

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

MAHAMED AHMED-CALI

Petitioner,

v.

WILLIAM BARR, Attorney General;
KEVIN K. MCALLEENAN, Acting Secretary
of Department of Homeland Security; **TODD**
LYONS, Immigration and Customs
Enforcement, Enforcement and Removal
Operations, Acting Field Office Director;
CHRISTOPHER BRACKETT,
Superintendent of the Strafford County
Department of Corrections

Respondents.

Case No.:

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241
(EXPEDITED HEARING REQUESTED)

INTRODUCTION

Petitioner Mahamed Ahmed-Cali (hereinafter “Mr. Ahmed-Cali” or “Petitioner”) is an asylum seeker from Somalia who is subjected to unlawful and prolonged detention by Respondents (“the government”) without being afforded the most basic of procedural protections – namely, a bond hearing. Since he received a final order of removal on February 7, 2017, he has been detained in the government’s custody for *more than 2 years*. Further, ever since he presented himself to the port of entry on October 10, 2016, he has been in the government’s custody for *more than 2 years and 6 months*, despite having no criminal record. Throughout this

time, the government has never explained why Mr. Ahmed-Cali’s detention is reasonably related to any government purpose.

First, Mr. Ahmed-Cali’s prolonged detention violates the Due Process Clause of the Fifth Amendment and the Immigration and Nationality Act. This Court must order Mr. Ahmed-Cali’s immediate release because his detention bears no reasonable relation to any government purpose and his removal is not reasonably foreseeable. In the alternative, the Court must order an immediate bond hearing before this Court or before an immigration judge, where the government bears the burden of justifying by clear and convincing evidence that Mr. Ahmed-Cali’s detention is necessary to prevent his flight or to protect public safety.

Second, Mr. Ahmed-Cali is facing removal from the United States while he is litigating his Motion to Reopen before the Board of Immigration Appeals (“BIA”). Absent this Court’s relief, the government could attempt to remove him while his Motion to Reopen before the BIA is pending. Mr. Ahmed-Cali asks this Court to issue an order preventing his removal to Somalia until resolution of his Motion to Reopen, as this relief is necessary to afford his due process right to a determination of his entitlement to protection in light of changed country conditions, as well as other relief sought.

Petitioner further alleges as follows:

PARTIES

1. Petitioner Mahamed Ahmed-Cali was detained by the government when he presented himself to the San Ysidro Pedestrian Port of Entry near San Diego, California on or about October 10, 2016. After being transferred to the government’s immigration detention facilities in Massachusetts, Louisiana, Alabama, Florida, Country of Senegal, Georgia,

Louisiana, Alabama, he recently arrived at the Strafford County Department of Corrections in Dover, New Hampshire. He remains in immigration custody in Dover, New Hampshire.

2. Respondent William Barr is the Attorney General of the United States. In this capacity, he has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, and oversees the Executive Office of Immigration Review. He is sued in his official capacity.

3. Respondent Kevin K. McAleenan is the Acting Secretary of the United States Department of Homeland Security and is Petitioner's legal custodian. In this capacity, he directs the U.S. Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE"). As a result, Respondent McAleenan has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103. He is sued in his official capacity.

4. Respondent Todd Lyons is the Acting Field Office Director of Immigration and Customs Enforcement (ICE), Enforcement and Removal Operation, of Boston Field Office, which maintains authority over immigration detention in New Hampshire. He is sued in his official capacity.

5. Respondent Christopher Brackett is the Superintendent of the Strafford County Department of Corrections and is Petitioner's immediate custodian. He is sued in his official capacity.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331, 2241 (habeas corpus) and Article I, Section 9, Clause 2 of the U.S. Constitution ("Suspension Clause").

7. The federal district courts have jurisdiction to hear habeas claims by non-citizens contesting the lawfulness of their immigration detention. *Aguilar v. Immigration & Customs Enforcement Div. of the Dep’t of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007) (citing *Demore v. Kim*, 538 U.S. 510, 516 (2003)).

8. Generally, a challenge to removal must be raised in the court of appeals by petitions for review from a decision of the BIA, rather than in federal district court. *See id.* (explaining that Congress intended to channel immigration disputes into administrative proceedings). However, the provisions of the REAL ID Act of 2005 set forth at 8 U.S.C. § 1252 (“jurisdiction-stripping provisions”), which strip jurisdiction of this Court’s habeas corpus review power, are not applicable in this case.

