

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

MAMADU BALDE,

Petitioner,

vs.

CLAIR DOLL, Warden, York County Prison;
JENNIFER RITCHEY, Director of the Philadelphia
Field Office of U.S. Immigration & Customs
Enforcement; THOMAS D. HOMAN, Director
(Acting), United States Immigration & Customs
Enforcement; and ELAINE C. DUKE, Secretary
(Acting), United States Department of Homeland
Security;

Respondents.

No: _____

A No. 77-563-400

**PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO
28 U.S.C. § 2241 AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

INTRODUCTION

1. Petitioner, Mamadu Balde, is a Sierra Leonean national who has been under final order of removal since late 2011. Respondents have been unable to deport Mr. Balde during the nearly six years since then because his native Sierra Leone has been unable to verify his nationality or citizenship and thus

refuses to issue travel documents. The failure to effect Mr. Balde's removal is not due to lack of effort. Respondents detained Mr. Balde for over nine months (343 days) in 2012, and he has been on supervised release since then, for more than four-and-one-half years. Repeated efforts to secure travel documents from Sierra Leone during the intervening 2000-plus days have failed.

2. Despite the fact that Mr. Balde has been fully compliant with his orders of supervision, has committed no criminal infractions, has been married to a U.S. citizen for seven years, has maintained a strong employment record, and, most importantly, there is still no reasonable prospect for Mr. Balde's removal, on June 14, 2017, Respondents revoked his order of release and arrested him. Besides claiming now, inexplicably, that there is a "significant likelihood that [he] may be removed in the reasonably foreseeable future," the document also cites as justification, "changed circumstances *in policy*." (Emphasis added). Shortly after detaining Mr. Balde, on June 23, the Sierra Leonean consulate rejected the U.S. government's latest entreaty, once again refusing to issue travel documents. Despite there being literally no prospect for Mr. Balde's imminent removal, Respondents continue to detain him at the York County Prison.

3. The U.S. government's wholly unsupported and legally unsupportable decision to re-detain Mr. Balde, disrupting family and employment obligations, constitutes an egregious violation of Mr. Balde's rights under 8 U.S.C. § 1231(a)(6) and the Fifth Amendment's Due Process Clause. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); and *Clark v. Martinez*, 543 U.S. 371 (2005). Mr. Balde respectfully requests that this Court grant his petition and order him released forthwith.

CUSTODY

4. Petitioner is currently in the physical custody of Respondents and their agents. They are detaining him at the York County Prison, 3400 Concord Road, York, Pennsylvania, 17402.

JURISDICTION

5. This action arises under the United States Constitution and the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* ("INA"). This Court has jurisdiction over this petition for writ of habeas corpus under 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); art. I, § 9, cl. 2 of the U.S. Constitution ("Suspension Clause"). This Court may grant relief pursuant to 28 U.S.C. §§ 2201-02, 28 U.S.C. § 2241, and the All Writs Act, 28 U.S.C. § 1651.

VENUE

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e), because Petitioner is being at the York County Prison in York, Pennsylvania, which lies in this judicial district.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

7. Petitioner's application for asylum and application for withholding of removal were denied and he was ordered removed by an immigration judge on March 31, 2003. Appeals were ultimately resolved against Petitioner when the U.S. Court of Appeals for the Second Circuit dismissed his final petition for review on October 25, 2011. The government took Petitioner into custody on January 4, 2012, and held him in detention at York County Prison until the government concluded that he should be released, pending his removal from the U.S., on October 15, 2012. Petitioner was under, and fully compliant with, all ICE orders of supervision from the time of his release in October 2012 until he was again detained by ICE on June 14, 2017. He remains detained in York County Prison.
8. Petitioner does not contest the validity of the order of removal against him, only his continued detention by Respondents, who refuse to release

Petitioner even though there is no reasonable prospect for his removal in the foreseeable future.

