

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

<p>MOUSSA CISSE,</p> <p style="text-align:center">Petitioner,</p> <p>vs.</p> <p>SCOTT BANIEK, ICE FIELD OFFICE DIRECTOR, UNITED STATES ATTORNEY GENERAL, et al.,</p> <p style="text-align:center">Respondents.</p>	<p style="text-align:center">No. 4:11-cv-00242-JAJ</p> <p style="text-align:center">ORDER</p>
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This matter comes before the Court pursuant to Respondents’ Motion to Dismiss filed on July 7, 2011. [Dkt. No. 5.] On May 24, 2011, Petitioner Moussa Cisse (“Petitioner”) filed a 28 U.S.C. § 2241 petition for writ of habeas corpus. [Dkt. No. 1.] On July 1, 2011, the Court ordered Respondent to appear and show cause why Petitioner should not be released. [Dkt. No. 2.] The Court grants Respondents’ Motion to Dismiss and dismisses the petition.

I. PROCEDURAL AND FACTUAL BACKGROUND

Petitioner is a native and citizen of Senegal. [Jensen Declaration, Dkt. No. 5, Ex. 1 ¶ 3.] On December 4, 2003, Petitioner was issued a Notice to Appear charging him with being inadmissible to the United States under 8 U.S.C. § 1182(a)(6)(A)(i). *Id.* ¶ 4. Section 1182(a)(6)(A)(i) states “an alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” Petitioner thereafter appeared several times for removal or deportation hearings at the Immigration Court in Omaha, Nebraska. Jensen Declaration ¶ 5. On January 4, 2006, the court found him not credible and denied his applications for relief from removal. *Id.* ¶ 6. The court granted Petitioner voluntary

departure to Senegal subject to a payment of a \$500.00 voluntary departure bond with an alternate order of removal to Senegal. *Id.* ¶ 7. Petitioner did not file an appeal of his order of removal to the Board of Immigration Appeals. The immigration judge's alternate deportation order, therefore, became a final order of deportation on February 3, 2006. *Id.* ¶¶ 8-9.

Immigration and Customs Enforcement ("ICE") sent a demand letter mandating the Petitioner's appearance for removal on June 20, 2006. *Id.* ¶ 11. Petitioner signed and returned the letter but did not report for removal on July 18, 2006. *Id.* ¶¶ 11-12.

On October 20, 2010, ICE arrested Petitioner per his outstanding order of removal. *Id.* ¶ 13. ICE also served him with his I-229(a) indicating his warnings for failure to depart. *Id.* ¶ 17.

Petitioner is being detained under 8 U.S.C. § 1231 on the basis of his warrant of removal dating from June 2006. *Id.* ¶¶ 14-16. ICE has periodically reviewed his detention to determine whether continued detention is warranted and has continuously attempted to have him removed. *Id.* ¶¶ 15, 17. The Embassy of Senegal in Washington D.C. received the first request for travel documents from ICE on October 28, 2010. *Id.* ¶ 18. The Embassy of Senegal did not respond to the request.

A mandatory 90 day Post Order Custody Review ("POCR") was issued to the Field Office Director, Scott Baniek, on January 25, 2011. *Id.* ¶ 19. Continued detention was approved because the Field Office Director believed that a travel document would be issued imminently. *Id.* ¶ 20.

ICE continued to repeatedly contact the Embassy of Senegal regarding a travel document for Petitioner on February 11, 2011, February 28, 2011, and March 23, 2011. *Id.* ¶ 21. A 180-day POCR was then referred to ICE headquarters on April 18, 2011. *Id.* ¶ 22. ICE again continued his detention in the belief that there was a "significant likelihood of removal in the reasonably foreseeable future." *Id.* ¶ 23. Petitioner was served with this continued detention letter on May 27, 2011. *Id.* ¶ 24.

On June 28, 2011, ICE served an Annex 9 letter on the Embassy of Senegal, citing non-compliance in issuing Petitioner's requested travel document and requesting expedited processing of the travel document. *Id.* ¶ 25. The travel document ICE is requesting is routine. *Id.* ¶ 26. ICE believes that Senegal will issue the travel document and "there is nothing in Petitioner's record to suggest Senegal will not do so in this case." *Id.*

II. ARGUMENT

Petitioner asserts that he has been unconstitutionally detained in the Marshall County Jail in Marshalltown, Iowa since October 21, 2010. He asserts that such custody violates his due process rights. He looks to 8 U.S.C. § 1226(a), which states that the DHS may continue to detain an alien or may release him on bond or conditions of supervision. Petitioner argues that he has "equities in the United States" and asks for the Court to direct ICE to release him on bond. Petitioner asserts that there are no facts or circumstances that would not guarantee his return for hearings. If he is released, Petitioner pledges that he will appear for all hearings and will appear if he is to be removed.

Respondents argue that the Court should dismiss the petition because detention is authorized by 8 U.S.C. § 1231(a)(6), and not § 1226. Section 1226 applies "pending a decision on whether the alien is to be removed from the United States." Section 1231 applies to aliens who have been ordered removed. Section 1226 is not applicable, according to Respondents, because there is already a final administrative removal order against the Petitioner. Further, it is the Respondents' opinion that Petitioner is not eligible for bond and the DHS has provided him with all the due process to which he is entitled. Respondents assert that Petitioner is not facing indefinite detention because he will be removed as soon as the Embassy of Senegal produces his travel documents.

III. ANALYSIS

Petitioner asserts that the Court should use the standards contained in § 1226(a),

which permits release of an alien pursuant to supervision or bond. But § 1226(a) is inapplicable to the Petitioner because that section is only for aliens *pending* the decision of removal proceedings. Petitioner's final administrative removal order became effective on February 3, 2006. Because Petitioner is an alien ordered removed, the Court must instead apply § 1231. Section 1231 controls the detention and removal of aliens ordered removed. Once ordered removed, the Secretary of the Department of Homeland Security ("DHS") "shall remove" the alien "within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). This "removal period" begins on the latest of: (i) the date the order of removal becomes administratively final; (ii) the date of the court's final order if a removal order is judicially reviewed and a court orders a stay of the removal of the alien; or (iii) if detained, the date the alien is released from detention or confinement. *Id.* § 1231(a)(1)(B). An alien must be detained during the removal period. *Id.*

After the 90-day removal period lapses because the alien has not left or is not removed, the DHS can choose to continue the detention or release the alien under supervision. *Id.* § 1231(a)(3). But subsection six provides for continued detention of some aliens. *Id.* § 1231(a)(6). Aliens who may be detained beyond the removal period include aliens who are deemed inadmissible under § 1182. *Id.*

Immigration and Naturalization Service ("INS") regulations add that the alien's records will be reviewed to determine whether further detention or release under supervision is warranted after the 90-day removal period expires. 8 C.F.R. § 241.4(c)(1), (h), (k)(1)(i). If the reviewing panel elects to detain the alien, then the matter will be reviewed again after a three-month period to determine whether to further detain or release the alien. *Id.* § 241.4(i), (k)(2)(ii). The alien is entitled to such a post-order custody review ("POCR") in annual intervals and has the right to request interim reviews "[n]ot more than one every three months in the interim between annual reviews." *Id.* § 241.4(k)(2)(iii).

Factors the panel considers in detention include the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, prior immigration history,

history of flight, and family ties. *Id.* § 241.4(f). Criteria for release include travel documents being unavailable, the alien is not presently a violent person and will likely remain non-violent if released, he is not likely to pose a threat to the community or violate conditions of release, and that he does not pose a significant flight risk if released. *Id.* § 241.4(e). The alien has the burden of showing “to the satisfaction of the Attorney General . . . that his . . . release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien’s removal from the United States.” *Id.* § 241.4(d)(1).

In *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), the Supreme Court recognized that § 1231(a)(6) does not provide for indefinite detention. “A statute permitting indefinite detention of an alien would raise a serious constitutional problem.” *Id.* at 690. Although acknowledging the primacy of the executive branch in foreign policy matters, including repatriation and immigration matters, the Court implied a limitation on the ability to indefinitely detain an alien. *Id.* at 700-01. The post-removal period of detention must be “reasonably necessary to bring about the alien’s removal from the United States.” *Id.* at 689. In *Zadvydas*, the Court held that six months was a “presumptively reasonable” period, but cautioned that the statute does not authorize detention for a period beyond six months unless removal is “reasonably foreseeable.” *Id.* at 699, 701. “[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.” *Id.* at 699. If an alien brings a habeas corpus petition after the six month period lapses, the government has the burden to rebut the showing that there is no significant likelihood of removal in the reasonably foreseeable future. *Id.* at 701. “This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, 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.” *Id.*

Both of the aliens at issue in *Zadvydas* were ordered deported because they committed certain violent crimes making them deportable. *Id.* at 683 (aliens deportable

based on 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), 1251(a)(2)). The Court did not expressly hold that aliens ordered removed pursuant to § 1182 could also be detained pursuant to § 1231. *See id.* at 711 (Kennedy, J., dissenting) (“On the one hand, it may be that the majority’s rule applies to both categories of aliens, in which case we are asked to assume that Congress intended to restrict the discretion it could confer upon the Attorney General so that all inadmissible aliens must be allowed into our community within six months. On the other hand, the majority’s logic might be that inadmissible and removable aliens can be treated differently. Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility.”).

But the Supreme Court later extended the terms of § 1231(a)(6) to include inadmissible aliens who are ordered removed under § 1182. *Clark v. Martinez*, 543 U.S. 371, 377-81 (2005). The Court reasoned in *Martinez* that the “answer must be yes” that § 1231(a)(6) applies in equal force to aliens ordered removed pursuant to § 1182. *Id.* at 378. Also reiterated was that six months is a presumptively reasonable detention period. *Id.* at 386; *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005) (citing *Zadvydas* and *Martinez*); *but see Martinez*, 543 U.S. at 387 (O’Connor, J., concurring) (“I write separately to emphasize that, even under the current statutory scheme, it is possible for the Government to detain inadmissible aliens for more than six months after they have been ordered removed . . . the 6-month presumption . . . is just that – a presumption.”).

The Eighth Circuit Court of Appeals has since interpreted and applied *Zadvydas* and its progeny to immigration-related matters. *See, e.g., Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003); *Ali v. Cangemi*, 419 F.3d 722 (8th Cir. 2005); *Bah v. Cangemi*, 548 F.3d 680 (8th Cir. 2008). In *Borrero*, Lazaro Borrero was an inadmissible alien subject to a final order of removal. The INS detained Borrero upon his release from imprisonment on state drug and firearms charges on September 11, 2000. *Borrero*, 325 F.3d at 1005. The district court granted Borrero’s petition for writ of habeas corpus and the INS released him from

custody on January 4, 2002. *Id.* The Court of Appeals reversed, finding that “[t]here is no contention that the government failed to follow [due process] procedures here” because the government complied with regulations governing the parole of [aliens] like Borrero. *Id.* at 1008 (citing 8 C.F.R. § 212.12) (alteration added). The Eighth Circuit “interpret[ed] *Zadvydas* as limiting the detention of only those aliens whose detention raises serious constitutional doubt.” *Borrero*, 325 F.3d at 1007. The *Borrero* court agreed that inadmissible aliens “who are unlawfully present in the United States are guaranteed due process of law,” but the government retains the power to “detain an alien who is stopped at the border.” *Id.* at 1008 (citations omitted). As the court explained, an alien may be physically present in the United States without effecting entry. *See id.* The *Borrero* court would not have applied a time limit on detention of inadmissible aliens, but the Supreme Court’s later decision in *Martinez* controls. *Martinez*, 543 U.S. at 378-86 (§ 1182 inadmissible aliens are also subject to the six-month reasonableness test).

Here, Petitioner is subject to an order of removal which became final on February 3, 2006. Petitioner has been detained in the Marshall County Jail since October 20, 2010. ICE conducted the mandatory 90-day POCR on January 25, 2011, and continued detention was approved on the basis that travel documents from the Embassy of Senegal were believed to be imminent. Detention was confirmed again for his 180-day, or 6-month, POCR on May 6, 2011. During this period of detention, ICE has sent no less than five requests to the Embassy of Senegal for Petitioner’s travel documents. The last request occurred approximately one month ago. ICE also states that the travel documents it has requested are routinely issued and likely to be issued for Petitioner. Based on these facts, the Court must determine whether Petitioner’s continued detention is the appropriate course of action or if deportation is reasonably unforeseeable.

The Supreme Court in *Zadvydas* held that, after detention for six months, the government had to rebut the presumption that there is no significant likelihood of removal in the reasonably foreseeable future. 533 U.S. at 701. *Zadvydas* did not establish a per se

requirement that aliens *must* be released after six months, only that the government must show that there is a significant likelihood of removal in the reasonably foreseeable future.

Id. Petitioner does not have the right to prompt removal simply because six months have lapsed since his detention. *Compare Turkmen v. Ashcroft*, 589 F.3d 542, 550 (3d Cir. 2009) (“plaintiffs can point to no authority clearly establishing a due process right to immediate or prompt removal following an order of removal or voluntary departure”), *with Diouf v. Napolitano*, 634 F.3d 1081, 1084-85 (9th Cir. 2011) (“We hold that individuals detained under § 1231(a)(6) are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a)).

The Court finds that Petitioner’s constitutional rights have not been violated with his continued custody. Immigrations regulations permit ICE to factor in Petitioner’s history of flight and prior immigration record in making its decision to continue his detention. Petitioner’s history of missing his arranged deportation (yet acknowledging the date of deportation by signing a related document) demonstrates to the Court that he is, at best, unreliable and at risk of non-compliance with future immigration directives. The Court must also consider that Petitioner did not voluntarily leave the United States or turn himself into authorities; rather, ICE agents tracked him down and arrested him.

Yet the Court also balances the competing interests of continued detention against a possible inability to obtain the documents necessary for Petitioner’s removal. If it is futile to get the travel documents, then the Court must release Petitioner. *See, e.g., Moallin v. Cangemi*, 427 F. Supp. 2d 908, 927-28 (D. Minn. 2006) (court ordered release because ICE acknowledged “that it may well be impossible to successfully deport . . . Somalis” because of the political conditions in Somalia).

But ICE has stated under oath to the Court that the Embassy of Senegal routinely and regularly produces travel documents like the one sought here. ICE has also repeatedly sought to obtain the documents in regular intervals. Most recently, ICE has sought an expedited request for the documents.

The Court finds that there is a significant and reasonable likelihood of removal in the foreseeable future. *See Zadvydas*, 533 U.S. at 701; *Martinez*, 543 U.S. at 378. The Court is satisfied that the periodic POCRs are sufficient to prevent any deprivation of constitutional rights.

Upon the foregoing,

IT IS ORDERED that a the Respondents' Motion to Dismiss [Dkt. No. 5] is granted.

IT IS FURTHER ORDERED that the Petitioner's Writ of Habeas Corpus [Dkt. No. 1] is dismissed. The Clerk shall enter judgment in favor of Respondents.

DATED this 5th day of August, 2011.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA