

No. 04-2490

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**AHMED HASSAN ALI a/k/a Ahmed Warsame
A73 488 577,**

Petitioner-Appellee,

v.

**MARK CANGEMI, Interim District Director,
Bureau of Immigration and Customs Enforcement,**

Respondent-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MINNESOTA, CIVIL NO. 03-3189 (DWF/JSM)**

BRIEF FOR RESPONDENT-APPELLANT

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BRIEF FOR RESPONDENT-APPELLANT

STATEMENT OF JURISDICTION

The Court's jurisdiction to review the June 1, 2004 Order of the district court derives from 28 U.S.C. §§ 1291 and 1292(a)(1), which provide the courts of appeals with jurisdiction over appeals from all final judgments of the district courts

and from a grant of injunctive relief, respectively. The district court granted Petitioner-Appellee Ahmed Hassan Ali's (Ali) petition for writ of habeas corpus, ruling that Ali cannot be removed to Somalia in the foreseeable future in light of the injunction issued in Ali v. Ashcroft, 346 F.3d 873 (9th Cir. 2003) (en banc rehearing petition pending), and that he therefore must be released from detention under the decision of the Supreme Court in Zadvydas v. Davis, 533 U.S. 678 (2001). The district court thus ordered the Bureau of Immigration and Customs Enforcement (ICE) to "release [Ali] from custody immediately, subject to such terms and conditions as Respondents reasonably deem necessary to ensure that [Ali] can be located and detained when Respondents are in a position to legally remove him from the United States." App. 21.¹ Thus, the district court's order is a final appealable decision under 28 U.S.C. § 1291 or, in the alternative, it is a decision which grants injunctive relief, and thus it is appealable under 28 U.S.C. § 1292(a)(1). Respondent-Appellee filed a timely notice of appeal on or about June 21, 2004.

¹ The abbreviation "App." followed by a number refers to a page of Respondent-Appellant's Appendix on file with the Court.

STATEMENT OF THE ISSUE

Whether the district court erred in ordering Ali's release from custody on the ground that actual removal is unlikely to occur in the reasonably foreseeable future, where this case is squarely controlled by the Court's decision in Jama v. Ashcroft, 362 F.3d 1117 (8th Cir. 2004) (Jama II), in which the Court applied the Zadvydas standard to essentially identical facts and held that the alien in that case could be detained pending the Supreme Court's decision in Jama v. INS, 329 F.3d 630 (8th Cir. 2003),^{2/} cert. granted, – U.S. –, 124 S.Ct. 1407 (Feb. 23, 2004) ("Jama I").

STATEMENT OF THE CASE AND FACTS

Ali, a native of Somalia, arrived in the United States by plane from Sweden in January 1995 with a fraudulent Swedish passport in the name of "Mohammed Jama." App. 1-2, 27-31, 34-44. Upon inspection at the airport, he stated that his name was Ahmed Warsame, that he was from Somalia, and that he would be persecuted if returned to Somalia. App. 2, 29, 31, 63. He asked for an immigration hearing. Id. He was paroled into the United States, and was placed in exclusion proceedings. App. 2, 44. He gave a Virginia address at which he said he would reside. App. 29. Two weeks after his attempted entry, he went to Canada on

² This Court denied rehearing and rehearing en banc on August 6, 2003, and recalled the mandate on November 10, 2003.

January 30, 1995 and sought asylum there under the name "Ahmed Mohammed Ali," without giving notice to the INS. App. 2, 29, 66, 68-69,70-73. He did not appear at his March 1995 exclusion hearing, but he subsequently requested that the hearing in the United States be moved from New York to Virginia. App. 2, 63. That request was granted, and another hearing was scheduled for August 17, 1995. Id. He failed to appear at the rescheduled hearing, and an exclusion order was entered against him *in absentia*. App. 2, 45-46, 63. In the meantime, Canada granted Ali "convention refugee status," but not asylum, which allowed him to remain in Canada temporarily. App. 2, 70, 100.

In March 1996, Ali filed an application for asylum in Texas, stating that his name was "Ahmed Hassan Ali," that he was from Somalia, and that he had entered the United States from Mexico. App. 3, 47. He used different biographical information and failed to disclose that he previously was placed in exclusion proceedings. App. 47, 52, 54. Unaware of his former identity and the prior exclusion order, an official of the former Immigration and Naturalization Service (INS) granted Ali's asylum application. App. 3, 54-56.

On August 5, 1997, Ali was sent a notice at the Virginia address he previously supplied to report for deportation pursuant to the exclusion order entered against him under the name "Ahmed Warsame." He failed to report on

August 28, 1997, as directed. App. 58-59, 61.

In July 2002, the government apprehended Ali in Minnesota pursuant to the warrant of removal based on the 1995 exclusion order. App. 3, 59-61, 63-65.

Upon a search of Ali's car pursuant to a warrant, a refugee travel document was found under the name "Ahmed Hassan Ali" and a visa from Norway, which showed that he entered Norway on January 26, 2001, using that travel document. App. 65, 100. INS records show his reentry into the United States on March 11, 2001, using the same refugee document.^{3/} Further investigation revealed that he traveled to Somalia during this trip abroad. App. 110. In addition, investigation revealed that Ali had made false statements on three of his Employment Eligibility Verification forms (INS Form I-9), claiming to be a lawful permanent resident. App. 64. At the time of his apprehension, Ali claimed to be transient and that he had just moved in with a friend but did not know the friend's phone number. App. 65, 107-08. A subsequent search of his vehicle, however, turned up statements for four different bank accounts at two banks which had a combined balance well in excess of \$45,000. Id. Investigation revealed that Ali has apparently traveled

³ A check with Swedish authorities indicates that they matched petitioner's fingerprints to a Swedish male, Hassan Mohamed Warsame, born in Ethiopia in 1966. App. 105. The Swedish record is based on fingerprints taken on March 4, 1991, at a police station in Katineholm, Sweden. Id.

widely and sought identity documents in several states. He holds drivers licenses from Minnesota and North Carolina, and obtained his social security number in Tennessee shortly after he was granted asylum in Texas. App. 64-65. He also apparently was routinely obtaining extensions of his Canadian work authorization. App. 66.

Ali's grant of asylum was subsequently rescinded on September 3, 2002. App. 3, 57. Three days later, Ali was charged with using a false passport, social security fraud, and making a false statement to an immigration officer. App. 4, 63-64. He pleaded guilty to using a false passport and was sentenced to time served. App. 4, 94. Thereafter, he was placed in detention by ICE on February 24, 2003. App. 4, 99.

Less than three months later, on May 15, 2003, Ali filed a habeas corpus petition challenging his continued detention. App. 6, 99. Among other things, Ali claimed that he could not be removed from the United States because of the injunction issued in Ali v. Ashcroft, 346 F.3d 783 (9th Cir. 2003), and that his release is therefore mandated by Zadvydas v. Davis, 533 U.S. 678 (2001). App. 5-6.

In March 2004, a magistrate judge recommended that the habeas corpus petition be granted and that Ali's immediate release be ordered. App. 18-19. The

magistrate judge found that, because removal of Somali aliens has been enjoined by the Ninth Circuit in the Ali decision, Ali's removal is unlikely in the reasonably foreseeable future. App. 17. The magistrate judge rejected the government's claim that the decisions in Jama I and Jama II controlled, rather than the injunctive relief granted in Ali. App. 11-12.

In a June 1, 2004 Memorandum Opinion and Order, the district court adopted the magistrate judge's Report and Recommendation. App. 20-23. The district court judge limited this Court's recent decision in Jama II to its facts and found that it did not mandate Ali's continued detention because "Ali's position will not be affected as immediately by the Jama I decision in the same manner as Jama himself will be affected." App. 22. Due to the injunction set in place by Ali, the district court found that Ali is not likely to be removed in the reasonably foreseeable future. Id. The district court therefore granted Ali's habeas corpus petition and ordered ICE to release Ali immediately, subject to such terms and conditions reasonably necessary to ensure that he could be located and detained when the government was in a position to legally remove him from the United States. App. 21.

In an Order dated June 30, 2004, the Court temporarily granted Respondent-Appellant's motion for a stay of the district court's June 1, 2004 Order.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's grant of the habeas petition. The district court's finding that Ali must be released from detention because his removal to Somalia is not reasonably foreseeable under Zadvydas directly conflicts with the law of this Circuit as determined in Jama II. In Jama II, this Court applied the Zadvydas standard for continued detention to essentially identical facts and held that the alien in that case could be detained pending the Supreme Court's decision in Jama I. Because Ali is as likely as Jama to be removed to Somalia "in the reasonably foreseeable future," Zadvydas does not compel his release.

ARGUMENT

I. STANDARD OF REVIEW

The disposition of a habeas petition by a district court is reviewed *de novo* by this Court. See Grove v. Bureau of Prisons, 245 F.3d 743, 746 (8th Cir. 2001). Questions involving statutory interpretation are reviewed *de novo*. See United States v. McIntosh, 236 F.3d 968, 972 (8th Cir.), cert. denied, 532 U.S. 1022 (2001). Factual findings are reviewed for clear error. See Johnston v. Luebbers, 288 F.3d 1048, 1051 (8th Cir. 2002).