9. Administrative exhaustion is not required by statute in the context of post-final-order detention. *See Matthias v. Hogan*, 2008 WL 913522, at *5 (M.D. Pa. 2008) (“Under the immigration laws, exhaustion of administrative remedies is statutorily required only on appeals of final orders of removal.”), *citing Cox v. Monica*, 2007 WL 1804335, at *3 (M.D. Pa. 2007).
10. Even if the court were to conclude that exhaustion was required, it should be excused because it would be “futile where the administrative body has predetermined the issue before it.” *Id.*, *citing McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).
11. Thus, the only remedy for Petitioner’s continued potentially indefinite detention is by way of this habeas challenge. *See Zadvydas*, 533 U.S. at 688.

PARTIES

12. Petitioner, Mamadu Balde, is a native and citizen of Sierra Leone. He has lived in the United States since his entry on or about June 6, 1999. He has lived in Charleston, West Virginia, since his release from I.C.E. custody in late 2012. He is currently in the physical and legal custody of Respondents at York County Prison, 3400 Concord Road, York, Pennsylvania, 17402.

13. Respondent Clair Doll is sued in his official capacity as Warden of the York County Prison, located at 3400 Concord Rd, York, PA 17402, where Petitioner is detained. As Warden of the York County Prison, Respondent Doll also is Petitioner's immediate custodian.
14. Respondent Jennifer Ritchey is sued in her official capacity as Field Office Director for Detention and Removal, U.S. Immigration and Customs Enforcement, in the Philadelphia office. As Field Office Director, Ms. Ritchey is responsible for I.C.E. operations in West Virginia and Pennsylvania. As Field Office Director for Detention and Removal, she is Petitioner's legal custodian.
15. Respondent Thomas D. Hogan is Director (Acting) of the United States Immigration and Customs Enforcement Agency and is Mr. Balde's legal custodian. He is sued in his official capacity.
16. Respondent Elaine C. Duke is sued in her official capacity as Secretary (Acting) of the U.S. Department of Homeland Security. In that capacity, she also has responsibility for the administration and enforcement of the immigration laws pursuant to 8 U.S.C. § 1103 and is Petitioner's legal custodian.

STATEMENT OF FACTS

Background

17. Mr. Balde is a native and citizen of Sierra Leone. He was born on January 2, 1973, in Kabala, Sierra Leone. He is a member of a minority group in Sierra Leone, the Fulani tribe.
18. Mr. Balde lived, attended school and worked in Sierra Leone until he came to the United States in 1999.
19. Sierra Leone experienced civil war between 1991 and 2002. An armed rebel group, the Revolutionary United Front (“RUF”), attacked Mr. Balde’s hometown, separating people by ethnic group. RUF burned Mr. Balde’s house, destroying the contents, including all of his documents and records. RUF also separated Mr. Balde from his parents and a sister, whom he has never seen again.
20. Mr. Balde entered the United States at New York City on or about June 6, 1999.

Immigration – Procedural History

21. On September 10, 1999, Mr. Balde filed affirmative applications for asylum pursuant to Section 208 of the Immigration and Nationality Act

(“INA” or the “Act”), 8 U.S.C. §1158(a)(1), withholding of removal pursuant to INA Section 241(b), 8 U.S.C. §1231(b)(3) and withholding of removal under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

22. U.S. immigration officials recommended denial of Petitioner’s Form I-589, Application for Asylum and Withholding of Removal, on or about February 4, 2000.
23. The government issued a Notice to Appear (“NTA”) on September 28, 2000, alleging Mr. Balde was subject to removal from the United States under INA Sections 237(a)(1)(A) and 212(a)(7)(A)(i)(I). The NTA alleged that Mr. Balde had in fact entered the U.S. before 1999 and, therefore, his petition for asylum should be denied as untimely.
24. On March 31, 2003, an immigration judge (“IJ”) ordered that Mr. Balde’s application for withholding of removal be pretermitted and that he be removed to Sierra Leone based on the charges in the NTA. *See* Exhibit 1.
25. Mr. Balde’s appeals of that decision consumed more than 7 years. He appealed the IJ’s decision on April 16, 2003. The Board of Immigration Appeals (“BIA”) remanded Petitioner’s appeal on June 17, 2004. On November 18, 2008, the IJ affirmed the orders to pretermitt the Mr. Balde’s

