

BDB:GMT:jmh

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

MAMADU BALDE,	:	NO. 1:CV-17-1446
Petitioner	:	
	:	
v.	:	(Kane, J.)
	:	(Carlson, M.J.)
CLAIR DOLL, et. al,	:	
Respondents	:	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondents¹ hereby opposes and requests that the Court dismiss the Petition for a Writ of Habeas Corpus under to 28 U.S.C. § 2241 upon the grounds and for the reasons set forth herein. In support thereof, Respondents aver the following:

¹ Pursuant to 28 U.S.C. § 2243, “[t]he writ, or order to show cause shall be directed to the person having custody of the person detained.” “These provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge....” Rumsfeld v. Padilla, 542 U.S. 426, 434 (2004). Thus, for purposes of a habeas action, the petitioner’s custodian is the warden of the institution where the petitioner is being held. Id. at 442. The only appropriate respondent is the warden of York County Correctional Facility, Clair Doll, who currently has immediate custody of Balde. As such, all other named respondents should be dismissed in this case.

I. Procedural History

Petitioner, Mamadu Balde, is a detainee of the Immigration and Customs Enforcement (ICE), currently housed at the York County Prison, in York, Pennsylvania. On August 15, 2017, Balde, through counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging the legality of his continued detention by ICE pending his removal from the United States and seeking an Order of Court for his immediate release. Pet. (Doc. 1) at 19.

On August 15, 2017, this Court issued an Order directing Respondent to file an answer by August 29, 2017. Order (Doc. 3.) On August 25, 2017, Respondents had requested an enlargement of time in order to obtain proper documentation from ICE and Petitioner opposed that motion. Mot. (Doc. 5); Opp'n (Doc. 6.) On August 28, 2017, ICE was able to provide Respondents enough information to allow Respondents to submit this response to the petition for writ of habeas corpus.

II. Factual Background

Balde claims to have entered the United States on June 6, 1999 at New York, New York with fraudulent documents. Record of Deportable/Inadmissible Alien (Ex. 1) at 2. He is a citizen and national of Sierra Leone by nature of birth. Id. On November 18, 2008, the immigration judge issued a final order of removal to Sierra Leone (with alternate removal to Guinea), pretermitted the asylum application, and denied all forms of withholding of removal. Id. Balde appealed this decision to the

Board of Immigration Appeals and filed a Petition for Review with the Second Circuit - both appeals were denied. Id. On October 25, 2011, Balde became subject to a final order of removal. Id.

Because ICE was unable to remove Balde at that time, on October 15, 2012, he was released on an Order of Supervision. Balde remained at large and at all times was expected to cooperate with efforts to acquire a travel document during his supervised release. During the time between 2012 and the present, changing conditions have resulted in Sierra Leone issuing travel documents for its citizens; thus, on June 16, 2017, Balde was returned to ICE custody to attend an interview with officials from Sierra Leone. Notice of Failure to Comply (Ex. 3); see also Excerpt from Fiscal Year 2016 ICE Enforcement and Removal Operations Report (Ex. 2) (showing 18 removals to Sierra Leone in 2016.) On June 23, 2017, Balde met with officials of Sierra Leone and provided fraudulent information that resulted in a July 18, 2017 decision by Sierra Leone to deny the issuance of a travel document. Notice of Failure to Comply (Ex. 3).

Shortly after the interview and Sierra Leone's denial based upon the interview, ICE officials served a Warning of Failure to Depart on Balde and decided to obtain a sworn statement regarding Balde's citizenship claims to compare with the information provided in the interview. Sworn Statement (Ex. 5.) In his sworn

statement, Balde confirmed he was a citizen of Sierre Leone and NOT the Ivory Coast as had been indicated in that interview. Id.

