeal. This appeal is pending in the United States Court **of** Appeals for the Third Circuit as Yacoub v. Elwood, Court of Appeals **No.** 02-4120.

On March 26, 2003, Mr. Yacoub filed the present habeas corpus petition. He has not requested a stay of removal from this Court. As far as the Court **is** aware, Mr. Yacoub has also not sought a stay of removal from the Third Circuit. The question raised by Mr. Yacoub's current habeas corpus petition is whether his continued detention violates by his due process rights.

When an alien is ordered removed, the Attorney General has ninety days to remove the alien. This period is the removal period. 8 U.S.C. § 1231(a) (1). **An** alien must be detained during the removal period. 8 U.S.C. § 1231(a) (2).

In practice, the Attorney General has not been able to remove every alien within ninety days of the alien's removal order. When an alien is removable under 8 U.S.C. § 1227(a) (2),

as Mr. Yacoub is because of his aggravated felony convictions, the Attorney General may continue to detain the alien beyond the removal period if the alien poses a risk to the community or is unlikely to comply with the removal order. 8 U.S.C. § 1231(a)(6). The statute does not place an outer limit on how long an alien may be detained while awaiting removal. The possibility of unlimited detention raises a due process problem. To avoid the due process problem, the Supreme Court established a framework for determining when continued detention violates due process. Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

Detention of an alien **for** less than six months after the beginning of the removal period is presumed constitutional. If an alien is detained for more than six months from the beginning of the removal period, there is no presumption that continued detention is constitutional. Id.

An alien detained longer than six months after the beginning of the removal period may show that continued detention after six months has passed is unconstitutional. To show that the continued detention is unconstitutional, the alien bears the burden of providing good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. If the alien meets his burden, the government must respond with evidence sufficient to rebut the alien's showing. Id.

The removal period begins on the latest of the following: (1) the date the order of removal becomes administratively final; (2) the date of a court's final order if the removal order has been judicially reviewed and the court ordered a stay of the removal; or (3) the date the alien is released from confinement. 8 U.S.C. § 1231(a)(1)(B). *Any* time spent in detention before the removal period begins does not count towards the six months of detention that is necessary to challenge continued detention on due process grounds. Zadvydas, 533 U.S. at 701; see Demore v. Kim, 123 S. Ct. 1708, 1719-20 (2003).

In the present case, there are two possible dates on which the removal period could have started: (1) August 14, 2002 or (2) October 4, 2002. Mr. Yacoub's order of removal became administratively final on January 31, 2002, when the BIA issued its decision. This Court, however, denied Mr. Yacoub habeas corpus relief from the BIA decision on August 14, 2002 after the Court had issued a stay of removal. The stay of removal expired on October 4, 2002, when Mr. Yacoub filed his notice of appeal from the Court's decision.

Even if the removal period began on October 4, 2002 as the government argues, it has been at least six months since the beginning of the removal period. There is not a presumption that continued detention of Mr. Yacoub is constitutional because Mr.

Yacoub has been detained for more than six months since the beginning of the removal period.

Once the presumption that continued detention is constitutional has been eliminated, the petitioner bears the burden of providing good reason to believe that his removal is not significantly likely in the reasonably foreseeable future. Allowing aliens to challenge continued detention when six months has passed since the removal period began "does not mean that every alien not removed must be released after six months." Instead, the 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. With respect to activity after the removal period began, Mr. Yacoub argues that the INS has made no efforts to remove him even though there is no stay of removal in effect.

Mr. Yacoub has provided no reason, much less a good reason, to believe that his removal is not significantly likely in the reasonably foreseeable future. His burden under Zadvydas is not satisfied by a bare allegation that the INS has made no efforts to remove him, Additionally, Mr. Yacoub is not entitled to release from **INS** custody with his bare allegation when he continues to litigate whether he is even subject to removal. Mr. Yacoub has made no showing that the government will not be able to remove him when his challenge to the underlying removal order

in his pending appeal is completed. Mr. Yacoub, therefore, has not met his burden under Zadvydas of showing that his removal is not significantly likely in the reasonably foreseeable future. See, e.g., Bradshaw v. INS, No. CIV.A. 01-5221, 2002 WL 1160832, at *2 (E.D. Pa. June 3, 2002) (Green, J.); Marshall v. INS, No. CIV.A. 02-510, 2002 WL 818865, at *4 (E.D. Pa. Apr. 29, 2002) (Reed, J.); Worrell v. Ashcroft, 207 F.Supp. 2d 61, 70 (W.D.N.Y. 2002); Guner v. Reno, No. 00-8802, 2001 WL 940576, at *2 (S.D.N.Y. Aug. 20, 2001).

If an alien meets his burden under Zadvydas, the burden shifts to the government to respond with evidence rebutting an alien's showing that his removal is significantly unlikely in the reasonably near future. In the present case, the burden never shifts to the government because Mr. Yacoub did not meet his burden under Zadvydas. The petition for a writ of habeas corpus, therefore, is denied.

An appropriate order follows.

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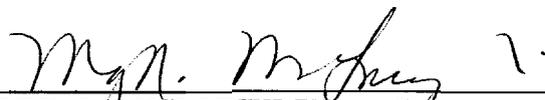
BUREAU OF IMMIGRATION &
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ORDER

AND NOW, this 20th day of May, 2003, upon consideration of the Petition for Writ **of** Habeas Corpus (Docket No. 1), the government's response thereto, and the petitioner's reply, IT IS HEREBY ORDERED that the petition for a writ **of** habeas corpus is DENIED for the reasons set **forth** in a memorandum of today's date.

BY THE COURT:



MARY A. MCLAUGHLIN, J.