asylum application for withholding of removal and ordered that he be removed to Sierra Leone on the charge contained in the Notice to Appear, and the BIA dismissed Petitioner's appeal on October 29, 2010. *In re Mamadu A. Balde*, No. A077 563 400 (B.I.A. Oct. 29, 2010), *aff'g* No. A077 563 400 (Immig. Ct. N.Y. City Nov. 18, 2008). On October 25, 2011, the U.S. Second Circuit Court of Appeals dismissed in part and denied in part Mr. Balde's Petition for Review. *Balde v. Holder*, 436 Fed. Appx. 44 (2d Cir. 2011). *See* Exhibit 2. Petitioner did not appeal that decision, making the removal order final.

Criminal Background

26. Though not strictly relevant to Mr. Balde's *Zadvydas* claim, his criminal background is provided as context. Mr. Balde has been convicted of two minor criminal charges, and none since 2010. On November 30, 2006, he was convicted in the Criminal Court of New York of Facilitating Aggravated Unlicensed Operation of Motor Vehicle, for which he was ordered to pay fees and fines. On March 18, 2010, he was convicted in the Newton Falls, Ohio, municipal court of Misuse of a Credit Card, and sentenced to 90 days imprisonment with all but 30 suspended. Neither charge qualifies as an aggravated offense under 8 U.S.C. § 1101. Since 2010, Petitioner has not been arrested or criminally charged.

Family Ties and Employment

27. Since his departure from Sierra Leone in 1999, Mr. Balde has had no ties with Sierra Leone. To his knowledge, he no longer has any family in Sierra Leone. His family resides in the United States, and he has not returned to Sierra Leone since he fled the country. The Petitioner has strong family ties in this country. Petitioner married a U.S. citizen, Ryan Suzanne Brown, in October 2010. The couple bought a house in Charleston, West Virginia, where they still live.
28. Mr. Balde also helps to support his thirteen-year-old niece and fifteen-year-old nephew, who reside in New York City and are both U.S. citizens. They were orphaned when their mother, Mr. Balde's sister, died. Mr. Balde was sending them approximately \$400 every month, but without a source of income has been unable to do so since his detention. Mr. Balde also has power of attorney for his 24-year-old niece, who is also a U.S. citizen. She is severely ill and is frequently hospitalized.
29. Mr. Balde is the beneficiary of an approved Form I-130, Petition for Alien Relative filed by his U.S. citizen wife. *See Exhibit 3.*

30. Petitioner has been employed steadily since his release from detention in October 2010. For the past two years he has been working as an Uber driver. Petitioner has paid all income taxes due, having used an accountant to prepare his and his wife's returns.

Post-Removal-Order Detention History

31. On January 4, 2012, three months after the Second Circuit Court of Appeal's decision finalizing Mr. Balde's order of removal, the government took him into custody, detaining him at York County Prison. Efforts at the time to deport him were unsuccessful because the Sierra Leonean government was unable to verify his status as a Sierra Leonean national or citizen. Sierra Leonean authorities denied Mr. Balde's request for travel documents due to their inability to verify his nationality or citizenship. *See* Exhibit 4.
32. Apparently recognizing lack of authority to continue to detain for more than six months an individual who could not be deported, *see Zadvydas v. Davis*, 533 U.S. 678 (2001), the government released Mr. Balde on October 15, 2012, pending his removal from the U.S. *See* Exhibit 5. The government was unable to effect Mr. Balde's removal during his 285 days of detention.
33. Mr. Balde has since his release from detention in late 2012 been under recurring orders of supervision issued by ICE. *See* Exhibit 6 (Oct. 15, 2012,

and March 2, 2016, Orders of Supervision). Mr. Balde has been fully compliant with all orders and directives, checking in regularly with local ICE agents at approximately six-month intervals, or on whatever term they ordered.

