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P R O C E E D I N G S

THE CLERK: The Court has before it for consideration this afternoon oral argument in civil case 18-cv-921-JL, Hussein versus Strafford County House of Corrections Superintendent, et al.

THE COURT: All right. I don't usually use the microphone in the courtroom, but I know there's a person in the gallery who's got an accommodation for hearing.

Can you hear okay, ma'am?

SPECTATOR: I think so, thank you.

THE COURT: Okay. If you have difficulty hearing during the proceeding, just give me a wave and we can move you up closer to the jury box or something else. Okay?

SPECTATOR: Thank you very much.

THE COURT: Thank you.

All right. We're here for a hearing on this habeas petition in the immigration context. Why don't counsel identify themselves for the record and we'll start with the government and then we'll proceed.

MS. OLLILA: Terry Ollila on behalf of the United States.

THE COURT: Good afternoon.

MS. OLLILA: Good afternoon.

1 MR. WAHRER: Benjamin Wahrer on behalf of the
2 petitioner.

3 MR. BRADEN: Twain Braden for Mr. Hussein,
4 petitioner.

5 MR. KIM: SangYeob Kim.

6 MR. BISSONNETTE: Gilles Bissonnette on behalf
7 of the petitioner, your Honor.

8 THE COURT: Thank you. I have your documents
9 on this tablet here. I just want to pull them up real
10 quick.

11 All right. All right. Let me see if I can
12 establish some kind of commonality, just so we can have
13 a hearing and be having the same conversation, the same
14 argument about the same factors.

15 I realize that the parties disagree about what
16 the length of detention here really is and about the
17 significance of detention under two different statutory
18 schemes. I realize that, and there's -- there's
19 disagreement there and the Court will resolve that.

20 But can we agree -- and I'm talking about the
21 due process part of the argument here, the
22 constitutional argument. Can we agree on that aspect of
23 the case -- of the case, that the *Reid* factors that are
24 really -- they're not exactly binding on this Court as
25 it -- but you've both referred to them and I really

1 do is take a few minutes to take a look at a couple
2 things really quickly, a couple things you mentioned
3 during the hearing, and I also want to give the court
4 reporter a little break.

5 So I'm going to take a five- or ten-minute
6 recess if everybody has time.

7 MS. OLLILA: Thank you.

8 (Recess taken from 3:27 p.m. until 3:40 p.m.)

9 THE COURT: All right. Is there anything
10 anybody, either side, wanted to say before I rule, that
11 you didn't have a chance to say or you didn't think of
12 or anything?

13 MS. OLLILA: Not from the United States, thank
14 you.

15 MR. WAHRER: No, your Honor.

16 THE COURT: All right. This was a
17 difficult -- difficult matter to rule on. There's not a
18 lot of good authority. But the Court appreciates your
19 presentations, your thoughtful presentations and your
20 advocacy.

21 The Court's going to grant the habeas petition
22 in this case and it's going to order a hearing before
23 the immigration judge on or about November 14th, 2018.

24 The Court makes no ruling on the statutory
25 construction question of Section 1226(c) because of the

1 split in the circuit, the split in intracircuit
2 authority, with the en banc split on our courts in the
3 *Casteñeda* case, as well as the fact that there is the
4 issues pending before the U.S. Supreme Court. The Court
5 just declines to rule on that issue and it doesn't --
6 it's not necessary given the fact that the Court's going
7 to order the motion -- grant the petition for habeas
8 relief based on constitutional due process grounds.

9 The parties have agreed -- they don't agree on
10 much, but the one thing they do agree on is that the
11 Court should apply the *Reid* factors in making this
12 determination. So the *Reid* -- and I'll go through the
13 *Reid* factors right now in order.

14 First factor is the total length of detention.
15 The Court's view is that there's a good faith argument
16 that the length of detention hereunder 1226 is much
17 shorter and not constitutionally problematic since the
18 August conversion from 1231 detention to 1226 detention,
19 but I think the -- I think my view is that for due
20 process purposes, that really does elevate form over
21 substance and the Court rules that it's about a
22 nine-month period of detention.

23 It's the sum of, you know, March to -- March
24 2018 to the present. There was a brief looks like a
25 15-day intervention of time, but I don't think that's

1 constitutionally significant for due process reasons.
2 And I think this factor, therefore, cuts in Hussein's
3 favor.

4 While the prominent cases do involve longer
5 periods as Attorney Ollila pointed out, this period of
6 time, this nine months, is beyond the periods
7 contemplated by the *Zadvyd* case under Section 1231 and
8 the *Demore* case under 1226, so I think this factor rules
9 in favor of habeas relief.

10 The second factor is the foreseeability of
11 proceedings concluding, and I think this factor again
12 weighs in favor of Hussein. I don't think there's any
13 authority for the proposition that the Court is bound to
14 look no further than the next scheduled date, which is
15 what again? November what?

16 MR. WAHRER: 26th, your Honor.

17 THE COURT: November 26th. There's really no
18 predictable timeline here.

19 The conclusion of proceedings is not imminent
20 in this case and Hussein is not likely to be imminently
21 released absent a bond hearing. Any ruling from the
22 immigration court on his CAT petition may be followed by
23 appeals, so there's really no predictable timeline for
24 this or other avenues of relief.

25 The government has represented in its papers

1 that an ICE attorney involved in the case will recommend
2 that the agency will not appeal. The Court accepts that
3 representation in good faith, but it's just too
4 uncertain and too contingent for the Court to rely on
5 under these circumstances.

6 And the fact that release after a bond hearing
7 might cause the immigration judge to delay hearing on
8 the merits on the CAT petition doesn't have any real
9 weight from the Court's perspective for the due process
10 analysis and that -- that is a government policy beyond
11 Mr. Hussein's control.

