

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 0:25-cv-03198-PJS-DTS

ROOSEVELT BARTU, JR.,

Petitioner,

v.

KRISTI NOEM, *et al.*,

Respondents.

**FEDERAL RESPONDENTS'
OBJECTIONS TO REPORT
AND RECOMMENDATION**

Introduction

Federal Respondents¹ respectfully submit the following objections to the Magistrate Judge's September 19, 2025, Report and Recommendation in this case. ECF 15 ("R&R"). While Federal Respondents agree with the R&R's conclusion that the Petition and TRO Motion should be denied, they strongly object to the finding that "Bartu has been subject to a final order of removal since October 11, 2024, when the BIA affirmed his removability under 8 U.S.C. § 1227(a)(2)" and is therefore detained under 8 U.S.C. § 1231 notwithstanding his *still ongoing* removal proceedings. R&R at 6.

Bartu remains in pre-final order detention under 8 U.S.C. § 1226(c), and consequently his detention is required for the duration of his removal proceedings under the Eighth Circuit's decision in *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024). The R&R's contrary finding overlooks the statute and regulation directly bearing on this issue, instead adopting a novel argument stretching far beyond the holdings of the Supreme Court

¹ Federal Respondents are Pam Bondi, Lisa Monaco, Kristi Noem, and Peter Berg.

cases it cites and impliedly rejecting decades of precedent in this district (and everywhere else) concerning the administrative finality of orders in removal proceedings.

Its findings also present substantial logistical and pragmatic issues for both the agency and immigration detainees, while upending the reasoning of the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Defendants therefore object to the R&R's conclusion concerning the statutory basis for detention and urge the Court to find that Bartu remains in pre-final order detention under § 1226(c) during his ongoing removal proceedings. This Court should otherwise affirm the denial of habeas relief.

Argument

A. Petitioner's Removal Order is Not Administratively Final Under the Applicable Statute and Regulation

The relevant statute and regulation demonstrate that Bartu's removal order is not yet administratively final. 8 U.S.C. § 1231, entitled "Detention and removal of aliens ordered removed," states that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." *Id.* § (a)(1)(A). As relevant here, that period "begins on the latest of the following: (i) The date the order of removal becomes administratively final. (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order. . . ." *Id.* § (a)(1)(B).

The regulations implementing this statute, 8 C.F.R. § 1241.1, state specifically when an order of removal becomes administratively final:

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act [8 U.S.C. § 1229a entitled “Removal proceedings”] shall become final:

- (a) ***Upon dismissal of an appeal by the Board of Immigration Appeals;***
- (b) Upon waiver of appeal by the respondent;
- (c) Upon expiration of the time allotted for an appeal if the respondent does not appeal within that time;
- (d) If certified to the Board or the Attorney General, upon the date of the subsequent decision ordering removal;
- (e) If an immigration judge orders an alien removed in the alien’s absence, immediately upon entry of such an order; or
- (f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

8 C.F.R. § 1241.1 (emphasis added). Administrative finality, such that the United States could effectuate someone’s removal, is what triggers the application of 8 U.S.C. § 1231.

Applied here, the statute and regulation demonstrate that the IJ’s removal order did not become administratively final October 11, 2024. This is because the Board of Immigration Appeals (“BIA”) opinion that day did not *dismiss* Petitioner’s appeal, *see* 8 C.F.R. § 1241.1(a) (finality occurs upon dismissal). Instead, it remanded the record for further proceedings by the IJ. *See* ECF 11-7 at 1 (reflecting the appeal to the BIA, the later filing of a motion to remand, and BIA’s decision to remand); *id.* at 6 (lacking a dismissal order, including only a single order stating, “ORDER: The motion to remand is granted, and the record is remanded to the Immigration Judge for further proceedings consistent

with the foregoing opinion” while also noting the BIA “express[es] no opinion as to the ultimate outcome of these proceedings”); 8 U.S.C. § 1231(a)(1)(B)(i) requiring an “order of removal” to be “administratively final” to trigger the removal period); *see also, e.g.*, R&R at 2 (citing Ex. I) (on remand the “IJ again ordered him removed to Liberia.”).

