United States District Court
Western District of Texas
San Antonio Division

Esau Ernesto Chicas Ortega, Petitioner, v. Kristi Noem, in her official capacity as Secretary, U.S. Department of Homeland Security *et al*, Respondents.	No. 5:25-CV-00689-OLG

Supplemental Response in Opposition to Petitioner's Motion for Temporary Restraining Order and/or Preliminary Injunctive Relief

On July 2, 2025, Respondents filed their opposition to Petitioner's Motion for Temporary Restraining Order (TRO). ECF No. 8. The following day, this Court ordered Respondents to file a supplemental response to substantively address whether Petitioner is likely to succeed on the merits of his claim that he is entitled to some measure of due process prior to his removal to a third country. ECF No. 10 at 1. The Court ordered the response due on July 11, 2025. ECF No. 13. On July 11, 2025, the Court extended the TRO for 14 days to allow for the preliminary injunction hearing currently scheduled for July 24, 2025. ECF No. 20. To supplement their initial opposition, ECF No. 8, Respondents submit the following in response to the Court's order:

1. This Court lacks jurisdiction to review Petitioner's due process claims because they are inextricably intertwined with ICE's unreviewable authority to execute a final order of removal. *See, e.g., C.R.L. v. Dickerson, et al*, 4:25-CV-175-DL-AGH, 2025 WL 1800209 at *2-3 (M.D. Ga. June 30, 2025) (denying habeas petition for lack of jurisdiction where alien sought review of ICE's decision to execute his final removal order to a third country, noting that ICE agreed to provide him with notice and opportunity to contest the removal); *Diaz Turcios v. Oddo*, No. 3:25-CVC-

0083, 2025 WL 1904384 at *5 (W.D. Pa. July 10, 2025) (removal to a third country is closely "bound up with" the removal order such that the court lacks jurisdiction over the TRO motion seeking to enjoin the removal). As such, Petitioner is unlikely to succeed on the merits of his due process claims.

2. On June 23, 2025, the U.S. Supreme Court granted the Government's application to stay the nationwide preliminary injunction in *D.V.D. v. Dep't. of Homeland Sec.*, No. 25-10676, 2025 WL 1142968 (D. Mass. Apr. 18, 2025), which required ICE to comply with certain procedures before initiating removal to a third country.

3. On July 9, 2025, the ICE Director issued written guidance to all ICE employees that explicitly rescinded all prior guidance implementing the previously issued preliminary injunction. Ex. A ("July 9 Guidance"). The July 9 Guidance ordered ICE, effective immediately, to adhere to the Secretary of Homeland Security, Kristi Noem's, March 30, 2025, memorandum, *Guidance Regarding Third Country Removals*. Ex. B ("March Guidance").

4. The March Guidance provides that aliens may be removed to a "country [that] has provided diplomatic assurances that aliens removed from the United States will not be persecuted or tortured." *Id.* If the State Department finds the representations credible, the "alien may be removed without the need for any further procedures." *Id.*

5. The process provided in the March Guidance satisfies all Constitutional requirements. The Supreme Court has held that when an Executive determines a country will not torture a person on his removal, that is conclusive. *Munaf v. Geren*, 553 U.S. 674, 702–03 (2008); *see also Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (federal courts "may not question the Government's determination that a potential recipient country is not likely to torture a detainee"), *cert. denied*, 559 U.S. 1005 (2010). As now-Justice Kavanaugh explained in concurrence in *Kiyemba*, the

"*Munaf* decision applies here a fortiori: That case involved the transfer of *American Citizens*, whereas this case involves the transfer of alien detainees with no constitutional or statutory right to enter the United States." *Kiyemba*, 561 F.3d at 517–18 (Kavanaugh, J., concurring). These cases stand for the proposition that when the Executive decides an alien will not be tortured abroad, courts may not "second guess [that] assessment," unless Congress has specifically authorized judicial review of that decision. *Id.* at 517 (citations omitted); *Munaf*, 553 U.S. at 703 n.6.

6. This framework also requires rejection of any argument of entitlement to an individualized determination under the CAT regulations. The law provides for assurances that an alien would not be tortured if removed to a "specific country," but once the Attorney General and the Secretary of State deem those assurances "sufficiently reliable," that is the end of the inquiry. *See* 8 C.F.R. § 1208.18(c)(1)-(3); *see also Munaf*, 553 U.S. at 703 n.6.

7. If removal is to a third country not covered by adequate assurances, the March Guidance makes clear that DHS will first inform the alien of the intent to remove him to that country and then give him an opportunity to establish that he fears removal there. Ex. B (March Guidance). If the alien affirmatively states a fear, immigration officials from U.S. Citizenship and Immigration Services ("USCIS") will screen the alien, generally within 24 hours, to determine whether he "would more likely than not" be persecuted on a statutorily protected ground or tortured in the country of removal. *Id.* at 2. If USCIS determines that the alien has not met this standard, the alien will be removed. *Id.* If the alien does meet the standard, the alien will be referred to the immigration judge in the first instance, or if previously in proceedings before an immigration judge, USCIS will notify ICE to file a motion to reopen those proceedings, as appropriate, for the sole purpose of determining eligibility for protection under INA § 241(b)(3) and CAT, specifically

to the newly designated country of removal. *Id.* Alternatively, ICE may choose another country for removal, subject to the same processes. *Id.*

8. The March Guidance affords sufficient process to aliens subject to final orders of removal. It confirms that Petitioner will be notified of a third country removal and afforded an opportunity to assert a fear claim. Petitioner has not shown a likelihood that he will be erroneously deprived of his rights under the March Guidance, such that he is entitled to any additional or substitute procedural safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 355 (1976) (no due process concerns where there is low risk of an erroneous deprivation through the procedures used). As such, it is unlikely that Petitioner will succeed on the merits of his due process claims.

9. Given the fact the March Guidance affords Petitioner an opportunity to present a fear claim prior to removal to any third country, he is not likely to prevail on the merits of his due process claims, and the TRO should be immediately dissolved.

Conclusion

Petitioner is lawfully detained by statute, and his detention comports with the limited due process he is owed as an alien with a final order of removal. This Court should dissolve the TRO and deny the habeas petition for lack of jurisdiction.

Respectfully submitted,

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