UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

| | | |
|---|---|---|
| SAAD OSMAN,<br><br>*Petitioner,*<br><br>*v.*<br><br>DALE J. SCHMIDT, in his official capacity as Sheriff of Dodge County, Wisconsin<br><br>*Respondent.* | ) | Civil Action No.<br><br>DHS File No. A[redacted] |

**PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO HIS PETITION FOR A WRIT OF HABEAS CORPUS AND MOTION FOR A TEMPORARY RESTRAINING ORDER**

## I. INTRODUCTION

Respondent argues that this Court lacks subject-matter jurisdiction over his claims because 8 U.S.C. § 1252(g) precludes judicial review of cases "arising from the decision or action by [the Department of Homeland Security ("DHS")] to commence proceedings, adjudicate cases, or execute removal orders." Respondent misreads Supreme Court and lower court precedent on this point, which makes clear that section 1252(g) bars challenges to *discretionary* actions in these three areas. *Reno v. American-Arab Anti-Discrimination Committee* (AADC), 525 U.S. 471 (1999); *Fornalik v. Perryman*, 223 F.3d 523, 531 (2000). DHS does not have discretion to execute a removal order under circumstances where it is explicitly forbidden from doing so by another section of the Immigration and Nationality Act ("INA"). Nor is the Petitioner here, Saad Osman, challenging that removal order, or DHS's right to remove him at such time as he is not covered by the protections of Temporary Protected Status ("TPS"). DHS is seeking to remove him, as it is detaining him, in violation of 8 U.S.C. § 1254a, and that is a violation of law that this Court has jurisdiction to remedy.

Respondent further claims that Mr. Osman is not entitled to temporary treatment benefits under the TPS statute because an official with U.S. Citizenship and Immigration Services ("USCIS"), in a declaration filed after this habeas petition, avers without explanation that he is not *prima facie* eligible for TPS. Declaration of Julia L. Harrison (Dkt. 8). This declaration should not be considered substantively, not only because it is entirely conclusory, but also because the process USCIS followed here is at odds with what agency representatives, in other currently pending litigation on its failure to make prima facie determinations of TPS eligibility, have stated under oath to be USCIS policy. What USCIS has done here, in addition to being an arbitrary and capricious departure from its own stated policies, also avoids issuing Mr. Osman a

written decision on his TPS application that would need to explain the reasons for any denial, and denies him his appellate rights under the TPS regulations. All of this is in violation of law. If the Court is to consider Ms. Harrison's declaration, Mr. Osman must have the opportunity to test the declarant under oath.

## II. THIS COURT HAS SUBJECT-MATTER JURISDICTION OVER MR. OSMAN'S PETITION

Respondent incorrectly frames Mr. Osman's habeas petition as seeking judicial review of the order of removal against him and argues that this Court's review is therefore barred under 8 U.S.C. § 1252(a)(5), which requires that appeal of a final order of removal take the form of a petition for review to the court of appeals. But Mr. Osman is not seeking judicial review of the order of removal entered against him by the Immigration Judge; rather, his challenge is to Respondent's authority to enforce that order in flat contravention of the TPS statute, 8 U.S.C. § 1254a, which prohibits Respondent from removing him *while he is covered by TPS.* Under these circumstances, Respondent's decision to execute the removal order against Mr. Osman is not within Respondent's discretion. And as the binding precedents of both the U.S. Supreme Court and the Seventh Circuit make clear, the limitation on district court review laid out at 8 U.S.C. § 1252(g) applies to discretionary actions of DHS with respect to the execution of removal orders, not to a situation such as this one where DHS seeks to execute a removal order under circumstances where it is explicitly prohibited from doing so by the TPS statute.

### *A. 8 U.S.C. § 1252(a)(5) Does Not Preclude This Court's Review of Mr. Osman's Claims Because Mr. Osman is Not Seeking Review of his Removal Order*

There is no dispute between the parties that the immigration court ordered Mr. Osman removed on January 22, 2024, and that as neither side appealed, the order of removal has been final since that date. (Resp't Answer, Dkt. 7 at 4; Final Removal Order, Dkt. 2-3 at 2). The statute is clear that the path to judicial review *of the removal order* would have involved, first, an

administrative appeal to the Board of Immigration Appeals, followed by a petition for review to the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. 8 U.S.C. § 1252(b)(2); 1252(d)(1). But that is not what Mr. Osman seeks here: he is not disputing the legal validity of the immigration court's decision in his case, which is what a petition for review to the court of appeals would aim to test. The court of appeals' review on a petition for review is also limited to the administrative record of the removal proceeding, whereas Mr. Osman's present claims to this Court stem from events and actions that intervened months after his order of removal became final. 8 U.S.C. § 1252(b)(4)(A)(court of appeals shall decide petition for review only on the administrative record on which order of removal is based).

For the same reason, Respondent's suggestion that Mr. Osman has failed to exhaust administrative remedies available to him and that he should have sought to reopen his removal proceedings is out of place. (Resp't Answer, Dkt. 7 at 14 n. 11). His claims in this habeas petition involve violations of law that intervened quite separately from, and months after the conclusion of, his removal proceedings, and that are unrelated to the immigration court's decision to deny him refugee protection or to its authority to order him removed at the time that it did. His present claims are reviewable in this Court, as further described below.

### B. *8 U.S.C. § 1252(g) Does Not Bar This Court's Review*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (IIRIRA), incorporated into the INA the limitation on judicial review codified at 8 U.S.C. § 1252(g):

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence

> proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

As the Supreme Court has declared, "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, 525 U.S. 471, 485 n. 9 (1999). This statutory provision, the Supreme Court noted, "seems clearly designed to give some measure of protection to . . . *discretionary* determinations." *Id.* at 485 (emphasis in original). More broadly, the Court stated, "*[M]any* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *Id.* at 486. The Court characterized section 1252(g) as "narrow," criticizing the parties' "unexamined assumption that § 1252(g) covers the universe of deportation claims--that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review,'" and concluding that "what § 1252(g) says is much narrower". *Id.* at 482; *see also AADC* at 487 ("our narrow reading of 1252(g)."

As the Seventh Circuit has held, in *AADC*, the Supreme Court "held that § 1252(g) restricts the district courts' power only in the three circumstances discussed in the text: when the alien challenges discretionary actions taken by the Attorney General to (1) commence proceedings, adjudicate cases, and (3) execute removal orders." *Fornalik v. Perryman*, 223 F.3d 523, 521 (7th Cir. 2000). The habeas petitioner in *Fornalik* was a young man who had suffered abuse at the hands of his father and had filed a petition under the Violence Against Women Act ("VAWA") to allow him to adjust status as an abused child of a lawful permanent resident. The Vermont Service Center of the Immigration and Naturalization Service ("INS") had granted Fornalik deferred action, declining to pursue removal against him while he pursued adjustment of status; the INS district director in Chicago, however, sought to remove him anyway. The

Seventh Circuit declared itself "baffled by this position—the last we checked, the INS is one unified agency of the federal government, not a mare's nest of autonomous actors." In addition, the court noted, "there is no indication in the regulations that a district office carries greater authority than a service center." 223 F.3d at 529-30. As the Seventh Circuit noted, Fornalik's claim was "not that the Attorney General is unfairly executing a removal order, but rather that a prior, unrelated error makes his removal improper." *Id.* at 532.

In the Seventh Circuit case Respondent cites in support of the contention that § 1252(g) bars this Court's review in Mr. Osman's case, the petitioner had also filed a self-petition under VAWA, which had yet to be approved when DHS sought to execute a prior removal order against her, prompting her to file a habeas petition. *E.F.L. v. Prim*, 986 F.3d 959 (7th Cir. 2021). The filing of a VAWA petition did not offer her legal protection against removal, however, and unlike Fornalik, she had not been granted deferred action. The Seventh Circuit held that it lacked jurisdiction under § 1252(g) to enjoin DHS from removing her while her VAWA petition was pending—the relief she had requested in habeas--both because during the pendency of the habeas proceedings that petition had in fact been approved, mooting habeas, and because DHS's decision to execute the removal against her was discretionary. 986 F.3d at 963-64.[1] The Seventh Circuit contrasted this with the situation in *Fornalik*. *Id.* at 964. In *Fornalik*, unlike *E.F.L.*, the petitioner was actually challenging the *legality* of the then-INS's attempt to remove

[1] There exists a string of other cases, cited in Respondent's Answer and along the same lines as E.F.L., finding no jurisdiction where habeas petitioners have asked district courts to block the execution of removal orders against them in order to enable them to pursue other relief or review before the agency, where—in contrast to the TPS statute--nothing in the statutes governing those applications for relief or otherwise *prohibited* their removal during those processes. See, e.g., *Sharif ex rel. Sharif v. Ashcroft*, 280 F.3d 786 (7th Cir. 2002) (Pakistani sisters sought stay of removal to apply for newly available immigration status and to seek reopening of their removal proceedings); *Bhatt v. Reno*, 204 F.3d 744 (7th Cir. 1999) (asylum seeker filed habeas petition for stay of removal from district court while pursuing reopening and reconsideration of his removal proceedings before the BIA); *Rauda v. Jennings*, 55 F.4th 773 (2022) (petitioner asked district court to enjoin his removal until the BIA ruled on his motion to reopen).

him because it involved one office of the agency ignoring an agency decision. *Fornalik*, 223 F.3d 523, 533 (reversing judgment of district court and remanding "with instructions to the Chicago office of the INS to respect the deferral decision currently in effect, unless and until, through authorized procedures, the agency as a whole comes to a final decision on Boguslaw Fornalik's status").

Mr. Osman's situation is much closer to—and in fact stronger than—that of Fornalik. Mr. Osman does not dispute that he is presently under a final order of removal. Nor it is quite accurate to say, as Respondent does, that Mr. Osman "claims that his TPS application automatically invalidated the immigration court's order of removal." (Resp't Answer, Dkt. 7 at 4.) Mr. Osman's position, rather, is that the *order* of removal against him remains valid—a grant of TPS does not vacate a removal order--but that a separate provision of law prohibits the actual removal of TPS holders. 8 U.S.C. § 1254a(a)(1)(A) (the government "*shall not remove* the alien from the United States during the period in which such [TPS] status is in effect" (emphasis added).) Non-citizens with a final order of removal are statutorily eligible for TPS and may not be denied TPS if otherwise eligible on the basis of that removal order. 8 U.S.C. §1254a(a)(5) (TPS statute provides no authority to "deny temporary protected status to an alien based on the alien's immigration status"). In addition, the TPS statute provides for temporary treatment benefits for an applicant who can establish a prima facie case of eligibility for TPS, until a final determination on his application is made.[2]

[2] Respondent cites to a case from the District of Colorado, in which the district court found no jurisdiction to stay petitioner's removal pending adjudication of his application for TPS. *Sanchez v. Longshore*, No. 08-cv-01937, 2008 WL 4447062 (D. Colo. Sept. 29, 2008). While the filings in that case are not publicly accessible, it is not clear from the court's decision that the TPS statute's prohibitions on removal and detention and provision of temporary treatment benefits for those facially eligible were raised.

This Court's review of Mr. Osman's claim that DHS is detaining him in violation of 8 U.S.C. § 1254a(d)(4) and seeking to deport him in violation of 8 U.S.C. § 1254a(1)(A) is therefore not foreclosed by 8 U.S.C. § 1252(g). The government unsuccessfully made the contrary argument just recently in another habeas case, filed in the District of Alaska by another Somali who was unaccountably re-detained by ICE in Alaska on the same day—February 5, 2025—that ICE in Wisconsin re-detained Mr. Osman. See Fed. Resp'ts.' Return Mem. and Mot. to Dismiss, *Salad v. State of Alaska, et al.*, No. 3:25-cv-00029 (D. Alaska filed Feb. 7, 2025), Dkt. 12 at 8 (arguing judicial review foreclosed by 8 U.S.C. § 1252(g)); Order Adopting Report and Recommendations, Dkt. 39 (granting petition and ordering immediate release from custody).

## III. MR. OSMAN IS *PRIMA FACIE* ELIGIBLE FOR TPS

In answer to Mr. Osman's habeas petition and TRO motion, Respondent claims that Mr. Osman is not *prima facie* eligible for TPS. Resp't Answer, Dkt. 7 at 21. As support for this statement, Respondent provides a declaration from a USCIS official stating: "On March 3, 2025, [the relevant directorate of USCIS] reviewed Petitioner's Form I-821 for prima facie eligibility for TPS and determined that Petitioner is not prima facie eligible for TPS." Declaration of Julia L. Harrison, Dkt. 8 ¶ 4 (the "Harrison Declaration"). This declaration provides no factual or legal support or explanation whatsoever for its conclusion. Respondent's *counsel*, in briefing, offers various possible explanations, but these do not in fact go to *prima facie* eligibility. In addition, the process that produced USCIS's *prima facie* determination is contrary to what representatives of that agency, in other currently pending litigation on its failure to make prima facie determinations of TPS eligibility, have stated under oath to be USCIS policy. In addition, it is differently inconsistent with the process that appears to have been followed in *Salad v. State of Alaska, et al.*, No. 3:25-cv-00029 (D. Alaska filed Feb. 7, 2025). In light of these disturbing

irregularities, this Court should not accord substantive consideration to the Harrison Declaration; should the Court be inclined to do so, Mr. Osman must be allowed to examine the declarant under oath.