The R&R does not address these directly applicable authorities in its analysis; instead, it cites only 8 U.S.C. § 1101(a)(47)(A)(B)(i), before concluding that Bartu was “subject to a final order of removal since October 11, 2024, when the BIA affirmed his removability.” *See* R&R at 6. The implication is that the October 11, 2024, remand order is “a determination by the Board of Immigration Appeals affirming [the IJ’s October 11, 2024, removal] order.” 8 U.S.C. § 1101(a)(47)(A)(B)(i). Though the opinion portion of the BIA’s remand did affirm the *conclusion* that Petitioner is removable, *see* ECF 11-7 at 3-4, it did not affirm the IJ’s removal *order*. Instead, it remanded the record to the IJ “for a new decision,”² *id.* at 3, chose “not [to] address remaining merits-based arguments,” *id.* at 3 n.3, and “express[ed] no opinion as to the ultimate outcome of the[] proceedings” on remand. *See id.* at 6.

A removal order is not final where the record remains open, and a new decision is pending. *See* 8 C.F.R. § 1003.1(d)(7)(i) (“The Board [of Immigration Appeals] may return a case to DHS or an immigration judge for such further action as may be appropriate

² Further confirming this, following remand the IJ issued a new decision, *see* ECF 11-9 at 1, which “found Respondent . . . removable” and stated that Petitioner “was ordered removed to Liberia.” *Id.* at 3. However, this new decision occurred in March of 2025, not October of 2024. *Id.*

without entering a final decision on the merits of a case.”) (emphasis added); *see also Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014) (“When the BIA remands to the IJ for any reason, no final order of removal exists until all administrative proceedings have concluded”); *Alam v. Holder*, 546 Fed. Appx. 121, 122 (4th Cir. Nov. 7, 2013) (removal order not final where BIA remanded order to an IJ on withholding of removal and CAT claims); *Satheeskumar v Attorney General*, 480 Fed. Appx. 121, 123 (3d Cir. 2012) (same); *Tshiteya v. Crawford*, 2013 WL 6635096 at *3 (E.D Va. Dec. 16, 2013) (same).

Moreover, even if 8 U.S.C. § 1101(a)(47)(A)(B)(i)—which like 8 C.F.R. § 1241.1 discusses affirming an order, not a conclusion—could be interpreted as the R&R implies, it is a definitional section applicable to the Immigration and Nationality Act more broadly, and defines finality for an “order of deportation,” generally, not the administrative finality of an order of removal specifically. *See* 8 U.S.C. § 1101(a)(47)(A)(B)(i). It should not be interpreted to conflict with 8 U.S.C. § 1231 and 8 C.F.R. § 1241.1, which directly address removal proceedings. Section 1231 conditions the start of the removal period on administrative finality, “[t]he date the order of removal becomes administratively final.” 8 U.S.C. § 1231(a)(1)(B)(i). In turn, 8 C.F.R. § 1241.1, states when such an order becomes final “(a) Upon dismissal of an appeal by the Board of Immigration Appeals.” Dismissal by the BIA did not occur here until May 23, 2025. *See* ECF 11-10. And shortly thereafter, that dismissal was followed by a superseding event impacting the beginning of the removal period—the Eighth Circuit’s July 3, 2025, Order granting a stay of removal. *See* ECF 11-12. However, as noted in the Federal Respondents’ Response, the Court of Appeals “has now granted that petition for review, vacating the BIA’s dismissal order and remanding the

case to the BIA for further proceedings, including to consider Petitioner's motion to accept his late-filed brief," ECF 8 at 13, thus there is no longer a "dismissal of [his second] appeal by the Board of Immigration Appeals," and as yet, no administratively final order of removal. 8 C.F.R. § 1241.1(a); 8 U.S.C. § 1231(a)(1)(B)." *Id.* (citations omitted). Petitioner remains in mandatory detention during his removal proceedings. 8 U.S.C. § 1226(c); *Banyee*, 115 F.4th at 933-934; *Abdirizak Mohamed A. v. Brott*, No. 18-CV-3063 (ECT/HB), 2020 WL 1062913, at *2 (D. Minn. Mar. 5, 2020) (applying 1226(c) to petitioner's detention even after the charge of removal was sustained, but proceedings continued on petitioner's applications for relief from removal); *Alier D. v. Sec'y of Dep't of Homeland Sec.*, No. 18-CV-1645 (NEB/HB), 2018 WL 5847244, at *2 (D. Minn. Nov. 8, 2018) (finding detention authority shifted from 1226(c) to 1231 after BIA dismissed petitioner's appeal of the denial of his request for relief from removal); *Gahamanyi v. Baniecke*, No. CIV. 07-4007 RHK/RLE, 2008 WL 5071098, at *9 (D. Minn. Nov. 24, 2008) (applying 1231 only after "the Removal Order became effective, and final, when the BIA sustained the Government's appeal [of only an application for relief from removal] on December 14, 2007").³

B. Bartu's Removal Proceedings are Ongoing and His Removal Order is Not Yet Final.

Drawing on two Supreme Court cases, the R&R also states that "The Supreme Court has emphasized that withholding-only proceedings do not affect the finality of removal

³ The law around finality of removal orders has not changed. Petitioner's creative argument is an attempt to get around the Eighth Circuit's holding in *Banyee* despite the ample precedent in this district applying 1226(c) to cases like this.

orders,” noting “Respondents do not dispute this Supreme Court precedent but argue that Bartu’s subsequent appeals concern the removal order itself rather than merely withholding of removal. However, the record demonstrates otherwise.” R&R at 6 (citing *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) and *Nasrallah v. Barr*, 590 U.S. 573, 582 (2020)). Respectfully, the R&R misinterprets both cases, neither of which apply here.

First, as a threshold matter, whether withholding-only proceedings impact the finality of removal orders is of no import here because, as Bartu admits, he is not in withholding-only proceedings. *See* ECF 17 at 6 (“Bartu, unlike *Castaneda* is not in withholding-only proceedings. He was placed into regular removal proceedings years ago”). Withholding-only proceedings are entirely different proceedings under a different provision of the INA which occur on an alternative track from the regular removal proceedings Petitioner admits he remains in here. *See, e.g., D.V.D. v. United States Dep’t of Homeland Sec.*, 778 F. Supp. 3d 355, 366 (D. Mass.) (explaining that withholding-only proceedings occur only after the final order of removal has been executed at least once) (subsequently clarified on other grounds).

The cases the R&R relies on are inapplicable to a situation where the BIA remands to an Immigration Judge for further proceedings. R&R at 6. *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021), does not apply because it was a case involving habeas petitioners with reinstated removal orders. *Id.* at 529-530. Their cases fall under an entirely distinct removal process governed by 8 U.S.C. § 1231(a)(5), which applies where an individual has a pre-existing final removal order, is removed, and then illegally reenters the United

States.⁴ *Id.* at 531-532. In that situation, § 1231 “explicitly insulates the removal orders from review, while also generally foreclos[ing] discretionary relief from the terms of the reinstated order.” *Id.* at 530. However, a claim for withholding of removal under § 1231(b)(3)(A) is still permitted, *id.*, hence the term — “*withholding only proceedings.*” (emphasis added).

It is in this reinstatement of removal context – not the context of standard removal proceedings under 8 U.S.C. §1229a – that the Supreme Court held that a reinstated removal order’s finality “does not depend in any way on the outcome of the withholding-only proceedings. *Johnson*, 594 U.S. at 539. That the petitioners asserting withholding of removal claims in *that* context were detained under § 1231 is unsurprising because the reinstated removal were already final, and removal had been effectuated. *Id.* Indeed, the process for reinstatement of removal at issue there is governed by § 1231, the post removal order statute. *Id.* at 542.

This is not true here. Bartu does not have a reinstated removal order that previously became final, and he did not reenter after removal. Quite the opposite, his removal proceedings are ongoing, and a final removal order is yet to be issued. The unique factual and statutory underpinnings of *Guzman Chavez* are not present here.

⁴ 8 U.S.C. § 1231(a)(5) states: “If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, *the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter*, and the alien shall be removed under the prior order at any time after the reentry.” (emphasis added).

Nor is the Court's decision in *Nasrallah v. Barr*, 590 U.S. 573 (2020), applicable. That case involved the scope of appellate court review of a BIA order involving CAT relief. 590 U.S. at 576. The Court's decision in *Nasrallah* was "narrow" and addressed only whether the circuit court could review a noncitizen's factual attacks on the BIA's CAT decision deferentially or not at all under 8 U.S.C. § 1252. *Id.* This case does not involve the scope of appellate review by the circuit court or § 1252, and *Nasrallah*'s narrow holding does not apply here.

Second, Bartu's removal proceedings are not final, they are ongoing. *See* 8 U.S.C. § 1229a(c)(4)(an IJ's determination on any applications for relief from removal are a required part of an IJ's decision in removal proceedings); *D.V.D.*, 778 F. Supp. 3d at 365 ("Removal proceedings determine not only *whether* an individual may be removed from the United States but also to *where* he may be removed."). There is no dispute that DHS cannot remove him now to Liberia (and Bartu has never affirmatively suggested that DHS would be free to remove him elsewhere). Everyone agrees that Bartu is removable, i.e., the charges brought against him can be sustained, and he has no right to remain in the United States unless he succeeds on one of his applications for relief from removal.

For the agency to effectuate Bartu's removal, it has to know what country to remove him to. It would like to remove him to Liberia, which has agreed to accept him and provided a travel document. The record, however, is currently open before the immigration court and its final decision will resolve the question of not just whether he can be removed, but to where.

Because of Bartu's appeals, however, everyone also agrees that the United States cannot remove him. Bartu characterizes the current posture of his case as being in an "indefinite and automatic stay of removal that remains in effect for as long as Petitioner's post-removal-order withholding of removal and DCAT proceedings remain before the Board of Immigration Appeals . . . and/or the immigration court." ECF 17 at 3. He asserts that "removal is barred," *id.*, and the United States agrees. Respondents are not attempting to remove him before the resolution of the questions relevant to removability before the immigration court.

If this were indeed a stay, this Court's rationale in *Bah v. Cangemi*, 489 F. Supp. 2d 905, 916 (D. Minn. 2007), supports a conclusion that Bartu is in 1226(c) custody. As explained in *Bah*, a stay of removal "defers the start of the removal period."⁵ This illustrates just one of the many inconsistencies in Petitioner's position and why it is important that the removal proceedings are complete (including any IJ decision on a request for relief from removal) before the removal order because administratively final. It also illustrates the absurdity in the position that by filing requests for relief from removal and appealing negative decisions, a petitioner could run out the removal period and the *Zadvydas* six-month clock.

⁵ The United States notes that this Court's *Bah* decision was decided before the Eighth Circuit's decision in *Banyee*. *Banyee* conclusively establishes the constitutionality of detention during the entire pre-final removal order period, and resolves the constitutional concerns raised in *Bah*, 489 F. Supp. 2d at 919-20. The facts of *Bah*, in which there was a long period of review at the Eighth Circuit without an official stay during which time Bah could have been removed, are distinguishable from this case. The agency is without a doubt encumbered or prevented from removing him now.

The R&R's reading of the 1226 and 1231 is inconsistent with the framework set out in *Zadvydas* and would upend the Supreme Court's holding in that case. *Zadvydas* concerned an individual who had a final order; the immigration court had ruled on his removability and his applications for relief. *Zadvydas v. Caplinger*, 986 F. Supp. 1011, 1015 (E.D. La. 1997). The Supreme Court's holding governed constitutional limitations on the period that was "reasonably necessary to secure removal," and made clear that a stateless individual cannot be held indefinitely. *Zadvydas v. Davis*, 533 U.S. at 699. The test the Supreme Court developed to limit that period has no applicability here because the removal period has not started, and DHS cannot do anything to "secure his removal." The R&R's holding that Petitioner is in § 1231 custody is contrary to the statute, regulations, judicial precedent, and long-standing practice, and it should not be adopted.

Conclusion

The Respondents respectfully request that his Court overrule the portion of the R&R finding that Bartu is in post-final-order custody under 8 U.S.C. § 1231. The Court should find Bartu is detained under 8 U.S.C. § 1226(c) and affirm the denial of habeas relief based upon *Banyee*.

Respectfully submitted,

Dated: October 3, 2025

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