34. In 2013 and 2015, Mr. Balde complied with his ICE agent's directive and applied to the Sierra Leonean embassy in Washington, D.C., for travel documents. Yet again, however, Sierra Leone refused to issue travel documents.
35. In April 2017, Mr. Balde complied with his check-in requirement at the Charleston, West Virginia, ICE field office. He was directed to return in June, when a new agent would assume supervisory responsibility.
36. On June 7, 2017, Mr. Balde reported as directed to the Charleston ICE office. A new agent questioned Mr. Balde aggressively about why he was still in this country, advised him to secure travel documents immediately, and told petitioner that if he did not leave the country by August the agent would have him locked up.
37. Mr. Balde contacted his immigration lawyer to begin the process yet again to try to secure travel documents from Sierra Leone.
38. On June 13, the ICE agent directed petitioner to report again the next day for fingerprinting. On June 14, Mr. Balde complied with the agent's request

by reporting, voluntarily, for the third time in two months. The agent advised Mr. Balde that his supervisors had instructed him to revoke Mr. Balde's supervision order and take him into custody, which he did. Mr. Balde was given no reason for his arrest and detention. A Notice of Revocation of Release provided to counsel on August 9, dated June 15, states that "ICE has determined that there is a significant likelihood of removal in the reasonably foreseeable future" *See* Exhibit 7. The document also states that the decision is "due to changed circumstances *in policy.*" *Id.* (Emphasis added). The document does not indicate how ICE policy changes impact Sierra Leone's refusal to accept Mr. Balde.

39. On or about June 19, 2017, Respondents transferred Mr. Balde to York County Prison in York, Pennsylvania, where he remains confined.
40. On June 23, 2017, Respondents arranged for Mr. Balde to interview with the Sierra Leonean consulate. Once again, Sierra Leone refused to recognize Petitioner as a Sierra Leonean citizen and declined to issue travel documents. Whatever policy ICE referred to in the June 15 notice obviously failed to effectuate Mr. Balde's removal.
41. Despite clear evidence that there is no reasonable expectation of Mr. Balde's removal to Sierra Leone in the foreseeable future, and Mr. Balde's

compliance with all terms of supervision for nearly five years, Respondents continue to detain him.

42. Respondents and their agents have on several occasions, over the past few weeks, coerced Mr. Balde into signing unknown documents. Respondents' agents have told Petitioner that his refusal to sign documents will be viewed as "uncooperative," which will preclude his release. On another occasion, Mr. Balde was told that failure to sign the document would subject him to a four-year prison term. Mr. Balde did not understand the meaning or nature of any documents he has signed, and he was not allowed to consult counsel, who have been unable to review any of the documents.

43. Since January 4, 2012, Mr. Balde has been in government detention for a total of more than eleven months (343 days), and when combined with the government's orders of supervision has been under the government's control and supervision for more than five-and-a-half years, or 2045 days, during which time the U.S. government has been unable to effect his removal.

44. In light of repeated refusals by the Sierra Leonean government – most recently on June 23, 2017 – it is clear that DHS cannot effectuate Petitioner's removal in the reasonably foreseeable future. Even if there were a remote possibility of effectuating removal, Mr. Balde's history of

cooperation while under ICE supervision over the past five years, and strong family and community ties, militates strongly for his release.

CLAIMS

Count 1: Respondents' Detention of Mr. Balde Violates 8 U.S.C. § 1231(a)(6).

45. The allegations contained in the previous paragraphs are repeated and alleged as though fully set forth herein.
46. Immigration detention is not punishment -- or at least it is not supposed to be. The government is authorized to secure custody of an alien after a final order of removal has been entered for 90 days, often referred to as the "removal period." 8 U.S.C. § 1231(a)(1)-(2). If the government is unable to remove the alien during those 90 days, the government may extend the detention beyond that period if the noncitizen is deemed a "risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6).
47. But post-final-order detention is not statutorily authorized if the noncitizen's removal is not reasonably foreseeable. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). Although the length of such post-removal-period detention is statutorily undefined, courts have established that indefinite post-removal-period detention of aliens would raise very serious constitutional concerns. *Id.* at 682.

48. Detention pursuant to 8 U.S.C. § 1231(a)(6) is authorized only if there is a “significant likelihood of removal in the reasonably foreseeable future.”

Zadvydas, 533 U.S. at 701. In *Zadvydas*, the Supreme Court held that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by [§ 1231(a)(6)].” *Id.* at 699. The Court established a presumptively reasonable detention period of six months. *Id.* at 701.

