

District Judge Tiffany M. Cartwright

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

NEHRAL ALBERT RUIZ MALIWAT,

Plaintiffs,

v.

BRUCE SCOTT, Warden, Northwest
Immigration and Customs Enforcement
Processing Center;

DREW BOSTOCK, Seattle Field Office
Director, Enforcement and Removal
Operations, United States Immigration and
Customs Enforcement;

KRISTI NOEM, Secretary, United States
Department of Homeland Security;

PAMELA BONDI, Attorney General of
the United States;

Respondents.

Case No. 2:25-cv-788-TMC

**PETITIONER'S REPLY TO
RESPONDENT'S OPPOSITION TO
PETITIONER'S MOTION FOR
TEMPORARY RESTRAINING ORDER**

Noted for Consideration:
May 5, 2025

INTRODUCTION

1. In their opposition to Mr. Maliwat's plea for a temporary restraining order ("TRO") the Respondents first argue that Mr. Maliwat is not entitled to immediate release because he is unlikely to succeed on the merits of his Due Process violation claims due to a failure to

established that his detention is indefinite as defined in *Zadvydas v. Davis*, 533 U.S. 678 (2001) and second they allege that he is not entitled to a bond hearing because his continued detention without bond has not become unreasonably prolonged and as a result does not violate his Fifth Amendment Due Process rights under the multi-factor test laid out in *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1116 (W.D. Wash. 2019). Finally, the respondents argue that Mr. Maliwat has not shown that he suffers irreparable harm because of his prolonged civil immigration detention.

2. Mr. Maliwat's initial pleadings already address many of the points raised by the Respondents and establish that Mr. Maliwat's detention has become unreasonable in violation of his constitutional Rights to Due Process, and he suffers irreparable harm as a result, therefore this reply is supplemental in nature.

SUPPLIMENTAL FACTUAL BACKGROUND AND ARGUMENT

I. Mr. Maliwat is likely to succeed on the merits of his claim that his detention has become unreasonably prolonged and his release not reasonably foreseeable in violation of his Fifth Amendment Due Process rights and he is entitled to immediate release or in the alternative a bond hearing.

3. First, while the Respondents argue that Mr. Maliwat cannot show that his immigration detention has become indefinite as defined in *Zadvydas v. Davis*, 533 U.S. 678 (2001) and as result he is not entitled to immediate release, the crux of the *Zavydas* holding is that "a statute permitting indefinite detention of an alien would raise a serious constitutional problem[...and] once removal is no longer *reasonably* foreseeable, continued detention is no longer authorized by statute." *Hong v. Mayorkas*, No. 2:20-cv-1784, 2021 WL 8016749, at *6 (W.D. Wash. June 8, 2021); *See Zavydas* at 690, 699 (emphasis added). The *Zavydas* court further reasoned that the habeas court must consider "whether the detention in question exceeds a period reasonably necessary to secure removal" *Id.*

4. Here, Mr. Maliwat's removal proceedings have already lasted for nearly 10 months and will continue for number of more years. The immigration court's finding that Mr. Maliwat's military conviction is for a Crime Involving Moral Turpitude ("CIMT") was and continues to be

1 disputed by him and he has preserved this issue for appeal. Mr. Maliwat also preserved for
 2 appeal his argument that his conviction is not an aggravated felony as alleged by the Department
 3 of Homeland Security (“DHS”). Given that the immigration court’s finding that his conviction
 4 constitutes a CIMT is the very thing that makes him removable in the first place, Mr. Maliwat
 5 intends to litigate this finding to the Board of Immigration Appeals (“BIA”) and if necessary to
 6 the Ninth Circuit and even the United States Supreme Court. This litigation will take years –
 7 making the length of Mr. Maliwat’s detention during the pendency of the immigration
 8 proceedings not reasonably foreseeable.

9 5. Notably, in its finding that Mr. Maliwat’s military conviction constitutes a CMIT, the
 10 immigration court deferred to BIA case¹ law over the Ninth Circuit precedent². As the Supreme
 11 Court held in 2024³, BIA does not get to have a deference any longer⁴. Therefore, in this case,
 12 the Ninth Circuit law had to be followed. Despite the Supreme Court ruling, the IJ held that the
 13 BIA case is to be followed here and found that Maliwat’s military conviction is a conviction for
 14 the immigration purposes. This argument was preserved for the future appeal by Mr. Maliwat in
 15 his brief to the IJ. However, that process will take years. It is well known that BIA appeals take
 16 years to process and recently a large portion of the BIA staff had been laid off by DOGE. Now,
 17 the BIA cases will take even longer, which means that Maliwat will be detained for years to
 18 come.