II. THE DISTRICT COURT ERRED IN ORDERING ALI RELEASED

The district court held that Ali cannot be removed to Somalia in the foreseeable future in light of the injunction issued in Ali and that he therefore must be released from detention under the Supreme Court's decision in Zadvydas. The district court erred because its order directly conflicts with the law of this Circuit as determined in Jama II.

A. The Relevant Law In The Eighth And Ninth Circuits

1. Ali's Removal To Somalia Is Currently Barred By The Ninth Circuit's Decision In Ali v. Ashcroft

In Ali v. Ashcroft, 346 F.3d 783 (9th Cir. 2003), the Ninth Circuit considered whether, under INA § 241, 8 U.S.C. § 1231, an alien may be removed to a country such as Somalia that has no functioning central government capable of "accepting" him. The Ninth Circuit held that removal is precluded in this circumstance and entered a nationwide injunction barring removal of aliens to Somalia. Id. The injunction applies to a nationwide class consisting of "[a]ll persons in the United States who are subject to orders of removal, expedited removal, deportation or exclusion to Somalia that are either final or that one or more Respondents believe to be final, excluding any person with a habeas petition pending, or on appeal, raising the issue of unlawful removal to Somalia under 8

U.S.C. § 1231(b)." Ali v. Ashcroft, 213 F.R.D. 390, 408 (W.D. Wash.), aff'd, 346 F.3d 873 (9th Cir. 2003).

Although Petitioner-Appellee Ali is being held in Minnesota, within the Eighth Circuit, he is a member of the nationwide class certified by the Ninth Circuit in Ali because his habeas corpus petition was filed after the district court's issuance of the injunction in Ali, 213 F.R.D. 390. The injunction does not apply to aliens who had habeas corpus petitions challenging removal and pending at the time of its issuance. As the instant habeas petition does not challenge removal and was not pending at the time the Ali injunction was entered, Ali is a class member in the Ali v. Ashcroft case. Thus, his removal to Somalia is currently barred.

2. The Eighth Circuit's Decisions In Jama I And II

In Jama I, this Court considered the identical question as the Ninth Circuit in Ali – whether an alien may be removed to a country that has no functioning central government capable of "accepting" him – but reached the opposite conclusion. Thus, in Jama I, this Court held that the absence of a functioning central government in a country does *not* bar removal of an alien to that country, and thus that the Department of Homeland Security had statutory authority to remove the alien to Somalia without first establishing that Somalia would accept his return. 329

F.3d 630.^{4/} Subsequently, the Court stayed and recalled its mandate in Jama I pending the Supreme Court's disposition of Jama's petition for certiorari. Id. The Supreme Court subsequently granted the petition, see Jama v. INS, 124 S.Ct. 1407 (2004), and will decide whether an alien may be removed to Somalia in the absence of a functioning central government. The effect of this Court's recall of the mandate in Jama I is to preclude Jama from being removed to Somalia during the pendency of the Supreme Court's proceedings.

In Jama II, the Court next considered whether, under Zadvydas v. Davis, 533 U.S. 678 (2001), Jama himself could be confined pending the Supreme Court's disposition in Jama I. 362 F.3d 1117. In Zadvydas, the Supreme Court construed 8 U.S.C. § 1231(a)(6), and it concluded that the government's authority to detain aliens, in the absence of special circumstances, could be sustained when an alien's removal was reasonably foreseeable. See 533 U.S. at 699-700. Further, the Supreme Court placed a presumptively valid temporal limitation of six months on the government's detention authority. See 533 U.S. at 701. Thereafter, an alien could obtain release only if he demonstrated that there was no significant likelihood

⁴ Because Jama's habeas petition was on appeal in the Eighth Circuit when the district court certified the nationwide class in Ali, Jama never became a member of that class. See Ali 213 F.R.D. at 408. Thus, unlike Petitioner-Appellee Ali, Jama's removal was not precluded by the Ninth Circuit's injunction in Ali.

of his removal in the reasonably foreseeable future.

Reversing the decision of the district court ordering Jama released from immigration detention, the Eighth Circuit concluded in Jama II that the district court had erred in concluding that there was no significant likelihood of Jama's removal in the reasonably foreseeable future and in ordering his release. 362 F.3d 1117. The Court reasoned that Jama's removal was reasonably foreseeable because the United States Supreme Court had granted certiorari and would decide the case within a "reasonable time." Id. The Court further noted that "it would be wrong to conclude that there is no significant likelihood that the government will prevail," reversed the district court's release decision, and ordered the continued detention of Jama pending the outcome of the Supreme Court's review.^{5/} Id. Thus, this Court concluded in Jama II that removal of an alien to Somalia is reasonably foreseeable, and thus that continued detention of that alien is permissible under Zadvydas, where the alien's removal is temporarily precluded pending the Supreme Court's decision of the ultimate question of whether an alien may be removed to Somalia under 8 U.S.C. § 1231 when there is no functioning government capable of accepting him.

