

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHEN XIANG GUI,	:
	:
Petitioner	:
	: CIVIL ACTION NO. 3:CV-03-1965
v.	:
	: (Chief Judge Vanaskie)
TOM RIDGE, <u>ET AL.</u> ,	:
	:
Respondents	:

MEMORANDUM

I. Introduction

Before this Court is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. The Petitioner, Chen Xiang Gui, a detainee of the Bureau of Immigration and Customs Enforcement (“BICE”), is presently incarcerated at the Pike County Correctional Facility in Lords Valley, Pennsylvania. Based on Zadvydas v. Davis, 533 U.S. 678 (2001), Gui challenges his continued detention pending his removal to China. For the reasons that follow, I will grant Gui’s habeas corpus petition and direct his release from custody forthwith.

II. Background

Petitioner Gui is a native and citizen of the People’s Republic of China. He entered the United States in 1990 on a visitor’s visa. Gui failed to return to China at

the expiration of his visa, overstaying his authorized admission to this country.

In 1991, Gui was arrested in New York for kidnaping with intent to collect ransom and assault with intent to cause physical injury. (Resp. to Pet., Ex. D, Post-Order Custody Review Worksheet.) Gui pled guilty to kidnaping and was sentenced to a two to six year term of incarceration. He was paroled from that sentence in 1994. In 1998, while on parole, Petitioner was arrested in Chicago, Illinois, and incarcerated. In May of 2002, he was sentenced to five years in prison on an aggravated battery conviction. (Resp. to Pet., Ex. B, Order of Commitment and Sentence to Illinois Department of Corrections.) On May 28, 2002, BICE issued a "Notice to Appear," apprising Gui that he was subject to removal based upon both his conviction of an aggravated felony and his overstay of his entry visa. At that time, Gui was taken into custody by BICE.

On July 24, 2002, Gui was ordered removed to China based on his conviction of an aggravated felony. (Resp. to Pet., Ex. C, Final Order of Removal.) The Final Administrative Removal Order was served on Gui on August 14, 2002. Gui waived his right to appeal the decision of the final order of removal.

On August 23, 2002, while in BICE custody, Gui was extradited to New York to face a parole violation charge resulting from his Illinois conviction. After serving his parole violation sentence, the New York State Department of Corrections

returned Gui to BICE custody on December 2, 2002. Gui has remained continuously in BICE custody since that time, awaiting removal to China. (Dkt. Entry 1, Petition.)

By Notice dated January 6, 2003, Gui was apprised that if he was not removed within the "removal period" set forth in 8 U.S.C. § 1231(a), which the notice explained to be "normally" 90-days of his entering BICE custody with a final order of removal, a District Director would "review [his] case for consideration of release on an Order of Supervision." (Ex. C to the Habeas Petition.) The notice explained that release was dependent upon Gui showing "by 'clear and convincing evidence' that [he] **will not** pose a danger to the community and **will not** be a significant flight risk." (Id.) Gui was further told that his custody status would be reviewed on or about April 4, 2003.

On April 17, 2003, the District Director issued a decision to continue Gui's detention, explaining:

You have not demonstrated that you would not present a threat to society if you were released. A review of your file reveals that you have multiple convictions for criminal behavior involving assaultive conduct. Your criminal history combined with little or no employment history, indicate a strong probability of recidivism. . . .
You have not provided the Service with any evidence that you would not be a flight risk.

(Id.) While the reviewer making this recommendation looked favorably upon Gui's lack of disciplinary reports during his detention, the following adverse factors, aside from

Gui's criminal history, were also considered:

Subject is currently out of status having overstayed his B-2 visa by over 10 years. Subject had an outstanding warrant in NY based on a probation violation from his prior weapons conviction. Subject assumed other identities while in custody in Chicago. . . . Subject has offered no letter demonstrating remorse or any evidence of rehabilitation. Subject did not submit evidence of employment prospects. Subject has no monies or property in the United States.