### A. *The Explanations Respondent's Counsel Offers in Briefing Do Not Go to Prima Facie Eligibility*

Counsel for the Respondent attempts to bolster the baldly conclusory Harrison Declaration with some possible explanations for its conclusion, pointing to a couple of alleged flaws in Mr. Osman's TPS application. The first is that the application "fails to identify a passport number, travel document number, or any other document establishing his personal identity," whereas the applicable regulation required "evidence of the applicant's identity and nationality." Resp't Answer, Dkt. 7 at 21. With respect, this is a bit much. As he indicated in his TPS application, Mr. Osman's Maltese travel document was lost in Mexico. But contrary to Respondent's assertion that "[n]owhere in his application did Petitioner provide such documentation or a substitute affidavit" (Dkt. 7 at 22), Mr. Osman had attached to his I-821 Application for Temporary Protected Status a copy of the subsidiary protection certificate issued to him by the Maltese government that included his picture and listed his nationality as Somali (Dkt. 2-4 at 20).

Moreover, and as USCIS well knows and as counsel for Mr. Osman had noted a cover letter to his TPS application, DHS had previously processed Mr. Osman for resettlement in the United States *as a Somali refugee*. (Dkt. 2-4 at 18). Indeed, following removal proceedings in which DHS charged Mr. Osman with being a native and citizen *of Somalia,* the Immigration Judge ordered him removed *to Somalia,* and the habeas proceedings and Mr. Osman's motion for a TRO stem from DHS's attempts to remove him to that country, allegedly after obtaining for him a travel document, although neither Mr. Osman nor his counsel have seen it. It is therefore

unclear on what possible basis Respondent could now be suggesting that there is any doubt as to Mr. Osman's identity or nationality. His presence in the United States prior to July 12, 2024—the relevant date from which he was required to show continuous residence in the United States under the most recent TPS designation for Somalia—and his continuous presence in this country since that time was stated in his TPS application and must likewise be undisputed, given that Mr. Osman has spent the entirety of that time in ICE custody or (between October 2024 and early February 2025) out of custody but subject to ICE monitoring.

At the time he and undersigned counsel were completing his TPS application, Mr. Osman was detained in Louisiana without access to his prior immigration records; having since received those through a request under the Freedom of Information Act, Mr. Osman has supplemented his pending TPS application with copies of his previous Maltese travel document (the predecessor to the one that he lost in Mexico). Copies of those documents are attached to this Reply (Maltese Travel Document of Saad Osman Sheikh, Dkt. 10-3, listing his nationality as Somali) and Maltese Subsidiary Protection Card of Saad Osman Sheikh (Dkt. 10-4).

Respondent's counsel's second point is that in completing the TPS application Mr. Osman had checked "yes" in response to a question about any past arrests or detentions without providing an explanation of the circumstances. Obviously Mr. Osman was then, and is now, detained by ICE for a civil violation of the immigration laws; the fact that he was in U.S. immigration detention—details of which are of course known to the agency detaining him—was noted in the cover letter to his original TPS filing. He had previously been detained, also for being an undocumented asylum seeker, first in Libya and then in Malta. He has now amended his Form I-821 Application for Temporary Protected Status to clarify this. (Dkt. 10-1, 2.) But given that Mr. Osman had correctly checked "no" to all the questions inquiring about any actual

criminal charges or convictions, it is unclear how a lack of information about a detention that had not resulted any criminal charge or conviction (in each case because it was civil), could make him inadmissible to the United States on any grounds not waived by the TPS statute.

### B. *The Process by Which USCIS Reached its Prima Facie Determination Here was Highly Irregular*

As it happens, a class action against USCIS is currently pending in the Western District of Washington, challenging USCIS' failure to provide employment authorization documentation to noncitizens applying for Temporary Protected Status (TPS) at the time their prima facie applications are filed. *Mansor v. USCIS*, No. 2:23-cv-00347 (W.D. Wash. filed Mar. 9, 2023). At the time that lawsuit was filed, and as another official with the USCIS Service Center Operations Directorate ("SCOPS") stated under oath in a declaration filed with the court in that case on April 24, 2023, USCIS determined *prima facie* eligibility using a "one touch" approach, which collapsed the *prima facie* eligibility determination and adjudication of the underlying merits of the TPS application as part of a single review. Declaration of Sharon Orise, *Mansor v. USCIS*, No. 2:23-cv-00347 (W.D. Wash. filed Mar. 9, 2023), Dkt. 37-1 ¶ 14. During the course of the litigation in *Mansor*, USCIS switched to a streamlined process for making prima facie determinations, known as "Prima Facie Eligibility Streamlined Case Processing (PFE SCP)," but on February 10, 2025, counsel for the government defendants in that case informed the court that it had reverted to its prior policy, described in the Declaration of Sharon Orise just cited. Notice of Administrative Action, *Mansor v. USCIS*, No. 2:23-cv-00347 (W.D. Wash. filed Mar. 9, 2023), Dkt. 97.