⁵ On May 19, 2004, this Court denied Jama's petition for rehearing en banc in Jama II.

B. Ali's Removal To Somalia Is Reasonably Foreseeable Under Jama II, And His Continued Detention Is Thus Permissible Under Zadvydas

This case is squarely controlled by this Court's decision in Jama II, which applied the Zadvydas standard for continued detention to essentially identical facts and held that the alien in that case could be detained pending the Supreme Court's decision in Jama I. Because Jama II is binding circuit precedent in this case, the district court erred in reaching a contrary result.

In explaining its decision, the district court in this case alluded to the injunction in Ali v. Ashcroft and stated that "Petitioner Ali's petition will not be affected as immediately by the Jama decision in the same manner as Jama himself will be affected." App. 22. The district court also noted that "[d]ue to the injunction set in place by Ali v. Ashcroft, Petitioner Ali's removable [sic] is not likely in the reasonably foreseeable future." Id. However, the distinction drawn by the district court between Ali's situation and that of Jama is a distinction without a difference. It is true that Ali prevailed in the Ninth Circuit while Jama lost in the Eighth Circuit. However, as the Eighth Circuit stayed its mandate in Jama I during the pendency of the Supreme Court's proceedings, Jama's removal to Somalia is currently precluded in the same way as Ali's removal to Somalia is precluded, even though Jama is not a member of the Ali class. Thus, the fact that Ali is a member

of the Ali class while Jama is not is irrelevant, as the removal of both aliens is precluded during the pendency of the Supreme Court's proceedings.

Now that the Supreme Court has granted certiorari in Jama I, there is no basis for regarding Ali as having a meaningfully greater likelihood than Jama of achieving ultimate success on the merits. Both Ali and Jama have asserted the same objection to removal to Somalia -- i.e., that Somalia lacks a functional central government capable of "accepting" them -- and in the Supreme Court their claims will stand or fall together. In other words, once the Supreme Court decides the Jama I case, for all intents and purposes it also will decide the Ali case insofar as removal to Somalia is concerned. Therefore, Ali is as likely as Jama to be removed "in the reasonably foreseeable future." Zadvydas, 533 U.S. at 701.

It is true that, if the government prevails in the Supreme Court in Jama I, its decision will not automatically terminate the existing injunction entered in Ali v. Ashcroft. Rather, some further order would be necessary to achieve vacatur of that injunction. Entry of such an order, however, would be a purely ministerial step if the government's legal position prevails in Jama I. Thus, Ali is as likely as Jama to be removed "in the reasonably foreseeable future." Zadvydas, 533 U.S. at 701.⁶

⁶ In its Ali v. Ashcroft decision, the Ninth Circuit affirmed the district court's decision to order to the immediate release of three alien named petitioners, on the ground that "there was no significant likelihood of Petitioners' removal in the

As Ali is as likely as Jama to be removed to Somalia "in the reasonably foreseeable future," Zadvydas does not apply, and the district court erred in ordering Ali's release from immigration detention.

reasonably foreseeable future because of the court's holding that their removal to Somalia would violate § 1231(b) in conjunction with the lack of evidence that conditions in Somalia are likely to change in the near future." 346 F.3d at 891. Jama II is not inconsistent with Ali, which was decided before the Supreme Court granted certiorari to resolve a conflict in the Circuits over whether an alien could be removed to Somalia. Unlike Ali, Jama II could and did rely on the grant of certiorari as evidence that this conflict would be resolved in a reasonable time and the government may prevail. Jama II, 362 F.3d at 1117 ("it would be wrong to conclude that there is no significant likelihood that the government will prevail" on the merits of its claim before the Supreme Court in Jama I). In any event, to the extent that the Ninth Circuit's holding in Ali conflicts with this Court's holding in Jama II, Jama II clearly controls this case as binding circuit precedent.

CONCLUSION

For the foregoing reasons, Respondent-Appellant respectfully asks the Court to reverse the district court's order releasing Ali from immigration detention and to deny his petition for a writ of habeas corpus.

Respectfully submitted,

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Dated: July 20, 2004

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is proportionally spaced using Times New Roman 14-point typeface and contains 3, 403 words of text. Respondent has used WordPerfect 9.0 to prepare this brief.

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CERTIFICATE OF VIRUS-FREE DISKETTE

I certify that, pursuant to Eighth Circuit Rule 28A(d), the enclosed 3 ½ inch computer diskette containing Respondent's Brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I certify that on July 20, 2004, two paper copies and a digital version of the **BRIEF FOR RESPONDENT-APPELLANT** were served on petitioner's counsel by placing them in the Department of Justice mail room for same day mailing, by Federal Express, addressed to:

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