9. The jurisdiction-stripping provisions cannot be used to deny Mr. Ahmed-Cali’s right to habeas corpus relief in this case without violating the Constitution’s Suspension Clause. The Suspension Clause is “violated where habeas corpus relief is foreclosed and alternative remedies are inadequate to ensure that the petitioner’s continued custody does not violate federal law.” *Compere v. Nielsen*, No. 18-cv-1036-PB, 2019 DNH 017, 2019 U.S. Dist. LEXIS 11593, at *14 (D.N.H. Jan. 24, 2019) (Barbadoro, J.) (citing *Boumediene v. Bush*, 553 U.S. 723, 792 (2008)); *see also Hussein v. Strafford County*, No. 18-cv-273-JL, 2018 DNH 101, 2018 U.S. Dist. LEXIS 82405, at *12-14 (D.N.H. May 16, 2018) (Laplante, J.); *see also Devitri v. Cronen*, 290 F. Supp. 3d 86, 93 (D. Mass. 2017) (“*Devitri I*”).

10. Venue is proper in the District of New Hampshire because Petitioner is currently detained at the Strafford County Department of Corrections in Dover, New Hampshire, in the territorial jurisdiction of this Court. 28 U.S.C. § 1391. *Vasquez v. Reno*, 233 F. 3d 688, 696 (1st Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

FACTS (APPLIED TO ALL COUNTS)

Petitioner fled Somalia

11. Mr. Ahmed-Cali was born in 1990 in [REDACTED] Somalia. [REDACTED]
[REDACTED]

12. [REDACTED]
[REDACTED]
[REDACTED]

13. Mr. Ahmed-Cali managed to escape alive, [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

14. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

15. [REDACTED]
[REDACTED]
[REDACTED]

16. After these incidents, he fled Somalia [REDACTED] [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

17. [REDACTED] he began his journey to the United States. He flew from [REDACTED] to Turkey and then went through Columbia, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, and Mexico. He finally arrived at the San Ysidro Port of Entry near San Diego, California on October 10, 2016, to seek asylum. *See Exhibit 3. Notice to Appear.*

Petitioner's Removal Proceedings and Detention

18. Since coming to the United States legally in October 2016, Mr. Ahmed-Cali has only lived in detention centers and jails, hoping one day to be released to experience all that American has to offer.

19. Mr. Ahmed-Cali expressed his fear of returning to Somalia the moment he presented himself to the Customs and Border Protection (“CBP”) agents in San Ysidro in 2016. He was found to have a credible fear of returning to Somalia.

20. At the time of his removal proceedings in 2017, Mr. Ahmed-Cali could not afford to hire an immigration attorney to present his asylum claim in immigration court. Even though the Immigration Judge found him to be credible, he denied his asylum application, claiming that he did not suffer harm on account of membership in a particular social group.

21. Mr. Ahmed-Cali received a final order of removal on February 7, 2017. *See Exhibit 2. Final Order of Removal.*

22. Mr. Ahmed- Cali wanted to appeal the decision, but since he did not have an attorney, he missed the deadline and ultimately failed to appeal the decision.

The December 7, 2017 Flight

23. Mr. Ahmed-Cali is one of 92 men and women whom the government subjected to inhumane conditions and abuse in an attempt to deport them to Somalia on December 7, 2017.

See Ibrahim v. Acosta, No. 17-cv-24574-GAYLES, 2018 U.S. Dist. LEXIS 13390, *7-8 (S.D. Fla. Jan. 26, 2018) (hereinafter “*Ibrahim*”) (concluding that the motion to reopen process was not an adequate substitute for habeas corpus relief under the circumstances; describing allegations of December 7, 2017 flight). For two days, the government forced Mr. Ahmed-Cali and his fellow deportees to sit shackled in an airplane chartered for the deportation flight, including 23 hours on a runway in Senegal. *See Exhibit 4. Fellow Deportees’ Declarations; Ibrahim*, ECF 3-2.

24. In the early morning hours of December 7, 2017, the government woke and shackled Mr. Ahmed-Cali and his fellow deportees with hard metal handcuffs binding their wrists that were tethered to a metal chain encircling their waists. *See Exhibit 4.* They were also placed in metal ankle shackles that were connected by a short metal chain. *Id.* Mr. Ahmed-Cali and his fellow deportees remained shackled for several hours before boarding the flight. *Id.* Immediately before boarding the flight, the shackles were tightened. *Id.* There were twenty to thirty ICE and contract guards on the plane with the 92 deportees. *Id.*

25. On December 7, 2017, the deportation plane left Louisiana and flew to Dakar, Senegal. *See Exhibit 4.* The plane sat on the runway in Senegal for almost a full day before returning to the United States. *Id.* During this entire time, Mr. Ahmed-Cali and his fellow deportees remained shackled and were not allowed to move around or even stand up. *Id.* The government has not denied that the deportees were forced to sit shackled for almost 48 hours. *Id.* The airplane bathrooms became full of waste and could no longer be used. *Id.* Because of the way they were shackled and forced to sit in close quarters with their fellow passengers, the government forced Mr. Ahmed-Cali and his fellow deportees to go without sleep for those two

days. *Id.* When Mr. Ahmed-Cali attempted to stand up to stretch his legs, he was pushed down by an ICE guard, cutting his knee on the metal seat – an injury that still hurts him to this day. *Id.* The airplane eventually left Senegal and arrived in Miami on December 9, 2017. *Id.* Upon arrival, Mr. Ahmed-Cali was detained at the Krome Processing Center in Miami, Florida. While there, Mr. Ahmed-Cali was a model detainee – having worked in the cafeteria and barbershop at the Krome Processing Center where he was detained for about a year.

Ibrahim v. Assistant Field Office Director Lawsuit

26. Mr. Ahmed-Cali was one of the plaintiffs in a high-profile class action lawsuit relating to the botched December 7 flight. *See Ibrahim v. Acosta*, No. 17-cv-24574-GAYLES, 2018 U.S. Dist. LEXIS 13390 (S.D. Fla. Jan. 26, 2018). This lawsuit sought stays of removal for individuals facing deportation to Somalia.

27. Although the district court granted the stay of removal, *id.*, the class action was ultimately dismissed after allowing the plaintiffs, including Mr. Ahmed-Cali, to file Motions to Reopen with Immigration Courts or the BIA.

Petitioner's Motion to Reopen

28. Mr. Ahmed-Cali found a pro bono counsel and filed a Motion to Reopen and Terminate Removal Proceedings with the Immigration Court in Boston, Massachusetts on July 14, 2018. His Motion is based on changed country conditions in his native country of Somalia that did not exist at the time of his individual hearing on February 7, 2017. Further, Mr. Ahmed-Cali asked the Immigration Court to terminate removal proceedings because the Notice to Appear filed by the government with the Immigration Court did not contain all required elements under 8 U.S.C. § 1229(a)(1), and thus rendering the Notice to Appear deficient in establishing jurisdiction over Mr. Ahmed-Cali.

29. On August 14, 2018, the Immigration Judge entered the order denying Mr. Ahmed-Cali's Motion to Reopen and Terminate. *See Exhibit 5. IJ's Decision on MTR.*

30. On September 1, 2018, Mr. Ahmed-Cali filed the notice of appeal with the BIA and submitted its brief in support of his appeal.

31. On March 19, 2019, the BIA remanded the appeal to the Immigration Judge because the Immigration Judge did not provide any findings of fact or legal analysis other than one form order and checked a box which stated: "The Court agrees with the reasons stated in the opposition to the Motion." *See Exhibit 6. BIA Decision on MTR Denial.*

32. Because the BIA could not review Mr. Ahmed-Cali's Motion to Reopen effectively without a complete record of proceedings, the BIA directed the Immigration Judge to resubmit his order with a full decision. *See id.* The BIA further ordered that Mr. Ahmed-Cali and the DHS will have an opportunity to submit briefs. *See id.*

33. Mr. Ahmed-Cali filed an emergency motion to stay with the Immigration Judge, and the motion was granted on April 12, 2019. *See Exhibit 7. Stay Order Granted by IJ.* Although the Immigration Judge stated that the stay is "allowed until full review by the BIA pursuant to remand order," *see id.*, the Immigration Judge's authority to grant the stay even after the review of the Motion to Reopen is transferred back to the BIA is questionable.

