UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARK ANTHONY REID, on behalf of himself and others similarly situated, Plaintiff/Petitioner	)	
v.	)	**C.A. NO. 13-cv-30125-MAP**
CHRISTOPHER DONELAN, Sheriff of Franklin County, et. al. Defendants/Respondents	)	

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S PETITION FOR WRIT OF HABEAS CORPUS AND PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE
(Dkt. No. 4 & 5)

January 9, 2014

PONSOR, U.S.D.J.

I. INTRODUCTION

Plaintiff, a lawful permanent resident, has been held in immigration detention for fourteen months pursuant to 8 U.S.C. § 1226(c). He has brought a Petition for Writ of Habeas Corpus, 28 U.S.C. § 2241, seeking an individualized bond hearing to challenge his detention. (Dkt. No. 4.) He has also filed a Motion for Order to Show Cause. (Dkt. No. 5.) Defendants are: Christopher Donelan, Sheriff of Franklin County; David Lanoie, Superintendent, Franklin

II. BACKGROUND

[1] **The facts are drawn from Plaintiff's Petition for Habeas Corpus. (Dkt. No. 4.)**

[3] **Plaintiff also filed a Motion for Summary Judgment to challenge ICE's policy of shackling him during immigration proceedings, absent an individualized determination that such shackling was necessary, (Dkt. No. 1), and a Motion for Class Certification. (Dkt. No. 33.) Defendants responded**

[4] **Defendants suggest that the claims against all parties except Defendant Donelan should be dismissed. They highlight Rumsfeld v. Padilla**

that such a limit does exist. Bourguignon, 667 F. Supp. 2d at 182.

Defendants believe Bourguignon was wrongly decided and should be reconsidered. Their argument is anchored on a broad reading of Demore v. Kim, 538 U.S. 510 (2003), where the Supreme Court upheld the constitutionality of § 1226(c). Far from supporting reconsideration of Bourguignon's holding, Demore supports this court's ruling. Only a brief discussion is required to make this clear.

As discussed in Bourguignon, the two Supreme Court cases touching upon this issue, Zadvydas v. Davis, 533 U.S. 678 (2001), and Demore, suggest a "reasonableness" limit in § 1226(c). In Zadvydas, the Supreme Court held that post-

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Two years later, the Supreme Court directly addressed the constitutionality of § 1226(c) in Demore. There, Chief Justice Rehnquist distinguished Zadvydas and upheld the constitutionality of § 1226(c) for the "brief period necessary for [the detainee's] removal proceedings." Demore, 538 U.S. at 513.

Picking up on that language, Justice Kennedy, in his concurrence, explicitly identified a "reasonableness" requirement that limited the scope of 1226(c). He said, "[A] lawful permanent resident . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." Id. at 532 (Kennedy, J., concurring) (citing Zadvydas, 533 U.S. at 684-86).

Taken together, these two cases support the conclusion that a "reasonableness" requirement is included in the statute. Bourguignon, 667 F. Supp. 2d. Such an interpretation is necessary to avoid the Fifth Amendment due process problem that prolonged detention, absent an

individualized hearing, would present.[5] No subsequent controlling authority alters this analysis.

Indeed, strong authority supports this interpretation. At least two other circuits have considered this issue and have both found a "reasonableness" limitation in the statute. See Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011). Moreover, since Bourguignon, a majority of judges in this district have reached the same conclusion. See Ortega v. Hodgson, No. 11-cv-10358-MBB, 2011 WL 4103138 (D. Mass. Sept. 13, 2011)(Bowler, Mag. J.); Flores-Powell v. Chadbourne, 677 F. Supp 2d 455 (D. Mass. 2010)(Wolf, J.); Sengkeo v. Horgan, 670 F. Supp. 2d 116 (D. Mass. 2009) (Gertner, J.); see also Zaoui v. Horgan, No. 13-11254-DPW, 2013 WL 5615913, at *4 (D. Mass. Aug. 23, 2013)(Woodlock, J.)(finding against the petitioner, but recognizing the "reasonableness" requirement in § 1226(c)).

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[5] **Plaintiff also believes that the detention implicates the Eighth Amendment. Given the strength of the due process argument, analysis under the Eighth Amendment is unnecessary.**

Section 1226(c) . . . [is] limited to a six-month period, subject to a finding of flight risk or dangerousness." Rodriguez, 715 F.3d at 1133 (9th Cir. 2013). The Ninth Circuit justified its view by applying one of its prior cases, Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011), to § 1226(c). In Diouf, the court analyzed the due process considerations arising from an immigration detention lasting over six-months. Consistent with Zadvydas, it concluded that such detention, absent an individual hearing, violated the constitution.

The First Circuit has not yet weighed in on this question, but the simpler approach adopted by the Ninth Circuit strikes this court as fairest to both sides. This rule follows in line with Supreme Court precedent, satisfies due process, and avoids the unnecessary administrative burden of holding two, repetitive hearings -- a habeas proceeding to determine if a bond hearing is required and then the bond hearing itself. This is the approach this court will take unless and until it is instructed otherwise. Significantly, however, the court would grant the petition here even using the more complex rule adopted by the Third

and Sixth Circuits.

1. Six-Month Rule

This rule is optimal for a number of reasons. First, this bright-line rule is consistent with Supreme Court precedent. In Zadvydas, after determining that indefinite, post-removal detention was impermissible, the Court said, "[W]e think it practically necessary to recognize some presumptively reasonable period of detention." Zadvydas, 533 U.S. at 700-01. Such pragmatism was justified by prior Supreme Court cases. Id. at 701, citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56-58 (1991)(applying a 48-hour rule to probable cause determinations); Cheff v. Schanckenberg, 384 U.S. 373, 379-80 (1966)(plurality opinion)(adopting a rule that the right to a jury trial extends to all cases in which a sentence greater than six months is imposed). Although the six-month line did not guarantee the detainee's release in Zadvydas, of course, it did entitle the detained individual to a bond hearing. A closely analogous situation is present in this case.

The Seventh Circuit's dicta in a comparable case is noteworthy. As Judge Posner said, "[I]t would be a

considerable paradox to confer a constitutional or quasi-constitutional right to release on an alien ordered removed (Zadvydas) but not on one who might have a good defense to removal." Hussain v. Mukasey, 510 F.3d 739, 743 (7th Cir. 2007). The Ninth Circuit's conclusion in Rodriguez applies that logic to § 1226(c). Indeed, no persuasive argument justifies discarding this pragmatic approach when dealing with individuals detained under § 1226(c).

The fact that Demore did not adopt a six-month rule does not undermine this logic. Defendants argue that the Demore Court could have utilized this approach. In failing to do so, they contend, the Court made a deliberate choice.

However, the Demore Court had no reason to invoke this rule. Demore explicitly noted that detention under § 1226(c) is inherently "of a much shorter duration," lasting "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." Demore, 538 U.S. at 529-31. Since the Court was facing a direct constitutional challenge to § 1226(c) and was operating under those temporal assumptions, it simply avoided

answering an unripe question.[6] Justice Kennedy's concurrence, which was the fifth vote to comprise the majority, clearly implies as much. In utilizing Zadyvdas to opine on a reasonableness requirement in § 1226(c), Justice Kennedy seems to suggest that the temporal discussion in that case is still the most applicable law on this issue. Id. at 532 (Kennedy, J., concurring)(citing Zadvydas affirmatively).

Due process considerations also favor the six-month approach. As the Ninth Circuit said in Diouf,

> **When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.**

Diouf, 634 F.3d at 1091-92.

These considerations, as the Ninth Circuit later found in Rodriguez, are equally applicable to the § 1226(c)

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[6] **Although the plaintiff's detention in that case was for roughly six-months, the court noted that the length was largely due to plaintiff's own tactics. It thus anchored its broad decision on the average length of detainment.**

analysis. After six months, a detainee's private interest in freedom from unreasonable restraint is high. The risk of unnecessary detention, unless it is found to be justified by safety concerns or flight risk, is also substantial.

Significantly, the burden on the government to hold such a bond hearing is minimal. Indeed, adopting a six-month approach actually eases the burden on the government. This approach only requires the executive to hold one hearing, rather than defend against an individual habeas petition first.