12 The third factor is the comparison of the
13 detention -- the comparison of the detention period to
14 the criminal sentence.

15 The Court's view is that the relevant
16 criminal -- criminal sentence here is the one that is
17 attached to the 1226(c) detention and that is a -- a --
18 it's a one-year probation sentence on an underlying
19 felony. That's the deportation offense. That's the one
20 that matters for 1226, at least as I understand the
21 record, 1226 detention.

22 Now, between that time, between the federal
23 felony conviction and his 2006 detention by ICE, Hussein
24 did plead guilty to and was detained for about a year in
25 prison on a Pennsylvania offense. And I view that as

1 really irrelevant to a due process analysis in this
2 case, but it's certainly going to be relevant at the
3 bond hearing and I don't have any real opinion about
4 that. So I think this factor, the third factor, like
5 the first two, weighs in favor of Hussein, in favor of
6 habeas relief here.

7 The fourth factor the Court views as really a
8 wash. It doesn't really cut in favor of relief or a
9 denial of relief, mostly because I don't feel like -- I
10 don't feel confident in making any real determination
11 about the promptness of these proceedings and to whom
12 to attribute delay and -- mostly because I've got
13 neither -- no real evidence from either side. I do have
14 an affidavit from the petitioner here, but I don't view
15 that as concrete enough for the Court to rely on and so
16 I think neither party gets -- really gets the credit on
17 factor four.

18 The fifth factor is the likelihood that
19 proceedings will culminate in favor of the removal
20 order. This factor doesn't weigh against Hussein and if
21 it does weigh in his favor, it's only slightly. But the
22 country conditions material submitted by Hussein in his
23 first habeas petition, the Court can take judicial
24 notice of that and I don't have any evidence to the
25 contrary, really, factually undermining any of that

1 information. I'm comfortable relying on it.

2 And BIA did grant Hussein's motion to reopen.
3 That doesn't have a lot of weight, but at least suggests
4 a chance that proceedings will not result in a final
5 removal order, so I think that factor, factor number
6 five, likelihood of removal, cuts in Hussein's favor.

7 Now, there are other factors. One factor
8 was -- that's been raised that other district courts
9 have examined, this was pointed out by petitioner's
10 counsel, is the facility. It's a detention facility.
11 There's no question it's a jail. So I think that
12 favor -- cuts in favor -- that factor, I should say,
13 cuts in favor of habeas relief.

14 There is also the fact, I think, that the --
15 the government has twice released Hussein from
16 immigration custody, once in 2007 and then earlier this
17 year. The most recent relief -- release was very brief
18 and it's not clear, really, how -- it's not really clear
19 that at the time of relief if ICE considered -- thought
20 that would be a brief or lengthy release. It's really
21 not clear. But it did change and he was detained
22 1226(c) shortly thereafter.

23 Actually, no, he was detained again 1231
24 shortly thereafter because the travel documents
25 materialized. I'm sorry. So I guess that release could

1 have been much lengthier, depending on the availability
2 of those documents.

3 Another factor is the subsequent criminal
4 conviction beyond the underlying felony. I think, if
5 anything, that probably cuts against habeas relief, but
6 it seems much more relevant to the bond hearing than to
7 this proceeding, so the Court doesn't give it too much
8 weight.

9 And this is just something the Court's been
10 thinking about and this factor, I think from a due
11 process perspective, it hasn't really been argued by
12 anybody, but it strikes me as unusual in this case, is
13 that this pending -- this current 1226(c) detention was
14 imposed after a Section 1231 detention and after a prior
15 1226 detention from which he was released, apparently,
16 based on what I've heard today, under the statutory
17 exception for some type of cooperation.

18 It doesn't appear to the Court that there was
19 ever a hearing resulting in the reimposition of 1226(c)
20 detention and I think that has due process implications
21 that nobody's really argued, but I wonder if there's --
22 whether he's entitled to some type of proceeding
23 before -- at the conclusion of whatever grounds be
24 permitted the release that would permit redetention.

25 I don't want to get into that now, but it

1 doesn't appear there's been any process that resulted in
2 the -- any process that resulted in the -- like a bond
3 hearing or anything else or any type of immigration
4 hearing that resulted in the termination of his 1226(c)
5 release. I'm not aware of it.

6 So my view is that 1226(c) detention following
7 his 1226(c) release in 2007 and then 1231 detention in
8 2018 without any process may have due process
9 implications and certainly based on the record I have
10 cuts in favor of habeas relief in this case.

11 So the Court orders that the defendant be
12 awarded a bond hearing by the immigration judge on or
13 before November 14th, 2018. I'll put that in an order
14 today. I'll issue it. There won't be a written order.
15 This hearing, this transcript, is the Court's order
16 except that there'll be a clear document you can use to
17 notify immigration that you're entitled to a hearing, a
18 bond hearing.

19 All right. Are there any other findings or
20 rulings anybody would like me to make today?

21 MS. OLLILA: Not from --

22 THE COURT: I'll start with the petitioner.
23 Anything else?

24 MR. WAHRER: Nothing, your Honor.

25 THE COURT: Government?

1 MS. OLLILA: Not from the United States, but
2 please note the United States' objection for the
3 record to the extent to which we have to preserve our
4 rights --

5 THE COURT: Of course. Yeah. You're on the
6 record objecting to this I think throughout the
7 proceeding and it's so noted now.

8 All right, Counsel. I'll get an order out
9 right away.

10 MS. OLLILA: Thank you, your Honor.

11 MR. WAHRER: Thank you, your Honor.

12 MR. BRADEN: Thank you, Judge.

13 (Proceedings concluded at 3:52 p.m.)
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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 11/9/18

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR