

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

AHMED HASSAN ALI,)	
)	
Petitioner,)	
)	
V.)	Response to Motion for Stay
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

Mr. Ali, through counsel, respectfully responds to the government’s motion for a stay pending review of the case by the Solicitor General of this Court’s Order granting his Petition for Writ of Habeas Corpus and Ordering his immediate release. For the reasons set forth below, the standard for granting this extraordinary relief has not been met. The motion for a stay pending review of the case by the Solicitor General should be denied.

The record in this case fails to support several of the elements necessary for an injunction. Far from irreparable injury, the scenarios offered to substantiate this element constitute relief for the government. As such, the balance of harms tips decisively in Mr. Ali’s favor. Further, because Mr. Ali is a member of the nationwide class certified in Ali v. Ashcroft, 346 f.3d 873 (9th Cir. 2003), the government’s chances of success on appeal are guarded at best. The litigation is likely to extend far into the future. Under these circumstances, Zadvydas v. Davis, 533 U.S. 678 (2001) compels Mr. Ali’s release, just as this Court ordered. Finally, the stay flies in the face of the public interest in this case.

Irreparable Harm

In order to prevail in its petition for injunctive relief, the government must establish that irreparable harm will result if a stay is not granted.¹ The government's argument for irreparable harm is based on the speculation that, if released, Mr. Ali will legally relocate to another country, possibly Canada, there to obtain asylum.² The government would have this Court conclude that this outcome will follow Mr. Ali's release because this is what happened in one other case.³ For further support, the government claims, without reference, that Mr. Ali entered the United States under a false passport, was living in his car when arrested, and articulated a release plan in which he would stay with a friend if and when released.⁴

Put simply, these claims fall woefully short of irreparable harm. First, common sense refutes the suggestion that Mr. Ali will leave for asylum in Canada because one other person did so. This Court and others in the District of Minnesota have released a number of Somalis who were subject to final orders of removal, none of which have taken the path that the government speculates Mr. Ali will follow. The assertion that "one other person did this, so Mr. Ali will too" is overcome by the record in other cases, if nothing else. Further, the proffered circumstances surrounding Mr. Ali's entry into and residence in the United States reflect nothing so much as a common means of entry, followed by indigence. Neither of these are unusual for immigrants, current or past.

¹ See, e.g., Dataphase Systems v. C.L. Systems, 640 F.2d 109, 113-14 (8th Cir. 1981).

² June 3, 2004, Memorandum in Support of Motion to Stay at 5.

³ Omar v. INS, 02-1387 (D. Minn.).

⁴ Id.

Finally, the argument fails because what is characterized as injury is in fact not injury at all. As a member of the class certified in Ali v. Ashcroft, 346 f.3d 873 (9th Cir. 2003), Mr. Ali is subject to a final order of removal. If he obtains lawful residence elsewhere, the government receives its desired objective. Put simply, this is not an injury.

Likelihood of Success On the Merits

In a nutshell, the government's argument with respect to this element is predicated on the prediction that its position in Jama v. INS, 329 F.3d 630 (8th Cir. 2003) will endure. Several problems are apparent on the surface of this view. First, although the government prevailed at the Eighth Circuit, there is no consensus that this result will endure Supreme Court scrutiny. Any suggestion to the contrary is no more than speculation about the final result of the Supreme Court's review, following briefing and argument. Further, Jama was neither a member of the class nor a beneficiary of the injunction in Ali v. Ashcroft. Decisions concerning the petitioner in this case's release must necessarily take the reality of this injunction and its impact under Zadvydas into account.

_____ Mr. Ali is a member of the class defined by the United States District Court in Ali v. Ashcroft, 213 F.R.D. 390 (W.D.Wash. Jan. 17, 2003),⁵ and therefore the recent contrary Eighth Circuit ruling in Jama v. I.N.S., 2003 WL 21212090 (8th Cir. 2003), does not control or affect his case. In Ali, a district court certified, over the heavily litigated objection of BICE, a nationwide class of Somalis facing removal to Somalia and enjoined the BICE from deporting

⁵ The United States has appealed the Ali decision in the Ninth Circuit Court of Appeals, and it is the understanding of Mr. Ali's counsel that the court in that case is hearing the matter on an expedited basis.

any members of the class. That class was defined to include:

All 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 Somalis under 8 U.S.C. § 1231(b).

See Ali, 213 F.R.D. at 408.

By the plain language of this class, Mr. Ali is included. Mr. Ali was ordered excluded and deported from the United States on August 17, 1995. Moreover, as with many other members of the class, BICE issued an arrest warrant on January 30, 2002, as part of its post-September 11 crackdown efforts to enforce outstanding removal and deportation orders for Somalis, and Mr. Ali was taken into custody in July of that year pursuant to that warrant. He is plainly included in the class action decision of Ali.

Neither the validity of the class certification nor the substantive ruling in that case precluding removal of Somalis from the United States is at issue in this case or is properly before this Court. These issues will of necessity be litigated elsewhere. As such, a likelihood in this case of success on its merits has not been demonstrated. Further, success or failure lies in the distant future, which speaks directly to the balance of harms.

Balance of Harms

To receive an injunction in this case, the government must establish that the harm that will result from the injunction is less than that which will result if no stay is issued. As shown above, no showing of harm, irreparable or otherwise, has been made. If a stay is granted, Mr. Ali will remain incarcerated as the Ali v. Ashcroft litigation follows its lengthy course. The

government contends that the harm that will result to Mr. Ali if the injunction is granted is “minimal.”⁶ The Court can appropriately be offended by this characterization. Mr. Ali was arrested in July, 2002. He is about to enter his third year of imprisonment. Litigation concerning the class certification and injunction to which he is a beneficiary will extend far into the future. Few harms exceed the indefinite deprivation of liberty, which is what will result from the stay that the government seeks.⁷ Indeed, short of execution, no greater harm can lawfully be imposed.

The Public Interest

Public interest may reside in the eye of its beholder. Nonetheless, the public interest in this case can fairly be articulated as including the following considerations, which weigh against granting a stay in this case. The public has an interest in having the decisions of its courts be respected by representatives of its government. This extends to class certifications and injunctions such as those issued in Ali v. Ashcroft. The public has an interest in seeing the civil rights that are established by its courts be vindicated in reality, and again in having these rights and remedies not be impeded by representatives of its government. This extends to the relief and rights recognized in Zadvydas. The public interest opposes the stay sought here.

⁶ June 3, 2004, Memorandum in Support of Motion to Stay at 6.

⁷ The government may respond that the injunction in this case only seeks to stay Mr. Ali’s release pending review of the case by the Solicitor General. It would be nice to believe this. The likely reality is instead that an extension of any stay will be sought pending the appeal that will almost certainly result from this review. Counsel for Mr. Ali is unaware of any case in this District in which a Petition was granted and an appeal was not filed.

Conclusion

For the reasons set forth above, the elements necessary for the injunctive relief sought by the government have not been established. Because they are lacking, the Motion for Stay of Order should be denied.

Dated: June 4, 2004

Respectfully submitted,

s/ Katherine M. Menendez

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