34. As of the filing of this petition, the Immigration Judge has not reissued his full decision yet.

35. If warranted, Mr. Ahmed-Cali is planning to file a petition for review with the First Circuit.

36. Since Mr. Ahmed-Cali presented himself at the border to seek asylum on October 10, 2016, he has been detained for *more than 2 years and 6 months*. After the issuance of the

final order of removal on February 7, 2017, Mr. Ahmed-Cali has been detained for *more than 2 years*, without any bond hearing despite no criminal record.

37. Mr. Ahmed-Cali is at risk of torture or death upon removal to Somalia by Al-Shabaab because he will be considered as an apostate and someone who holds religious and political beliefs contrary to its warped, terrorist version of Islam. *See Exhibits 1, 8, 9.*

LEGAL BACKGROUND

Post-Removal Detention

38. 8 U.S.C. § 1231 provides for post-removal detention. The first statutory basis for non-citizens' detention after the administrative final order of removal is 8 U.S.C. § 1231(a)(2). It provides that “[d]uring the [90-day] removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found . . . deportable under section 1227(a)(2) or 1227(a)(4)(B)” 8 U.S.C. § 1231(a)(2). The 90-day removal 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.
- (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B).

39. The second statutory basis for post-removal detention beyond the removal is 8 U.S.C. § 1231(a)(6). Non-citizens “removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) . . . may be detained beyond the removal period” 8 U.S.C. § 1231(a)(6).

40. Further, a non-citizen granted deferral of removal under the Convention Against Torture or who has filed a motion to reopen for consideration of deferral of removal is subject to the same post-removal-period detention authority. 8 C.F.R. § 241.4

41. In interpreting § 1231, in *Zadvydas v. Davis*, the Supreme Court held that non-citizens whom the government detain under an order of removal are entitled to freedom from excessive detention. 533 U.S. 678, 690-96 (2001).

42. The *Zadvydas* Court set a “presumptively reasonable period of detention” of six months. *Id.* at 699-701. Further, the Supreme Court instructed that in reviewing prolonged detention after six months, “if removal is not reasonably foreseeable, the [habeas] court should hold continued detention unreasonable.” *Id.* at 701.

43. In *Clark v. Martinez*, the Supreme Court held that *Zadvydas* applies to non-citizens like Mr. Ahmed-Ali found inadmissible as well as removable. 543 U.S. 371 (2005).

Right to a Hearing and Prolonged Detention under 8 U.S.C. § 1231(a)(6)

44. “Freedom from imprisonment – from government custody, detention, or other forms of physical restraint,” the *Zadvydas* Court urged, “lies at the heart of the liberty that [the Due Process] Clause protects.” *Id.* at 690. Under due process principles, detention must “bear [a] reasonable relation to the purpose for which the individual [was] committed.” *Id.* (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

45. Moreover, as detention becomes prolonged, the Due Process Clause requires a sufficiently strong justification to outweigh the significant deprivation of liberty, as well as procedural protections. *Id.* at 690-91. The *Zadvydas* Court was explicit that after six months, detention pursuant to 8 U.S.C. § 1231 would become presumptively unconstitutional, requiring a sufficiently strong justification. *Id.* at 701. This requires release, or at a minimum, a bond

hearing if a person has been detained for six months. *See Diouf v. Napolitano*, 634 F. 3d 1081 (9th Cir. 2011); *accord Guerrero-Sanchez v. Warden York City. Prison*, 905 F. 3d 208, 224 (3d Cir. 2018). Here, once again, the government has detained Petitioner in excess of two years.

46. Finally, to justify prolonged immigration detention, the government must bear the burden of proof by clear and convincing evidence that Petitioner is a danger or flight risk. *See Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). Where the Supreme Court has permitted civil detention in other contexts, it has relied on the fact that the government bore the burden of proof at least by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 750, 752 (1987) (upholding pre-trial detention where “full-blown adversary hearing,” requiring “clear and convincing evidence” and “neutral decisionmaker”); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (finding post-final-order custody review procedures deficient because, *inter alia*, they placed burden on detainee).

47. The requirement that the government bears the burden of proof by clear and convincing evidence is also supported by the application of the three-factor balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *First*, prolonged incarceration deprives noncitizens of a “profound” liberty interest. *See Diouf*, 634 F.3d at 1091-92. *Second*, the risk of error is great where the government is represented by trained attorneys while detained noncitizens are often unrepresented and frequently lack English proficiency. *See Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (requiring clear and convincing evidence at parental termination proceedings because “numerous factors combine to magnify the risk of erroneous factfinding” including that “parents subject to termination proceedings are often poor, uneducated, or members of minority groups” and “[t]he State’s attorney usually will be expert on the issues contested”). Moreover,

immigration detainees are incarcerated in prison-like conditions that severely hamper their ability to obtain legal assistance, gather evidence, and prepare for a bond hearing. *Third*, placing the burden on the government imposes minimal cost or inconvenience, as the government has access to the noncitizen's immigration records and other information that can be used to make its case for continued detention.