While the Chinese government has issued travel documents to Chinese citizens who have no status in the U.S., . . . this has been known to be a very slow process. The subject is a threat to society and a flight risk if released as demonstrated by the violent nature of his crimes, and lack of funds or property in the U.S. Subject has demonstrated that he is a recidivist.

(Resp. to Pet., Ex. D, Post-Order Custody Review Worksheet.) The District Director decision informed Gui that if travel documents to effect his removal were not obtained within "another" 90 days, "control will be transferred to the [BICE] Headquarters Post Order Detention Unit [HQPDU]." (Ex. C to the Habeas Petition.)

The record reflects the following efforts to remove Gui to China: On January 6, 2003, a request for travel documents was submitted to the Chinese Consulate in New York. A follow-up request was sent approximately a month later. Telephone calls to the Chinese Consulate on March 31, 2003 and April 1, 2003, were not answered. On April 2, 2003, a Ms. Fu of the Consulate of China stated she could

not find the travel document request, and an additional request was sent. Telephone inquiries with the Consulate were attempted between April 7, 2003, and April 10, 2003, without success. (Id.) On September 26, 2003, a BICE email documents an attempt “to persuade the PRC [People’s Republic of China] to issue more documents on a faster pace.” (Resp. to Pet., Ex. E, E-mail of Thomas Strzishar.) Petitioner Gui was one of three Chinese detainees for whom HQPDU sought additional information.

On August 25, 2003, Petitioner wrote to the HQPDU, requesting a custody review. (Habeas Petition, Ex. C, Gui’s Letter of August 25, 2003.) BICE did not respond to this request. Gui initiated this habeas corpus proceeding on November 3, 2003 .

III. Discussion

A final administrative order for Gui’s removal was entered on July 24, 2002. He is presently in BICE custody, and has been available for removal since New York authorities returned him to BICE custody on December 2, 2002.

The detention and release of aliens ordered removed is governed by the provisions of 8 U.S.C. § 1231. Under § 1231(a), the Attorney General has 90 days to remove an alien from the United States after his order of removal. In this case, the

removal period began on December 2, 2002.¹ Detention during the 90-day removal period is mandatory. 8 U.S.C. § 1231(a)(2). Once the 90 day period has expired, an alien can be released, subject to specified conditions. 8 U.S.C. § 1231(a)(3).

However, pursuant to 8 U.S.C. § 1231(a)(6), criminal aliens, inadmissible aliens, or other aliens considered a flight risk or danger to the community may be detained beyond the removal period. 8 U.S.C. § 1231(a)(6).

The issue of whether § 1231(a)(6) authorizes the Attorney General to detain a removable alien indefinitely beyond the 90 day removal period was resolved by the Supreme Court in Zadvydas v. Davis, 533 U.S. 678 (2001). Recognizing that the indefinite detention of aliens “would raise serious constitutional concerns,” the Court concluded that § 1231(a)(6) “limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.” Id. at 689. The Court held that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.” Id. at 699. The court recognized six (6) months as a “presumptively reasonable period of detention.” Id. at 701. With respect to detention

¹Under 8 U.S.C. § 1231(a)(1)(B)(iii), the removal period in Gui’s case began to run when he was returned to BICE custody by New York.

after the six month period, the Court explained:

[F]or detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink. 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. (emphasis added). The Court provided the following instructions for the consideration of habeas claims brought by detained aliens complaining of prolonged confinement pending removal:

[T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute’s basic purpose, namely assuring the alien’s presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien’s release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions. And if removal is reasonably foreseeable, the habeas court should consider the risk of the alien’s committing further crimes as a factor potentially justifying confinement within that reasonable removal period.

Id. at 699-700 (citations omitted). “Thus, if a federal court determines in the habeas action that removal is not ‘reasonably foreseeable,’ the alien should be released from

custody subject to conditions of supervised release that are 'appropriate in the circumstances.'" Seretse-Khama v. Ashcroft, 215 F. Supp. 2d 37, 46 (D. D.C. 2002).

After six months of post-final order detention, Zadvydas places the burden on the alien to show that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future" 533 U.S. at 701. Upon such a showing, BICE "must rebut it to keep him in custody." Abdel-Muhti v. Ashcroft, 314 F. Supp. 2d 418, 424 (M.D. Pa. 2004).

Following Zadvydas, the Attorney General promulgated regulations establishing a process for determining the custody of aliens subject to prolonged detention awaiting execution of a removal order. See, 8 C.F.R. § 241.13. Section 241.13 applies to aliens, such as Gui, "who are subject to a final order of removal and are detained under the custody review procedures provided at [8 C.F.R.] § 241.4 after the expiration of the removal period" 8 C.F.R. § 241.13(a). Section 241.13 "tracks Zadvydas's mandate in that it requires a deportable alien to first establish a basis that removal in the 'reasonably foreseeable future' is not possible." Jabir v. Ashcroft, No. Civ. A. 03-2480, 2004 WL 60318, at *5 (E.D. La. Jan. 8, 2004). A detained alien may trigger HQPDU review of whether there is a significant likelihood of removal in the reasonably foreseeable future by way of written request. 8 C.F.R. § 241.13(d). Faced with such a request, the HQPDU generally must respond with ten

(10) business days, acknowledging receipt of the request for review and explaining the process that will be followed to consider the alien's request. 8 C.F.R. § 241.13(e)(1). The HQPDU must then assess the alien's cooperation with removal efforts and consider a host of other factors, including the history of BICE's "efforts to remove aliens to the country in question or to third countries, . . . the ongoing nature of . . . efforts to remove this alien . . . , the reasonably foreseeable results of those efforts, the views of the Department of State regarding the prospects of a removal of aliens to the country or countries in question, and the receiving country's willingness to accept the alien into its territory." 8 C.F.R. § 241.13(f). The regulations caution that, while "there is no presumptive period of time within which the alien's removal must be accomplished, . . . the prospects of the timeliness of removal must be reasonable under the circumstances." 8 C.F.R. § 241.13(f). The HQPDU is to issue a written decision based upon the administrative record. 8 C.F.R. § 241.13(g). If HQPDU determines that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future, the alien is to be released, subject to appropriate conditions, unless "special circumstances" exist. 8 C.F.R. § 241.13(g)(1).²

²The "special circumstances" warranting continued detention of removable aliens who are not likely to be deported in the reasonably foreseeable future are defined in 8 C.F.R. § 241.14. As a general rule, such aliens pose a special risk, such as carrying contagious diseases that are a public safety risk, 8 C.F.R. § 241.14(b),
(continued...)

Respondents concede “that Gui has been in post-order detention for a period exceeding six months and thus such detention is no longer presumptively reasonable.” (Resp. to Habeas Corpus Petition at 5.) Gui made a request for HQPDU determination of the prospects of his removal by letter dated August 25, 2003, after the six month post-removal order period had passed. HQPDU did not, however, respond to the request. Indeed, even after being served with the habeas corpus petition in this case, BICE took no formal action to assess the likelihood of Gui’s removal in the reasonably foreseeable future.

Despite the absence of a written determination by HQPDU required by 8 C.F.R. § 241.13, respondents argue that Gui has failed to show that there is no significant likelihood of his removal within the reasonably foreseeable future. Respondents’ argument is without merit. Gui has now been in custody awaiting removal for more than twenty (20) months, or more than three times the “presumptively reasonable” period. As one court has observed, “[w]hile the shifting scales of reasonableness weigh heavily in favor of the authority of the Executive to detain a removable alien during the initial six-months of detention, those scales increasingly

²(...continued)

pose serious adverse foreign policy consequences, 8 C.F.R. § 241.14(c), are being detained because of anti-terrorism concerns, 8 C.F.R. § 241.14(d), or have been determined to be “specially dangerous,” either because of the alien’s criminal record or by virtue of mental illness. 8 C.F.R. § 241.14(f).

shift in favor of a detainee as the period of detention extends beyond six months and the likelihood of removal remains remote." Jabir, 2004 WL 60318, at *8. "Under the sliding scale adopted in Zadvydas, the lengthy period of petitioner's post-removal confinement has certainly caused the 'reasonably foreseeable future' to shrink to the point that removal must be truly imminent" Seretse-Khama, 215 F. Supp. 2d at 48. The record suggests only meager efforts on the part of BICE to effect removal of Gui, with no evidence of any attempts to secure travel documents being made after September of 2003. Under these circumstances, Gui has carried his initial burden of showing that there is no significant likelihood of his removal in the reasonably foreseeable future. See Shefqet v. Ashcroft, No. 02 C 7737, 2003 WL 1964290, at *4 (N.D. Ill. Apr. 28, 2003) (petitioner in post-final-order detention for more than 17 months carried burden of showing that there was no significant likelihood of removal in the reasonably foreseeable future).

BICE nonetheless maintains that evidence submitted in response to Gui's petition shows a significant likelihood of timely removal. This assertion is belied by the fact that more than eight months have passed since this assertion was made, and Gui remains detained in the Pike County Correctional Facility. (See August 8, 2004 letter of Gui to this Court, Dkt. Entry 10.) Furthermore, the evidence presented by the Respondents, consisting of naked data showing the number of criminal aliens

successfully removed to China for the fiscal years 1997 through 2002, is not persuasive. In this regard, other courts have not been impressed by evidence of an arguable indication of past success in removing aliens to a particular country to establish a significant likelihood of removal of the alien in question in the reasonably foreseeable future. See, e.g., Rajigah v. Conway, 268 F. Supp. 2d 159, 167 (E.D.N.Y. 2003); Lin v. Ashcroft, 247 F. Supp. 2d 679, 686 n.9 (E.D. Pa. 2003); Shefqet, 2003 WL 1964290, at *5-6; Seretse-Khama, 215 F. Supp. 2d at 49-50. As these courts have recognized, a statistical presentation of past successful repatriation efforts may actually undermine the government's position that removal in a particular case will occur in the reasonably foreseeable future. Past success for others suggests that there is some reason why the foreign government is refusing to accept the petitioner in question. Furthermore, the data presented by the Respondents in this case does not indicate the number of attempted removals to China made each year or the length of time that passed between a request for issuance of travel documents and the issuance of the documents. "Finally, while 'the history of the Service's efforts to remove aliens to the country in question' is one consideration to take into account in determining the likelihood of removal in the foreseeable future, this factor becomes increasingly less important the longer a country refuses to provide travel documents for a particular removable alien." Id. at 50. Thus, the abstract numbers presented by the

Respondents in this case afford no basis for a reliable prediction that there is a significant likelihood of Gui's removal in the reasonably foreseeable future.

This conclusion is buttressed by the fact that respondents have not shown diligence on their part to effect Gui's removal. The lax efforts shown in this case "in no way support the contention that petitioner's removal is significantly likely in the reasonably foreseeable future." Id.

IV. Conclusion

In summary, Gui has shown that there is no significant likelihood of his removal to China in the reasonably foreseeable future. In this regard, Gui's burden was not to show that removal is impossible. See Shefqet, 2003 WL 1964290, at *6. Respondents have not contended that Gui has failed to cooperate in effecting his removal. Moreover, respondents have not rebutted Gui's showing of the absence of a significant likelihood of removal in the reasonably foreseeable future. "Although some possibility of removal may exist, Petitioner's period of post-final-order detention has been sufficiently long such that a remote, non-specific possibility [of removal] does not satisfy Respondents' burden." Id. Accordingly, Gui is entitled to be released from custody, subject to appropriate conditions of supervision imposed by BICE.³ See

³ This Court's determination is limited to the Zadvydas issue of the prospects of removal in the reasonably foreseeable future. No opinion is intimated as to whether
(continued...)

Abdel-Muhti, 314 F. Supp. 2d at 430-31. An appropriate Order follows.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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³(...continued)

continued detention of Gui may be justified under the "special circumstances" set forth in 8 C.F.R. §241.14.

4. The Clerk of Court is directed to mark this matter **CLOSED**.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania