

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 03-3189 DWF/JSM

AHMED HASSAN ALI,)
a/k/a Ahmed Warsame,)
)
Petitioner,)
)
v.)
)
MARK CANGEMI, Interim District)
Director, Bureau of Immigration)
and Customs Enforcement,)
)
Respondent.)

**MEMORANDUM IN SUPPORT OF
MOTION FOR STAY**

Mark Cangemi, District Director, Immigration and Customs Enforcement (ICE), moves for a stay pending a determination by the Solicitor General (SG) whether he may file a Notice of Appeal and pending such an appeal. ICE will likely prevail on appeal because the issue is on all fours with the mandate in the second appeal in Keyse G. Jama v. Ashcroft, App No. 04-1127 (8th Cir., May 27, 2004) (Jama II) (copy attached). Moreover, Petitioner, Ahmed Hassan Ali (Ali), presents a significant risk of flight. He is homeless, without job prospects and has entered the United States with a false passport, failed to appear for a hearing on whether he should be deported and detained by the District Court pending a criminal proceedings.^{1/} This Court should grant a stay until the

¹Ali was detained in United States v. Warsame, Crim. No. 02-272 (JRT/FLN), in which he was convicted of use of a false passport. Such undisputed facts distinguish this case from Ahmed Abdi Mohamed v. Aljets, Civ No. 03-2468 DWF/JSM, which is pending on appeal. There, ICE did not request a stay because the risk of

issues in the instant case are resolved on appeal.

I. THE STANDARD FOR A STAY IS THE SAME AS THE STANDARD FOR GRANTING A PRELIMINARY INJUNCTION.

The standard for a stay of a writ of habeas corpus is the same as the standard for a preliminary injunction. Spain v. Podrabac, 68 F.3d 1246 (10th Cir. 1995); See generally In re Hops Antitrust Litigation, 832 F.2d 470, 472-73 (8th Cir. 1987), Gans v. Merrill Lynch Futures, Inc., 814 F.2d 493 (8th Cir. 1987). There are four factors which must be considered in assessing a request for a preliminary injunction: (1) the threat of irreparable harm to the movant if it is denied, (2) the balance between this harm and the injury inflicted on other litigating parties, (3) the likelihood that the movant will succeed on the merits, and (4) the public interest. See Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 113-14 (8th Cir. 1981); see also Lucacela v. Reno, 161 F.3d 1055, 1058 (7th Cir. 1998); Ignacio v. INS, 955 F.2d 295, 299 (5th Cir. 1992) (applying the same four-factor test to deny a request for a stay of deportation). The burden is on the movant to show that a stay should be granted. Abbassi v. Immigration and Naturalization Service, 143 F.3d 513, 514 (9th Cir. 1998).

If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has

flight pending deportation was less than presented in the instant case.

raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

Dataphase Systems, 640 F.2d at 113. Here, ICE meets its burden and a stay should be granted.

A. The Likelihood of The Government's Success on The Merits and The Irreparable Harm That the Government Would Suffer If Ali Is Released Favor Staying His Release.

(1) There is a strong likelihood of the government's success on the merits.

In Zadvydas v. Davis, 533 U.S. 678 (2001), the Supreme Court was confronted with the prospect of indefinite detention because the government was unable to remove the alien. See 533 U.S. at 684-86. No agreement or custom existed between two sovereigns - the United States and the government of the aliens' native countries - concerning repatriation. In the instant case, however, the inability to remove Ali arose from judicial action and inaction. Indeed, ICE has successfully removed an alien to Somalia where he opted out of the Ali class.

Here, Ali has not been removed because of an injunction in Ali v. Ashcroft, 346 F.3d 873 (9th Cir. 2003), which conflicts with the Eighth Circuit opinion in Jama v. Immigration and Naturalization Service, 329 F.3d 630 (8th Cir. 2003) (Jama I). After certiorari was granted in Jama I, the petitioner moved for release from custody. The district court granted release. The Eighth Circuit summarily reversed the release holding that because the end of litigation was reasonably foreseeable, petitioner's removal was

reasonably foreseeable.^{2/} Jama II. Likewise, Ali is similarly situated and his removal reasonably foreseeable. Therefore, the district court's order is inconsistent with the recent mandate in Jama II.

The Court's order also places ICE in a double bind. In the Eighth Circuit, ICE has six months to remove Ali without implicating any due process issues discussed in Zadvydas. The instant Petition was filed well before that time had expired. According to this Court's Order and analysis, ICE must release Ali because more than six months expired before the Court's final order. Under Zadvydas, however, not only may ICE detain an alien for six months, it is entitled to consider whether the instant petitioner presents a risk of flight the permits his detention beyond the statutory six month removal period.

Finally, ICE is likely to prevail because a court must consider the merits of a habeas corpus petition as they existed at the time of filing the petition. See Jones v. Jerrison, 20 F.3d 849, 852 (8th Cir. 1994); Nelson v. Tahash, 347 F.2d 500, 501-502 (8th Cir. 1965) (premature habeas action may be filed again once it ripens). This Court, however, considered the merits as they existed at the time the court issued its order, more than a year after the petition was filed and did not consider defenses that

²There are two different opinions in Jama. This Court's order cites the pervious published opinion. It does not refer to the later reversal of a second order in Jama.

existed at that time.

(2) The government will suffer irreparable harm if Ali is released.

The government will suffer irreparable harm if Ali is released from detention. In another case that was pending before the United States District Court for the District of Minnesota, an alien filed a claim similar to Ali. See Omar, et al. v. Immigration and Naturalization Service, No. 02-1387 (D. Minn.) (Davis, J.), appeal pending, No. 03-2653 (8th Cir.). After one of the aliens in Omar was released, that alien, Mahad Mohamed Omar, fled to Canada disobeying the conditions of release by declining to notify the government of his departure. Consequently, the government has no remedy to pursue against Mahad Mohamed Omar so long as he remains in Canada, where he has, according to Omar's counsel, obtained asylum.

Here, the risk of flight to a foreign country is even greater. As ICE's undisputed pleadings and exhibits demonstrated, Ali does not have a residence. When arrested, he lived in his car. In his most recent detention review, he stated he would stay with an unidentified "friend" for whom he did not have an address. On top of these risks of flight, Ali entered the United States after purchasing a false passport, then fled to Canada while a hearing was pending. Ali is a significant risk of flight while his removal to Somalia is pending.

B. The Public's Interest is Served by A Stay of The District

Court's Release Order, And the Irreparable Harm to The Government and The Public's Interest Outweighs Harm to Ali.

The relative harm to Ali is minimal. He voluntarily returned to Somali while hiding in the United States. He has demonstrated the means, ability and desire to maintain connections with his native country regardless of the conditions in that country. Indeed, Ali's ability to obtain false passports, medical care in Somalia and travel extensively suggests resources inconsistent with living out of a car unless he is purposefully avoiding detection while in the United States.

The public interest also supports staying the courts order. Executing final orders of removal is of primary concern to society, especially where individuals are fraudulently present and remain in the United States by violating the law. Detaining Ali will prevent him from intentionally fleeing removal.

Ali has not challenged his removal. Rather, he only challenged the government plans to remove. Without dispute, Ali is subject to removal. Ali's continued detention until such time as the Supreme Court decides Jama I or an appeal is filed does not outweigh the irreparable harm to the government and public interest, if flees while awaiting removal.

II. ICE SHOULD RECEIVE A TEMPORARY STAY WHILE THE SOLICITOR GENERAL REVIEWS A REQUEST FOR APPEAL.

The government respectfully requests a temporary stay of the district court's order of release pending the SG's review of the

ICE's request to appeal. As noted above, the government possesses a strong likelihood of success on the merits and, absent a temporary stay of the district court's order, the government would be irreparably harmed.

The U.S. Attorney's office will promptly inform the Court when the SG makes an appeal determination.^{3/}

CONCLUSION

For the foregoing reasons this court should stay its order while the SG considers ICE's request to appeal the Order and while any ensuing appeal is pending. In the alternative, it should amend its judgment to conform to the mandate in Jama II and the opinion in Jama I, a copy of which is included as Exhibit 1.

Dated is __3__ day of June 2004.

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³Based on information and belief, the memorandum to the SG is being prepared at the same time as this motion.