CLAIMS FOR RELIEF

COUNT 1
DUE PROCESS — PROLONGED DETENTION
(AS APPLIED TO DETENTION)

48. The foregoing allegations are realleged and incorporated herein.
49. The Due Process Clause of the Fifth Amendment to the United States Constitution requires an adequate hearing before a neutral decision maker to determine whether prolonged immigration detention is justified by the prevention of flight risk and danger to the community.
50. The Due Process Clause requires that the deprivation of Petitioner's liberty be narrowly tailored to serve a compelling government interest.
51. Mr. Ahmed-Cali has not had any bond hearing during his 2 year detention under 8 U.S.C. § 1231.
52. Mr. Ahmed-Cali's unreasonably prolonged detention without any bond hearing violates due process.

COUNT 2
IMMIGRATION AND NATIONALITY ACT — 8 U.S.C. § 1231(a)(6)
(AS APPLIED TO DETENTION)

53. The foregoing allegations are realleged and incorporated herein.

54. Petitioner's detention violates 8 U.S.C. § 1231(a)(6), as interpreted in *Zadvydas*. 533 U.S. 678, 701. Having been detained for more than 2 years following the date when the final order of removal was issued, Petitioner's removal is not reasonably foreseeable.

COUNT 3
**DUE PROCESS — DENIAL OF RIGHT TO LITIGATE MOTION TO REOPEN ON
ACCOUNT OF ELIGIBILITY FOR ASYLUM/WITHHOLDING OF REMOVAL/CAT
PROTECTION
(AS APPLIED TO REMOVAL)**

55. The foregoing allegations are realleged and incorporated herein.

56. Procedural due process requires that the government be constrained before it acts in a way that deprives individuals of life or liberty interests protected under the Due Process Clause of the Fifth Amendment.

57. The United States government is obligated by federal and international law, to hear the claims of non-citizens, regardless of their status, who have a credible fear of persecution or torture emanating from their home country before they are removed from the United States to that country.

58. Because the danger to Mr. Ahmed-Cali is based on changed country circumstances in Somalia, he has not received his core procedural entitlement—he has not had an opportunity to have his claims heard at a meaningful time and in a meaningful manner, that is, with respect to current conditions, not the conditions that existed at the time his removal order was issued. Removing Mr. Ahmed-Cali without giving him this opportunity violates due process guarantee of the Fifth Amendment. *See Devitri v. Cronen*, 289 F. Supp. 3d 287 (D. Mass. 2018) (“*Devitri II*”) (removal before petitioners had ability to file and litigate motions to reopen based on changes country conditions in Indonesia violated due process); *see also Compere*, No. 18-cv-

1036-PB, 2019 DNH 017, at *2 (removal of petitioner “to Haiti before he can litigate his motion to reopen would violate his rights under federal law”).

REQUEST FOR ORAL ARGUMENT

59. In accordance with Local Rule 7.1(d), counsel respectfully requests oral argument.

PRAYER FOR RELIEF

Petitioner asks that this Court grant the following relief:

- (1). Assume jurisdiction over this matter;
- (2). Order Respondents to release Petitioner immediately on his own recognizance or under parole, bond, or reasonable conditions of supervision;
- (3). In the alternative, order a constitutionally adequate, individualized bond hearing at which the government will bear the burden of establishing, by clear and convincing evidence, that Petitioner’s continued detention is justified;
- (4). Enjoin Respondents from removing Petitioner from the United States to Somalia until he has had the opportunity to complete his motion to reopen process, and to seek judicial review of that determination if necessary;
- (5). Enjoin Respondents from removing Petitioner from New Hampshire pending this Petition’s claims;
- (6). Award attorney’s fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. §504, if applicable; and
- (7). Order any further relief this Court deems just and proper.

Respectfully submitted this 25th day of April 2019.

MAHAMED AHMED-CALI,

By and through his Counsel,

/s/ SangYeob Kim

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