Broader due process concerns also militate against the individualized approach adopted by the Third and Sixth Circuits. Although that approach may work for those individuals with access to the federal courts, only a minority of detainees have this capacity. The individualized approach presumes that detainees have knowledge about the American court system and have finances to obtain an attorney (or are fortunate enough to receive pro bono assistance) and that they have the language skills required to navigate the legal thicket. Simply put, "litigation is unlikely to be a viable solution for most

immigrants in prolonged detention . . . [because] it is logistically difficult to bring a habeas petition." Geoffrey Heeren, Pulling Teeth: The State of Mandatory Immigration Detention, 45 Harv. C.R.-C.L. L. Rev. 601, 603 (2010). The six-month approach protects the due process rights of all detainees whose confinement has become "presumptively unreasonable."[7]

Finally, administrative concerns favor this rule. Defendants suggest that factual differences between cases justify the Third and Sixth Circuit's approach. However, this argument conflates the right to a bond hearing with the outcome of said hearing -- the possible right to release. In a bond hearing, an IJ is necessarily going to consider the reasonableness of the alien's continued detention. For example, an IJ may properly decline to grant bail to a detainee whose stalling tactics were the sole cause of the length of confinement. It makes more sense to have one

[7] **This factor is particularly persuasive since the government has continued to employ its interpretation of § 1226(c) as new cases arise, despite consistent court orders to do otherwise. Absent an approach that deals with this issue globally, Defendants will likely continue to apply their incorrect interpretation of the statute in violation of the Fifth Amendment.**

hearing in front of an IJ, rather than require each detainee to file a habeas petition first so that the detainee can obtain a hearing on whether he or she is entitled to a hearing. This six-month rule effectively protects both a detainee's due process rights and Defendants' resources.

Under the six-month approach, the analysis in this case is simple: Plaintiff has been held in custody for fourteen months, and thus his continued detention without a bond hearing is presumptively unreasonable.

2. Case-by-Case Determination

Even if the individualized approach were more appropriate, Plaintiff's prolonged detention without a bond hearing is unreasonable. Relevant factors in this determination include: the length of detention; the period of detention compared to the criminal sentence; the foreseeability of removal; the prompt action of immigration authorities; and whether the petitioner engaged in any dilatory tactics. Zaoui, 2013 WL 5615913, at *4 citing Flores-Powell, 677 F. Supp. 2d at 471.

The length of Plaintiff's criminal sentence compared to his detention is the only factor that cuts against his

claim. That element, however, is substantially outweighed by the length of Plaintiff's confinement and the uncertainty underlying his immigration case.

First, Plaintiff has been detained for fourteen months. This is well beyond the brief detainment contemplated in Demore. Demore, 538 U.S. at 529. In Demore, the Court assumed that detention would last an average of thirty days up to a maximum of five months.

Moreover, this court has already ruled that a seven-month detainment, half the length of the confinement here, would be unreasonable. Bourguignon, 667 F. Supp. 2d at 183. In dealing with the defendants' arguments in that case, this court said, "[E]ven if the court made its calculations conservatively. . . the more than seven-month detention period still exceeds the brief time frame contemplated by Chief Justice Rehnquist in Demore." Id.

It is significant, as well, that Plaintiff's removal is not foreseeable. In Bourguignon, there was no end in sight for the petitioner's case before the BIA, since it was unclear when the BIA would rule and subsequently, whether the petitioner would appeal. Id. Here, Plaintiff is even

further away from a final outcome. Nearly half a year after the IJ's initial decision, the BIA reversed and remanded Plaintiff's case. Then, on December 17, 2013, the IJ again ruled against Plaintiff. Plaintiff now intends to bring his case back to the BIA. At best, he will receive another

threshold. Regardless of how that limit is defined, Plaintiff's detention has crossed the line. While Plaintiff may not obtain the relief he seeks, he is at least entitled to take a shot at persuading the IJ to release him.

this order. This report will include notification as to the outcome of the bond hearing.

3. Failure of an Immigration Judge to conduct the bond hearing as ordered will entitle Petitioner to request a bond hearing before this court.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge