United States District Court
Western District of Texas
El Paso Division

Peymon Haidari
Petitioner,

v.

Kristi Noem, Secretary of United States Department of Homeland Security et. al.,
Respondents.

No. 3:25-cv-00250-FB

Federal Respondents' Response to Habeas Petition

Petitioner, through counsel,[1] filed a habeas petition with this Court on or about July 7, 2025. ECF No. 1. The Court ordered service on Respondents and a response by July 21, 2025. ECF No. 2. Petitioner is a native and citizen of Iran with a final order of removal to Iran, following an early 2000s conviction for drug possession with intent to distribute. ECF No. 1 ¶ 64–66. ICE took Petitioner back into custody on July 1, 2025, to execute his final order of removal. *Id.* ¶ 69.

The petition consists of three counts: (1) Fifth Amendment Due Process violation, regarding third country removals; (2) Fifth Amendment Due Process violation, regarding the likelihood of removal; and (3) Equal Access to Justice Act (EAJA) relief. These claims are largely based on speculation that ICE (1) intends to remove Petitioner to a third country, rather than the country listed on his removal order; (2) cannot remove Petitioner to Iran in the reasonably foreseeable future; and (3) is responsible for reimbursing attorney fees, expenses and costs under EAJA. For the following reasons, Petitioner's claims should be denied.

[1] Counsel for both parties have conferred multiple times in good faith since this petition was filed, with the last conference as recently as yesterday afternoon. Due to competing obligations, including emergency deadlines and out-of-state travel with limited internet access, the parties have been unable to reach an agreement. The parties will continue to confer in good faith to explore mutually agreeable resolutions.

ICE denies that there is no significant likelihood of removal to Iran in the reasonably foreseeable future. ICE further denies that ICE is making efforts to remove Petitioner to a third country and avers that it will consider third country removal options only if Iran refuses to accept Petitioner for repatriation. Petitioner's post-order detention is mandatory for the first 90 days of the removal period. 8 U.S.C. § 1231(a). Even beyond the 90-day removal period, any constitutional challenge to continued detention is not ripe until the alien has been detained in post-order custody for at least six months. Finally, EAJA fees are not available to habeas petitioners in this circuit.

I. This Court Lacks Jurisdiction to Review Petitioner's Due Process Claim Regarding Third Country Removals.

Federal Respondents are actively seeking repatriation to Iran, Petitioner's country of origin. Even if ICE were to consider third country removal options for this alien, current ICE policy provides sufficient notice and an opportunity to be heard. As of July 9, ICE reestablished as the March 2025 guidance on third country removals as the effective policy, which includes a variety of due process protections prior to removal to any third country. *See* Exhibit A (ICE Policies re: Third Country Removals). Beyond that, the Court lacks jurisdiction to review this due process claim because it is inextricably intertwined with ICE's unreviewable authority to execute his 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).

A. Even if there were jurisdiction, current ICE policy provides sufficient notice of any third country removals.

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. 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. 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*. *Id.* 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.*

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.

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.

If removal to a third country is 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. A. 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.*

The March Guidance affords sufficient process to aliens subject to final orders of removal. It confirms that Petitioner will be notified of any third country removal and afforded an opportunity

to assert a fear claim. There is no indication that this process would deprive Petitioner of his due process rights. *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). Given the fact the March Guidance affords Petitioner notice and an opportunity to present a fear claim prior to removal to any third country, the claim should be denied.

II. Any Due Process Claim Under *Zadvydas* Is Premature.

Second, where the alien challenges the discretionary basis for detention authority, that decision is protected from judicial review. 8 U.S.C. § 1252(a)(2)(B). ICE's detention authority under 8 U.S.C. § 1231 is well-settled. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). That statute affords ICE a 90-day mandatory detention period within which to remove the alien from the United States following the entry of the final order. 8 U.S.C. § 1231(a)(2). The 90-day removal period begins on the latest of three dates: the date (1) the order becomes "administratively final," (2) a court issues a final order in a stay of removal, or (3) the alien is released from non-immigration custody. 8 U.S.C. § 1231(a)(1)(B). Not all removals can be accomplished in 90 days, and certain aliens may be detained beyond the 90-day removal period. *See Zadvydas*, 533 U.S. at 701. Under § 1231, the removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien fails to comply with removal efforts or presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is "no significant likelihood of removal in a reasonably foreseeable future." *Zadvydas*, at 533 U.S. at 680.

Petitioner is detained in ICE custody under 8 U.S.C. § 1231(a), because he has a final order of removal. *See* ECF No. 1. Although Petitioner's removal order became final in 1999, the 90-day

removal period may be extended where ICE determines the alien is unlikely to comply with the removal order. *See Johnson v. Guzman-Chavez*, 594 U.S. 523, 528–29, 544 (2021); *see also* 8 C.F.R. § 1231(a)(6); 8 C.F.R. § 241.4. Continued detention under this provision is the "post-removal-period." *Guzman-Chavez*, 594 U.S. at 529. The statute does not specify a time limit on this post-removal period, but the Supreme Court has read an implicit limitation into the statute and held that the alien may be detained only for a period reasonably necessary to remove the alien from the United States. *Id.*; 8 C.F.R. § 241.13. Six months is the presumptively reasonable timeframe in the post-removal context. *Zadvydas*, 533 U.S. at 701. Although the Court recognized this presumptive period, *Zadvydas* "creates no specific limits on detention . . . as 'an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'" *Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006) (quoting *Zadvydas*, 533 U.S. at 701).

To state a claim for relief under *Zadvydas*, Petitioner must show that: (1) he is in DHS custody; (2) he has a final order of removal; (3) he has been detained in *post*-removal-order detention for six months or longer; and (4) there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 700. Petitioner does not and cannot make this showing, as he has been detained less than six months in post-order custody. Any due process claim under *Zadvydas* is, therefore, premature. Moreover, Petitioner has not shown good cause to believe that his imminent removal to Iran (or any other country permitted by statute) is unlikely.

A. No Substantive Due Process Violation

In *Zadvydas*, the U.S. Supreme Court held that § 1231(a)(6) "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States" but "does not permit

indefinite detention." 533 U.S. at 689. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute." *Id.* at 699. The Court designated six months as a presumptively reasonable period of post-order detention but made clear that the presumption "does not mean that every alien not removed must be released after six months." *Id.* at 701. Once the alien establishes that he has been in post-order custody for more than six months at the time the habeas petition is filed, the alien must provide a "good reason" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade*, 459 F.3d at 543–44; *Gonzalez v. Gills,* No. 20–60547, 2022 WL 1056099 at *1 (5th Cir. Apr. 8, 2022). Unless the alien establishes the requisite "good reason," the burden will not shift to the government to prove otherwise. *Id.* There is no dispute that Petitioner has not been in custody for six months. *See* ECF No. 1 at ¶ 69.

Even if his claim were ripe, Petitioner has a final order of removal that authorizes his detention under 8 U.S.C. § 1231(a). Moreover, he has an aggravated felony conviction, which could lead ICE to continue his detention beyond the 90-day removal period in the exercise of discretion. *Id.* § 1231(a)(6). Finally, Petitioner has not shown "good reason" that removal to Iran, or any other third country permitted by statute, is unlikely, which prevents the burden of proof from shifting to ICE to show that there is significant likelihood of removal in the reasonably foreseeable future.

The "reasonably foreseeable future" is not a static concept; it is fluid and country-specific, depending in large part on country conditions and diplomatic relations. *Ali v. Johnson*, No. 3:21–CV–00050-M, 2021 WL 4897659 at *3 (N.D. Tex. Sept. 24, 2021). Additionally, a lack of visible progress in the removal process does not satisfy the petitioner's burden of showing that there is no significant likelihood of removal. *Id.* at *2 (collecting cases); *see also Idowu v. Ridge*, No. 3:03-

CV-1293-R, 2003 WL 21805198, at *4 (N.D. Tex. Aug. 4, 2003). Conclusory allegations are also insufficient to meet the alien's burden of proof. *Nagib v. Gonzales*, No. 3:06-CV-0294-G, 2006 WL 1499682, at *3 (N.D. Tex. May 31, 2006) (citing *Gonzalez v. Bureau of Immigration and Customs Enforcement*, No. 1:03-CV-178-C, 2004 WL 839654 (N.D. Tex. Apr. 20, 2004)). One court explained:

> To carry his burden, [the] petitioner must present something beyond speculation and conjecture. To shift the burden to the government, [the] petitioner must demonstrate that "the circumstances of his status" or the existence of "particular individual barriers to his repatriation" to his country of origin are such that there is no significant likelihood of removal in the reasonably foreseeable future.

Idowu, 2003 WL 21805198, at *4 (citation omitted).

Petitioner fails to allege "good reason" to believe that there is no significant likelihood of removal to Iran or to any other country permitted by statute in the reasonably foreseeable future. Instead, Petitioner relies on only conclusory allegations and speculation to argue that removal is not likely, which are wholly insufficient to meet his burden of proof under *Zadvydas*. *See Nogales v. Dept. of Homeland Sec.*, No. 21-10236, 2022 WL 851738 at *1 (5th Cir. Mar. 22, 2022) (citing *Rice v. Gonzalez*, 985 F.3d 1069, 1070 (5th Cir. 2021)); *Akbar v. Barr*, SA-20-CV-01132-FB, 2021 WL 1345530 (W.D. Tex. Mar. 5, 2021); *see also Andrade*, 459 F.3d at 543–44; *Boroky v. Holder*, No. 3:14-CV-2040-L-BK, 2014 WL 6809180, at *3 (N.D. Tex. Dec. 3, 2014). As such, Petitioner cannot meet his burden, and the burden does not shift to ICE to show that there is no significant likelihood of removal in the reasonably foreseeable future. *See Thanh v. Johnson*, No. EP-15-CV-403-PRM, 2016 WL 5171779, at *4 (W.D. Tex. Mar. 11, 2016) (denying habeas relief where government was taking affirmative steps to obtain Vietnamese travel documents). Petitioner's substantive due process claim fails here as a matter of law.

B. No Procedural Due Process Violation

To establish a procedural due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). While an agency is required to follow its own procedural regulations, the Fifth Circuit finds no procedural due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). In any event, a remedy for a procedural due process violation is substitute process. *Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354, at *6 n.6 (W.D. Tex. May 24, 2016) (finding no merit to petitioner's procedural due process claim where the evidence demonstrated that the review had already occurred, thereby redressing any delay in the provision of the 90-day and 180-day custody reviews). Even in the criminal context, failure to comply with statutory or regulatory time limits does not mandate release of a person who should otherwise be detained. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990).

Like his substantive due process claim, Petitioner provides only conclusory allegations that fall short of the pleading standards to argue that ICE has failed or will fail to provide him with adequate procedural protections.

III. EAJA Fees Are Not Available in Habeas Cases.

Finally, EAJA fees are not available to habeas petitioners in the Fifth Circuit. *See Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023).

Conclusion

Petitioner is lawfully detained by statute on a mandatory basis during the 90-day removal period. His detention comports with the limited due process he is owed as an alien with a final order of removal. This Court should deny the petition.

Respectfully submitted,

Justin R. Simmons
Acting United States Attorney

By: */s/ Lacy L. McAndrew*

Lacy L. McAndrew
Assistant United States Attorney
Florida Bar No. 45507
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
(210) 384-7325 (phone)
(210) 384-7312 (fax)
lacy.mcandrew@usdoj.gov