Upon information and belief, ICE reviewed Balde's file and discussed with Sierra Leone officials that everything in his file substantiates that he is a citizen of Sierra Leone. Specifically, his I-589; a statement he submitted in conjunction with his I-589; an I-130; a statement from his wife; the brief that was submitted to the U.S. Court of Appeals for the 2nd Circuit in support of his PFR; a G-325 that states he was born in Sierra Leone and lived in Kabala from 1973 to 1999. Further that the G-325 further provides his parent's names and states they were born in Kabala, Sierra Leone. In addition, information in the file indicates that the Forensic Document Lab examined the expired Sierra Leone passport issued in Balde's name that the subject claimed was obtained fraudulently when he was interviewed by the Embassy. All information indicates that the passport conforms to comparable genuine specimens and that no physical evidence of photograph substitution, page substitution or date entry alterations were observed. Finally, Sierra Leone was informed about the most recently gathered information in the sworn statement. Upon information and belief, Sierra Leone officials are reviewing this information to determine whether a travel document will issue.²

² Respondents note that of the other two Sierra Leone citizens interviewed by Sierra Leone officials at the same time as Balde, a travel document has been

III. Question Presented

Should the Court deny the habeas corpus petition because Balde's post-order detention is constitutionally permissible, and he has not shown that his removal is unlikely in the reasonably foreseeable future?

IV. Argument

A. Balde's Detention Is Constitutional

Balde's detention is constitutional because he fails to show that his removal is not reasonably foreseeable. Under section 241 of the INA, ICE is permitted to detain an alien for 90 days (the removal period) following the latest of these three dates: (1) "the date the order of removal becomes administratively final;" (2) if removal is stayed pending judicial review of the removal order, "the date of the [reviewing] court's final order;" or (3) "the date the alien is released from [criminal] detention or confinement." 8 U.S.C. § 1231(a)(1)(A), (B). In this case, the removal period re-commenced on June 16, 2017, when Balde re-entered ICE custody after already having been subject to a October 25, 2011 removal order. Ex. 1 (Record of Deportable/Inadmissible Alien) at 2-3. Thus, Balde has been in post-final order

received for one and the money order and itinerary was submitted for the second with full expectation that a travel document will issue upon receipt of the money order and itinerary. Upon information and belief, had Balde provided accurate information at the time of his interview, ICE would already have a travel document for him.

status for approximately six years and has been most recently detained for approximately 2.5 months.

Balde claims that his continued detention is unlawful, citing Zadvydas v. Davis, 533 U.S. 678 (2001). Pet. (Doc. 1) at 4. In Zadvydas, the United States Supreme Court recognized six months as a “presumptively reasonable period” of post-final order detention. Zadvydas, 533 U.S. at 700-01. An alien detained beyond the six-month presumptive period has the opportunity to show that there is no reasonable likelihood that he will be deported in the “reasonably foreseeable future.” Id. at 701. If the alien meets this burden and makes such a showing, the burden then shifts to the government to show that there is a reasonable likelihood of deportation in the “reasonably foreseeable future.” Id.

B. Zadvydas does not Apply where Balde’s Removal Period is Tolled, or, in the Alternative, He has Failed to Demonstrate a Significant Likelihood of Removal in the Reasonably Foreseeable Future.

Balde 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. Balde alleges that despite his cooperation in obtaining a travel document, Sierra Leone has not yet produced one. However, Balde’s allegations of cooperation are contrary to the record. Notice of Failure to Comply (Ex. 3). Further, upon information and belief, ICE and Sierra Leone officials have been reviewing and discussing Balde’s citizenship in an effort to obtain a final decision on Balde’s travel

document status utilizing the full panoply of information contained in his file and a sworn statement more recent than his interview rather than the fraudulent information provided by Balde at his latest interview. Pierre v. Dep't of Homeland Sec., 2013 WL 4083777, at *5 (M.D. Pa. Aug. 13, 2013) (court held that the alien had offered no evidence to carry his burden that he would not be removed in the reasonably foreseeable future and denied the habeas petition).

The mere fact that Balde has been detained in excess of six months over the last six years - most recently for 2.5 months - is insufficient to meet his burden of demonstrating “no significant likelihood” of his removal within the “reasonably foreseeable future;” it is only sufficient to entitle him the opportunity to make that showing. See Akinwale v. Ashcroft, 287 F.3d 1050, 1051-1052 (11th Cir. 2002) (holding that “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” (quoting Zadvydas, 533 U.S. at 701)); see also Fahim v. Ashcroft, 227 F.Supp.2d 1359, 1365 (N.D. Georgia, 2002).