19 6. Mr. Maliwat will also be appealing the finding that his conviction is an aggravated
 20 felony to the BIA, then the Ninth Circuit Court and then the Supreme Court of the USA if
 21 needed. The DHS did admit that there is no precedent of the statute of his conviction being an
 22 aggravated felony; therefore, Mr. Maliwat has a strong argument on appeal that his conviction is
 23 not an aggravated felony. Moreover, the same argument that his conviction by the military court
 24 is not a conviction for the purposes of immigration law, applies to the aggravated felony finding.

¹ *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008).

² *Gubbes, v. Hoy*, 261 F.2d 952 (9th Cir. 1958).

³ *Loper Bright Enterprises b. Raimondo*, 144 S. Ct. 2244 (2024).

⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1 If the circuit court precedent is followed, Mr. Maliwat's conviction will not be found an
2 aggravated felony conviction for the immigration purposes and making him not removable;
3 therefore, he is to keep his lawful permanent residency.

4 7. Bottom line is, Maliwat has a strong chance of prevailing on appeal and getting released
5 as a lawful permanent resident after years spent in immigration custody. It is not unheard of for
6 ICE to keep a person detained for years under the mandatory detention statute only to then release
7 a person to reside in the U.S. with a lawful status. Counsel Djamilova did have such case at the
8 NWDC with the same IJ O'Dell.

9 8. Second, Respondent's argue that Mr. Maliwat is not entitled to a bond hearing because
10 his continued detention without bond has not become unreasonably prolonged and as a result
11 does not violate his Fifth Amendment Due Process rights under the multi-factor test laid out in
12 *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1116 (W.D. Wash. 2019). What Respondents argue
13 here, can be summed as "it is bad but not horrible." If this Court keeps in mind that Maliwat,
14 who is a lawful permanent resident of the United States, has already been detained for nearly 10
15 months and without judicial intervention will continue to be detained for years to come, not for a
16 crime under a sentence that he already served a decade ago, not as a result of a new offense
17 committed but rather under a "civil" immigration statute, it does shocks the consciousness and
18 becomes truly "horrible."

19 9. Weighing the Respondent's argument of each of the six *Banda* factors this Court should
20 find that the Respondent's argument fails, and Mr. Maliwat is entitled to a bond hearing:

21 **a) Length of Detention.**

22 10. This factor is addressed extensively in Mr. Maliwat's initial petitions for Habeas Corpus
23 and TRO and Mr. Maliwat reasserts and affirms the claims and argument contained therein with
24 regards to this factor.

b) Likelihood of Future Detention Without Judicial Intervention.

11. This factor is addressed Mr. Maliwat's initial petitions for Habeas Corpus and TRO and Mr. Maliwat reasserts and affirms the claims and argument contained therein with regards to this factor. Additionally, it should be noted that currently the BIA routinely rejects interlocutory appeals, so filing such appeal before the IJ makes a final decision on the case is futile⁵. Moreover, even if such appeal would be filed while the removal proceedings are ongoing, under the current Executive Office for Immigration Review ("EOIR") policy, the IJ will not issue a continuance for the appeal decision on the CIMT for a detained person. Therefore, the fact that the appeal of the CIMT has not yet been filed should not result in this factor favoring the Government.

12. Furthermore, the Respondent's incorrectly argue that the appeal of the CIMT may not be necessary if he is granted relief from removal. Under the current standing, the relief Mr. Maliwat is eligible for is withholding of removal or protection under the Convention Against Torture "CAT". Both of these forms of relief imply that Mr. Maliwat will have an order of removal against him that is being withheld by the government. As it is clear now from the Abrego Garcia case, people with this form of relief are vulnerable to deportation to either their home country or the third country by choosing of the US government.

13. At the same time, if Maliwat wins the appeal of the CIMT finding, he will preserve his green card and the lawful permanent status. In this situation to say that appeal may not be necessary is to show the lack of understanding of the immigration laws of the USA.

14. In their brief the Respondents do not mention the aggravated felony finding that the IJ made in Mr. Maliwat's removal proceedings. The likely reason for this is that there is no such order in the removal case record. The finding of Mr. Maliwat's conviction being an aggravated felony was made orally by the IJ and not reflected in the record of the case the DHS is in

⁵ BIA Practice Manual, Appeals of Immigration Judge Decisions Chapter 4, 4.14(c) The Board does not normally entertain interlocutory appeals and generally limits interlocutory appeals to instances involving either important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by Immigration Judges. See *Matter of K-*, 20 I&N Dec. 418 (BIA 1991). (<https://www.justice.gov/eoir/reference-materials/bia/chapter-4/14>)

possession of. Counsel Djamilova called the immigration court to inquire about the lack of order on this issue and was advised by the clerk that the finding was made orally by the IJ O'Dell. This is yet another showing of imperfect nature of the immigration procedures currently in place which makes navigation of these procedure so very difficult, especially for a detained person like Mr. Maliwat.

c) Conditions of Detention.

15. This factor is addressed extensively in Mr. Maliwat's initial petitions for Habeas Corpus and TRO and Mr. Maliwat reasserts and affirms the claims and argument contained therein with regards to this factor.

d) The Nature and Extent of Any Delays in Removal Caused by the Petitioner.

16. This factor is addressed in Mr. Maliwat's initial petitions for Habeas Corpus and TRO and Mr. Maliwat reasserts and affirms the claims and argument contained therein with regards to this factor. Specifically, Mr. Maliwat argues that he has raised and continues to pursue legitimate defenses and challenges to removal as he is entitled to.

17. Additionally, Counsel Djamilova entered onto Mr. Maliwat's removal case only a week ago. It took her about a week to try and figure out the procedural history of the case. Mr. Maliwat's current hearing on the merits of his withholding of removal and CAT case is set a month from now, on June 6, 2025. Both of these forms of relief require a showing of 50% or more of future persecution or torture in Mr. Maliwat's country of origin. It is a high burden of proof to carry and will require testimony of a country conditions expert. To find such an expert and have him prepare the case will require more time than one month. Moreover, IJ John Odell has extremely high denial rate for asylum: 29,3% and even lower for other forms of relief: 4.8%. Given these numbers, Maliwat and counsel Djamilova, do require more than one month time to be ready to prove that Maliwat will be more likely than not persecuted and tortured in his country of citizenship.

e) The Nature and Extent of Any Delays Caused by the Government.

18. The Government's delay in the initiation of the removal proceedings should be weighed by this Court in its consideration of whether Mr. Maliwat's detention is now unreasonably prolonged. Had the Government initiated these proceedings immediately after Mr. Maliwat's release from his criminal confinement Mr. Maliwat would not be facing the same level of irreparable harm because of this detention because now Mr. Maliwat is in a position where he his wife and young children, all who are United States citizens, rely on him for financial and emotional support and are deprived of such due to his detention.

f) Likelihood the Final Proceedings Will Culminate in a Final Order of Removal.

19. This factor is addressed in Mr. Maliwat's initial petitions for Habeas Corpus and TRO and Mr. Maliwat reasserts and affirms the claims and argument contained therein with regards to this factor. Additionally, in their argument, the Respondents fail to note that the order of removal becomes final after the BIA decides on the case, not when the IJ makes the decision. If we say, *arguendo*, that the IJ will decide on June 3, 2025, ordering the deportation of Mr. Maliwat from the USA, Mr. Maliwat will have the statutory right for appeal, and he fully intends to file such appeal to the BIA. Appealing a case to the BIA gives a mandatory stay from removal. As argued *supra*, the appeals take years to be decided by the BIA. After that, if the BIA denies his appeal, Mr. Maliwat intends to file the appeal to the Ninth Circuit Court of Appeals, which may also grant his stay of removal. As discussed *supra*, Mr. Maliwat has a strong case on appeal regarding his conviction not being a conviction under the Ninth Circuit law given the recent Supreme Court decision in *Loper Bright Enterprises b. Raimondo*, 144 S. Ct. 2244 (2024).

II. Mr. Maliwat has established that he suffers irreparable harm if his detention continues and his private interests under these circumstances outweigh the public interests of the Government.

20. Mr. Maliwat reasserts and affirms the argument and claims made in his initial TRO petition establishing that the irreparable harm he suffers as a result of his detention outweighs the public interest in his continued unreasonably prolonged detention without a bond hearing and

emphasizes that the nature of his wife's mental health condition which has required her to be

1 placed on medical leave. This development is significant and a matter of urgency which will
2 leave a lasting impact on Mr. Maliwat and his family and makes his family's need for his release
3 in order to prevent further irreparable harm that much more urgent and necessary.

4 **CONCLUSION**

5 21. The Petitioner reasserts and affirms the claims and argument in his original motion
6 and urges this court to grant the requested relief of a TRO.

7 DATED this 5th day of May 2025.

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