UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

YU ZHOU, Petitioner	:	
v.	:	CIVIL NO. 3:CV-01-0863
JOHN ASHCROFT, Respondent	:	(Judge Kosik)

ORDER

AND NOW, THIS 15TH **DAY OF APRIL, 2002,** in accordance with the accompanying Memorandum, **IT IS HEREBY ORDERED AS FOLLOWS:**

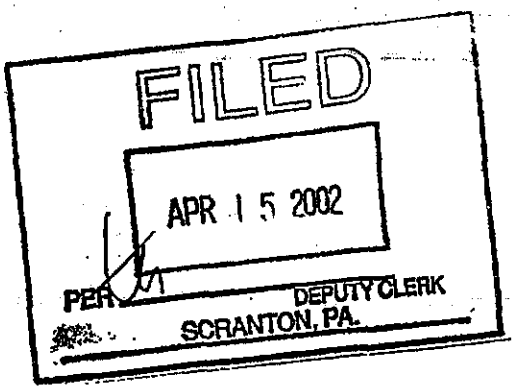
1. The petition for writ of habeas corpus is granted.

2. The INS is directed to immediately formulate a plan of supervisory release consistent with 8 U.S.C. § 1231(a)(3) and to implement such plan, including the release of petitioner, within thirty (30) days from the date of this Order.

3. Petitioner is advised that the failure to abide by any of the terms of his supervisory release may result in the consequences set forth in the accompanying Memorandum.

4. The Clerk of Court is directed to **CLOSE** this case.

EDWIN M. KOSIK
United States District Judge



(22)
4/15/02
TS

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

YU ZHOU,	:	
Petitioner	:	
v.	:	CIVIL NO. 3:CV-01-0863
JOHN ASHCROFT,	:	(Judge Kosik)
Respondent	:	

MEMORANDUM

Yu Zhou filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 on May 16, 2001, challenging his continued detention by the Immigration and Naturalization Service (INS) pending his removal to the People's Republic of China. He is represented by counsel in this matter. On May 22, 2001, respondent was ordered to show cause why the petition should not be granted. (Doc. 2.) A response to the petition was filed on June 13, 2001, following the grant of an enlargement of time. (Doc. 5.) Thereafter, petitioner filed a traverse. (Doc. 7.) Supplements to these pleadings were later submitted by the parties pursuant to an Order issued by the court on August 2, 2001. (Docs. 9-11.)[1] On October 15, 2001, the court issued an Order dismissing Yu's petition without prejudice, and referring

[1] Respondent was directed to file a supplemental brief specifically addressing the impact on this action, if any, of the United States Supreme Court decisions of INS v. St. Cyr, 533 U.S. 289 (2001); Calcano-Martinez v. INS, 533 U.S. 348 (2001); and Zadvydas v. Davis, 533 U.S. 678 (2001). Petitioner was also afforded the opportunity to reply to any supplement filed by respondent.

the petition to the INS as a request for review under 8 C.F.R. § 241.4 based on the United States Supreme Court's decision in Zadvydas. Thereafter, a motion to reinstate this action filed by petitioner was granted by the court on January 16, 2002.[2] The petition is now ripe for consideration and will be granted in accordance with the following.

I. Background

Petitioner is a native and citizen of the People's Republic of China. He entered the United States on February 9, 1995, as a legal permanent resident. On April 1, 1997, he was convicted in Queens County, New York, of burglary in the first degree. He was sentenced to an indeterminate term of 3 to 6 years. On July 9, 1998, the INS issued to petitioner a Notice to Appear, advising him that he was removable from the United States based on § 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, which provides for removal of aliens who commit an aggravated felony as defined in the Act. An Order of Removal was entered against him on January 12, 1999. That order became final when it was not appealed by February 11, 1999. On June 2, 2000, Yu was released from state custody, and taken into INS custody. He is currently in INS detention at the Tensas Parish Detention Center in Waterproof, Louisiana.

On June 28, 2000, the INS requested travel documents from the Chinese Consulate on behalf of Yu. The INS renewed this request on August 23, 2000. On October 31, 2000, the Chinese Consulate notified the INS by letter that after reviewing Yu's case, China had

---

[2] The basis of the motion to reinstate was that petitioner had, in fact, received his required review by the INS prior to the court's issuance of the January 16, 2002 Order. Because the INS had decided that Yu should remain in detention, the issues as originally presented in Yu's habeas petition were now ripe for review by this court. Further, the respondent concurred in petitioner's request to reinstate this action.

decided that it would not accept him. (Doc. 1 Ex. 1.) Despite this letter, the INS once again renewed its request on December 8, 2000.

In April of 2001, the INS conducted a custody review of Yu which resulted in a decision to continue his detention. The deportation officer provided the following rationale for this decision:

> The detainee has used 5 aliases, 4 dates of birth, and 2 different addresses. Aside from China the detainee has also used Pakistan as a place of birth. These preceding factors make him a high flight risk. The detainee was also convicted of a crime which involved violence, this in my opinion makes him an extreme danger to society. The only reason Mr. Yu is still detained is because the Chinese Consulate refuses, for no reason, to issue him a travel document. Due to the aforementioned reasons I am recommending the continued detention of Mr. Yu.

(Doc. 6, Ex. A at 5, 4/01 INS Decision to Continue Detention.)

On October 1, 2001, the INS conducted a second custody review.[3] The INS again decided to continue Yu's detention. The rationale provided to Yu for this decision was, in relevant part, as follows:

> You received a final order of removal to China on January 12, 1999. You did not appeal this decision, thus making it administratively final. The INS requested that the Chinese embassy issue a travel document to physically remove you to China. On August 17, 2001, the INS along with the department of State presented a list of Chinese nationals to the Chinese Consulate for attention. Your case was one of those submitted.

---

[3] This was the INS review conducted in response to the Supreme Court's decision in Zadvydas. Following this decision, the Attorney General created a new procedure for the review of indefinite detainee cases. Petitioner filed a Request for Release pursuant to these procedures prior to the time the court issued its order directing the INS to consider petitioner's instant petition as a request for release. As such, petitioner had actually received his INS review pursuant to the new procedures prior to the issuance of the court's order directing the INS to do so.

> To date, China has not yet issued the requested document.
>
> The Service's experience, however, demonstrates that it is likely that a Chinese national may be removed to that country. In Fiscal Year (FY) 2000, 531 persons were removed to China. For the first half of FY 2001, 274 persons have already been removed to China. You have not demonstrated any evidence that your case is an exception. You have not shown good reason to believe that your removal is unlikely.

(Doc. 14, Ex. A, 10/1/01 INS Decision to Continue Detention.)

In the instant petition, Yu challenges his continued detention by the INS. He argues that his continued indefinite detention violates his constitutional rights, particularly in light of the Supreme Court's decision in Zadvydas.

II. Discussion

Petitioner does not challenge his Final Order of Removal. Rather, Yu argues that the failure of the INS to remove him from the United States, and his continued indefinite detention, are in violation of his due process rights. In particular, he asserts that he has been in post-removal INS detention for over 20 months because the INS has been unable to obtain the travel documents necessary to deport him to China. He further contends that there is no significant likelihood of his removal in the near future because the Chinese Consulate has specifically stated that they will not accept him back into China as a deportee. As such, petitioner argues that in light of the principles set forth by the Supreme Court in Zadvydas, he is entitled to be released from INS custody.

As noted above, Yu was ordered removed from the United States on January 12, 1999. The removal order became final on February 11, 1999. He remains in the custody of the INS pending his removal to the People's Republic of China. Title 8 of the United States Code, section 1231 provides the statutory framework regulating the detention, release and

removal of aliens ordered removed from the United States. Pursuant to 8 U.S.C. §1231(a), the Attorney General shall remove an alien from the United States within 90 days after the date that the removal order becomes administratively final. During this 90 day period, detention of the alien is mandatory. 8 U.S.C. §1231(a)(2). At the expiration of this 90 day period, if the alien is not removed and still remains in the United States, he may be released under the supervision of the Attorney General. 8 U.S.C. §1231(a)(3). However, 8 U.S.C. § 1231(a)(6) provides that: "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2)[4], or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)."

The number of cases are increasing where removable aliens are detained far beyond the 90 day period pending their removal from the United States. This is particularly evident in cases where aliens are ordered deported to such countries as Cambodia, Cuba and Vietnam where the governments have refused to repatriate their citizens who have been ordered removed from the United States. Ngo v. INS, 192 F.3d 390, 395 (3d Cir. 1999). In fact, the Third Circuit has recognized that at times repatriation efforts move "at a speed approximating the flow of cold molasses." Id. at 398.

The potential indefinite detention of removable aliens was recently addressed by the

---

[4] Section 1227(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." The petitioner was ordered removed based on this provision.

Supreme Court in the case of Zadvydas v. Davis, 533 U.S. 678 (2001). In Zadvydas, the Court stated: "In our view, the statute [which allows the detention of removable aliens], read in light of the Constitution's demands, 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." 533 U.S. at 689. The Court concluded that detention is no longer permissible "once removal is no longer reasonably foreseeable." Id. at 699. The Court then recognized a period of 6 months as a presumptively reasonable period of detention. Id. at 701. The Court went on to hold that "[a]fter this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for 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." 533 U.S. at 701.

The court will briefly review the facts underlying the Zadvydas case and decisions by the Fifth and Ninth Circuits following remand. The Zadvydas case consisted of the following two consolidated immigration cases based upon similar facts: Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) and Ma v. Reno, 208 F.3d 815 (9th Cir. 2000). In Zadvydas, the Fifth Circuit had held that Zadvydas' detention did not violate the Constitution because his "eventual deportation was not 'impossible,' good faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review."

Zadvydas, 533 U.S. at 685. In Ma v. Reno, the Ninth Circuit had held that the continued detention of Ma, a Cambodian alien, violated due process in that there was no realistic chance Ma would be deported due to the lack of a repatriation agreement between the United States and Cambodia. Id. at 686.

The Supreme Court vacated both the Fifth Circuit's decision in Zadvydas and the Ninth Circuit's decision in Ma finding that the detention of an alien pending deportation violates due process if there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. The Supreme Court then remanded both cases to enable the Fifth and Ninth Circuit courts to apply the principles announced in Zadvydas.

In reviewing the Zadvydas case on remand, the Fifth Circuit found that Zadvydas had "no significant likelihood of removal in the reasonably foreseeable future." Zadvydas v. Davis, ___ F.3d ___, 2002 WL 385663 (5th Cir. March 12, 2002). As such, his continued detention was not constitutionally permissible under the principles set forth by the Supreme Court. This decision was based on the facts that Zadvydas was born in a displaced person camp in Germany and, while he immigrated to this country in 1956, he never became a United States citizen. In addition, Germany refused to accept him because he was not a German citizen, and despite Lithuanian heritage, Lithuania also rejected him. Even his wife's country of origin, the Dominican Republic, would not accept Zadvydas. No significant likelihood of removal in the reasonably foreseeable future existed for Zadvydas because no country would accept him. Id., 2002 WL 385663 at *2.

On remand, the Ninth Circuit Court of Appeals in Ma also found that there was no likelihood of the petitioner's removal in the reasonably foreseeable future, and held that he was subject to release under the principles announced by the Supreme Court in Zadvydas.

See Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001.) In reaching this conclusion, the court focused on the facts that "there was no 'extant or pending' repatriation agreement," and also that there was an insufficient showing that a repatriation agreement was likely within the reasonably foreseeable future.[5] Id. at 1099.

In applying the Zadvydas standard to the instant facts, the court finds that Yu has provided good reason to believe there is no significant likelihood that he will be removed in the reasonably foreseeable future. Yu comes forward with a letter from the Chinese Consulate stating, in no uncertain terms, that after reviewing Yu's file, China will not accept him back as a deportee. In an effort to rebut this evidence, the INS presents the following arguments. They first acknowledge that the Chinese Consulate has issued the letter referred to by petitioner. Despite this fact, the INS states that they again requested that the Chinese embassy issue a travel document to remove Yu to China. On August 17, 2001, the INS and the State Department presented a list of Chinese nationals to the Chinese Consulate for attention, and Yu's case was apparently one of the cases on the list. The INS admits, however, that China has not issued any travel document for Yu, or for that matter, indicated in any way that they have any intention of taking him back into China.

The INS further presents the following statistics in support of their contention that Yu will be repatriated in the reasonably foreseeable future. They state that it is the experience

---

[5] In fact, after the Ninth Circuit conducted a review of the underlying District Court record, which included full briefing by the parties and the State Department as to repatriation efforts, it was clear that the government's efforts to effect some form of repatriation agreement with petitioner's native land, Cambodia, were "in an embryonic stage", having been met with no response from the Cambodian government. Id. at 1099. In addition, the negotiation of any such repatriation agreement depended upon the status of similar negotiations with Vietnam, which had been demonstrated to have been met during the past several years with "no realistic chance of success". Id.

of the INS that it is likely a Chinese national may be removed to China. In Fiscal Year 2000, 531 persons were removed to China, and for the first half of Fiscal Year 2001, 274 persons have been removed there. Based on the foregoing, they conclude that it is likely petitioner may also be removed in the reasonably foreseeable future. In an attempt to put these figures into context, the INS offers the following:

> A preliminary analysis of the detention data indicates that approximately 6,600 Chinese nationals were detained a (sic) some point during Fiscal Year 2001; that the average daily population of detained Chinese nationals was 1,176 in 2001; and that as of November 26, 2001, 323 Chinese nationals under final orders of deportation were being detained.

(Doc. 17, Supp. Response to Order to Show Cause at 5.) The INS suggests that based on these statistics, a Chinese national faces a reasonable likelihood of release or repatriation. The INS further states that this is the extent of the information it has available to rebut Yu's evidence with regard to the likelihood of deportation.[6]

The court finds respondent's evidence insufficient to satisfy the requirements set forth in Zadvydas. Yu has come forth with a letter from the Chinese Consulate unequivocally stating that China will not accept him. Although the INS has offered evidence that in the past two years China has accepted the return of some of its nationals from the United States, this is no indication that China will accept Yu in the reasonably foreseeable future, if at all. To the contrary, China has already stated otherwise. Although the INS may continue their efforts to attempt to deport Yu to China by placing his name on lists they present to the Chinese Consulate for consideration of repatriation, this does not suggest

---

[6] The court further notes that the INS has never claimed that any special circumstances exist in this case whereby Yu is or was a terrorist or part of any threat to the national security.

any significant likelihood that the INS will be able to accomplish Yu's removal in the reasonably foreseeable future. Further, Yu's detention has already lasted well beyond the six-month "presumptively reasonable" period established by the Supreme Court in Zadvydas. Under these circumstances, the court finds that the INS may not detain Yu any longer.[7] However, Yu must comply with the strict supervision requirements to be imposed by the government as set forth in 8 U.S.C. § 1231(a)(3). He will be subjected to such conditions as (1) appearing before an immigration officer on a periodic basis for identification; (2) submitting to a medical and/or psychiatric examination if deemed necessary; (3) providing information under oath pertaining to his nationality, habits, associations, activities and whatever the Attorney General deems necessary and (4) obeying reasonable restrictions on his conduct and activities as prescribed by the Attorney General. Yu is also forewarned that should he violate the supervisory release terms which are imposed by the government, he is subject to various penalties as set forth in 8 U.S.C. § 1253(b) which include being fined and/or imprisoned.

An appropriate Order is attached.

[7] This is not to say that the INS may not continue in their attempt to secure a travel document for Yu after his release. Rather, under Zadvydas, based upon the facts in this case, the INS may not continue to detain Yu while it attempts to do so.