Balde’s order of removal was administratively final when the Second Circuit denied his Petition for Review. 8 U.S.C. § 1228(b). Therefore, his removal period began to run on that date, and was suspended with his October 25, 2012 release. See 8 U.S.C. § 1231(a)(1)(B)(ii). The 6-month mark was reached on or about April

25, 2012; however, Balde was then released from custody for almost five years. Although his current 2.5 month detention combined with his previous post final detention exceeds the 6-month presumptively reasonable period, Zadvydas does not mandate his release. Zadvydas does not yet govern Balde's removal period because the period is tolled under 8 U.S.C. § 1231. Where the removal period is tolled, even if his detention exceeds 180 days, he remains properly detained under 8 U.S.C. § 1231(a)(2). That is, Balde's actions in providing false information to Sierra Leone officials in an attempt to thwart the issuance of a travel document resulted in ICE placing Balde in Failure to Comply status. See Zadvydas, 533 U.S. at 689 (an alien's post-removal period detention is limited to the period "reasonably necessary to bring about that alien's removal from the United States."). As Balde's has blocked his own removal by lying to the Sierra Leone officials, the "Zadvydas clock" is not running. Despite his lack of cooperation, ICE has not ceased its efforts to seek Balde's removal. The stay period should not be factored into the time that ICE has to accomplish said removal when Balde finally becomes removable. All evidence in Balde's file points to his Sierra Leone citizenship – including a Sierra Leone passport. Passport (Ex. 4). Further, ICE has informed this office that one travel document has already been issued in the last 60 days and another is expected at any moment.

Even assuming, *arguendo*, that Zadvvydas does govern Balde's detention, he has failed to meet his burden to show that "there is no significant likelihood of removal in the reasonably foreseeable future." Id. at 701. Balde has not identified any particular barriers to his repatriation or any other reasons why his removal is unlikely now that Sierra Leone has re-opened his case in an effort to review all information provided by Balde throughout his entire immigration history to confirm his status as a citizen of Sierra Leone. Specifically his I-589; a statement he submitted in conjunction with his application for asylum; an I-130; a statement from his wife; the brief that was submitted to the U.S. Court of Appeals for the 2nd Circuit in support of his PFR; a G-325 that states he was born in Sierra Leone and lived in Kabala from 1973 to 1999, the G-325 further provides his parent's names and states they were born in Kabala, Sierra Leone.

In addition, information in the file indicates that the Forensic Document Lab examined the expired Sierra Leone passport issued in Balde's name that the subject claimed was obtained fraudulently when he was interviewed by the Embassy. Tan examination of the document indicates that the passport conforms to comparable genuine specimens and that no physical evidence of photograph substitution, page substitution or date entry alterations were observed. Beyond conclusory statements whereby he believes Sierra Leone will not issue a travel document because it would not issue in 2012 due to an Ebola outbreak (that has subsided), he has

completely failed to provide any evidence supporting his claim there is no significant likelihood of removal within the reasonably foreseeable future.

Moreover, Balde has failed to follow the procedures required by the regulations at 8 C.F.R. § 241.13(d) by providing erroneous information during his interview and, but for the erroneous information provided by Balde (that has been controverted), there is a significant likelihood that his travel documents would have been issued.

The only bar to Balde's removal is his own behavior. Balde has thus failed to meet his Supreme Court-mandated burden to make a *prima facie* showing that his removal is not significantly likely in the reasonably foreseeable future. Balde is thus ineligible for a writ of habeas corpus because his continued detention is neither unreasonable nor indefinite in nature. In the instant case, Balde has not demonstrated that there is no significant likelihood of removal within the reasonably foreseeable future. Furthermore, there is no evidence indicating that his removal to Sierra Leone is unlikely. Therefore, the petition should be denied.

V. Conclusion

For the reasons stated above, the Court should deny the petition for writ of habeas corpus.

Respectfully submitted,

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Date: August 29, 2017

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CERTIFICATE OF SERVICE VIA ELECTRONIC CASE FILING (ECF)

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers. That on August 29, 2017, she caused to be served a copy of the attached

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via the Court's Electronic Case Filing System ("ECF") and that the Addressee(s) listed below are filing users under the ECF system. Upon the electronic filing of a pleading or other document, the ECF system will automatically generate and send a Notice of Electronic Filing to all filing users associated with this case. Electronic service by the Court of the Notice of Electronic Filing constitutes service of the filed document, and no additional service upon the filing user is required.

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