Normally, after six months, if “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.” *Id.* The Supreme Court emphasized that the lawfulness of post-order detention hinges on whether removal is reasonably foreseeable: “Thus, if removal is not reasonably foreseeable, the [habeas] court should hold continued detention unreasonable and no longer authorized by statute.” *Id.* at 699-700 (ellipses added).

49. Upon release, the noncitizens are subject to supervision as provided in 8 U.S.C. § 1231(a)(3).

50. DHS has no authority to detain Mr. Balde under 8 U.S.C. § 1231(a)(6). The allegations in this Petition demonstrate that there is no significant likelihood that Mr. Balde will be removed in the reasonably foreseeable future. *See Zadvydas*, 533 U.S. at 701; *Clark v. Martinez*, 543 U.S. 371, 383 (2005)

(“*Zadvydas*’s holding that detention cannot be continued once removal is no longer reasonably foreseeable . . . applies in all cases.”).

51. DHS has already detained Mr. Balde past the authorized six-month period, and his removal is even less foreseeable now than it was five years ago. His initial post-removal detention in 2012 lasted over nine months, during which time DHS could not effect his removal. In the intervening four-and-one-half years, Mr. Balde complied with all release conditions, including making two more attempts, in about 2013 and 2015, to secure travel documents from the Sierra Leonean embassy in Washington, D.C.

52. After DHS revoked Mr. Balde’s order of supervision on June 14, 2017, DHS facilitated yet another meeting on June 23 with Sierra Leonean officials. Once again, however, Sierra Leone declined to issue travel documents.

53. Therefore, because “removal is not reasonably foreseeable, th[is] court should hold continued detention unreasonable and no longer authorized by statute.” *Zadvydas*, 533 U.S. at 699-700.

Count 2: Mr. Balde’s Detention Violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

54. “[D]etention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . .

or, in certain special and ‘narrow’ nonpunitive ‘circumstances’ . . . where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’” *Zadvydas*, 533 U.S. at 690 (citations omitted).

55. In the immigration context, detention is only lawful when it bears a reasonable relation to its purpose: securing removal of those ordered removed from the United States. *See Zadvydas*, 533 U.S. at 690-92; *Demore v. Kim*, 538 U.S. 510, 527-28 (2003); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (“[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”). Where removal is not “practically attainable,” immigration detention does not “bear[] reasonable relation to the purpose for which the individual [was] committed.” *Zadvydas*, 533 U.S. at 690 (quoting *Jackson*, 406 U.S. at 738); *Demore*, 538 U.S. at 527.

56. At this point, it is clear that DHS is not detaining Mr. Balde for the purpose of removing him to Sierra Leone, which removal is clearly not “practically attainable.” *Zadvydas*, 533 U.S. at 690. Frankly, it is not clear why DHS is detaining Mr. Balde at this time, except perhaps for political-grandstanding reasons, but politics obviously do not and cannot trump the U.S. Constitution and federal immigration statutes. Without a reasonable

prospect of removal, Mr. Balde's detention is punitive and thus violates due process.

PRAYER FOR RELIEF

WHEREFORE, Petitioner pray that this Honorable Court grant the following relief:

1. Assume jurisdiction over this matter;
2. Grant Petitioner a writ of habeas corpus directing the Respondents to release Petitioner from custody forthwith;
3. Enjoin Respondents from re-detaining Mr. Balde without first establishing, in this Court, by a preponderance of the evidence, that his removal has become reasonably foreseeable;
4. Award attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and
5. Order any other further relief that this Honorable Court deems just and proper.

Respectfully Submitted,

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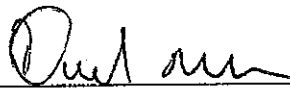
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Attorneys for Petitioner Mamadu Balde

Date: August 15, 2017

DECLARATION

I, Mamadu Balde, hereby declare on this 14th day of August, 2017, that the factual allegations in the foregoing Petition are, to the best of my knowledge and belief, true and accurate.

A handwritten signature in cursive script, appearing to read "Mamadu Balde", written over a horizontal line.

Mamadu Balde