In contradiction to this stated policy, on March 3, 2025, after Mr. Osman filed this habeas petition, and after USCIS stated to the Western District of Washington that it was reverting to a policy of making *prima facie* determinations at the same time it adjudicated the merits of the

TPS application, USCIS apparently pulled Mr. Osman's TPS application, decided for unstated reasons that he had not established *prima facie* eligibility, yet did not issue a final decision on the TPS application or issue Mr. Osman a Request for Evidence to give him an opportunity to remedy any deficiencies. In so doing, USCIS avoided issuing a written decision on the TPS application, a decision that would have had to explain the reasons for denial, and thus denied Mr. Osman administrative appellate rights. *See* 8 C.F.R. § 244.10(c) (providing that TPS denial must be in writing and outlining appellate rights); 8 C.F.R. § 244.5(c) (providing that there shall be no appeal from the denial of temporary treatment benefits).

Moreover, a comparison of the docket in Mr. Osman's case with that in the parallel and recently concluded habeas proceedings of his compatriot Roble Salad in Alaska shows that in Salad's case, there is no indication that USCIS issued any prima facie determination at all. Rather, an ICE official filed a declaration stating that "Petitioner cannot be removed until USCIS adjudicates his TPS application. To that end, ICE has requested USCIS expedite processing of Petitioner's TPS application. ICE will arrange for completion of the necessary biometrics for that application." Declaration of Bradley Hayes, Feb. 12, 2025, *Salad v. State of Alaska*, No. 3:25-cv-00029 (Dist. of Alaska 2025) (Dkt. 13 ¶ 20).[3]

In other words, the manner in which USCIS made a *prima facie* determination with respect to Mr. Osman's TPS application was highly irregular. Given that the Harrison Declaration offers no explanation or basis for the conclusion that Mr. Osman has not established prima facie eligibility for TPS, this Court should not give that Declaration substantive

[3] This is consistent with undersigned counsel's prior experience of DHS's approach to *prima facie* determinations for purposes of detention and removal, where—at least so far as was visible to counsel and apparent from copies of clients' immigration files later obtained through FOIA—ICE seemed to make those determinations, while USCIS slowly processed the TPS applications. It is also consistent with longstanding guidance from the Office of General Counsel of the then-INS that the agency "*must* release detained individuals who may be eligible for TPS and who wish to apply for such protection." Memo, Carpenter, Dep. GC, HQCOU 120/12.2-P (Feb. 7, 2002) (Dkt. 2-7 at 9).

consideration. If the Court wishes to consider the Declaration, Mr. Osman is entitled to question the Declarant under oath.

### C. *On the Face of His TPS Application, Mr. Osman is Eligible for TPS*

As laid out in his application for TPS, Mr. Osman:

(1) is a native and citizen of Somalia;

(2) has "been continuously physically present in the United States since the effective date of the most recent designation of Somalia for TPS" (i.e. September 18, 2024);

(3) has "continuously resided in the United States since such date as the [Secretary] may designate" (in this case July 12, 2024);

(4) is "admissible as an immigrant" except for the inadmissibility grounds waived under 8 U.S.C. § 1254a(c)(2)(A), and "not ineligible for temporary protected status" based on having been convicted of a felony or two or more misdemeanors committed in the United States, or as a persecutor of others;

(5) has registered for TPS in the manner and during the registration period prescribed.

8 U.S.C. § 1254a(c)(1); USCIS, Extension and Redesignation of Somalia for Temporary Protected Status, 89 Fed. Reg. 59135.

## IV. CONCLUSION

As he has applied for TPS and is *prima facie* eligible for that protection, ICE is prohibited from deporting Mr. Osman by statute, 8 U.S.C. § 1254a(a)(4)(B), and this Court has jurisdiction to consider. He therefore requests that this Court grant his petition for a writ of habeas corpus and order his release.

Dated: March 14, 2025

Respectfully submitted,

s/Anwen Hughes
Anwen Hughes
HUMAN RIGHTS FIRST
75 Broad St., 31st Fl.
New York, NY 10004
T : (212) 845-5244
F : (212) 898-1301
HughesA@humanrightsfirst.org