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United States District Court,
D. Minnesota.

Ahmed Hassan ALI, aka Ahmed Warsame,
Petitioner,
v.
Mark CANGEMI, Interim Director, Bureau of Immigration and Customs, Respondents.

No. 03–3189 (DWF/JSM). | June 1, 2004.

Attorneys and Law Firms

Katherine Menendez, Assistant Federal Public Defender, Minneapolis, Minnesota, for Petitioner.

Lonnie F. Bryan, Assistant United States Attorney, Minneapolis, Minnesota, for Respondents.

Opinion

MEMORANDUM OPINION AND ORDER

FRANK, J.

***1** This matter is before the Court upon Defendant's objections to Magistrate Judge Janie S. Mayeron's Report and Recommendation dated March 30, 2004, recommending that Petitioner Ahmed Hassan Ali's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 be granted and that Respondents be ordered to release Petitioner from custody immediately, subject to such terms and conditions as Respondents reasonably deem necessary to ensure that Petitioner can be located and detained when Respondents are in a position to legally remove him from the United States. Respondents request that the Court decline to adopt Magistrate Judge Mayeron's Report and Recommendation and order that Petitioner Ali remain in custody pending the outcome of the Supreme Court's review in *Jama v. I.N.S .,* 329 F.3d 630 (8th Cir.2003), *cert. granted,* 124 S.Ct. 1407 (2004).

The court has conducted a *de novo* review of the record, including a review of the arguments and submissions of counsel, pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c). Based on the *de novo* review of the record and all of the arguments and submissions of the parties and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

ORDER

1. Magistrate Judge Janie S. Mayeron's Report and Recommendation dated March 30, 2004, is ADOPTED;

2. Petitioner Ahmed Hassan Ali's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is GRANTED; and

3. Respondents are ordered to release Petitioner Ahmed Hassan Ali from custody immediately, subject to such terms and conditions as Respondents reasonably deem necessary to ensure that Petitioner Ahmed Hassan Ali can be located and detained when Respondents are in a position to legally remove him from the United States.

MEMORANDUM

In her Report and Recommendation dated March 30, 2004, Magistrate Judge Mayeron found that because of the injunction put in place by *Ali v. Ashcroft,* 346 F.3d 873 (9th Cir.2003), it does not appear that Petitioner Ali will be removed from the United States at any time in the reasonably foreseeable future, and thus that he is entitled to release pursuant to *Zadvydas v. Davis,* 533 U.S. 678 (2001).

The Government has raised two primary arguments in objecting to Magistrate Judge Mayeron's Report and Recommendation. First, the Government argues that Magistrate Judge Mayeron failed to apply *Jama v. Ashcroft,* 362 F.3d 1117 (8th Cir., March 25, 2004). Second, the Government asserts that Magistrate Judge Mayeron's Report and Recommendation fails to recognize that the six-month time period under *Zadvydas* is tolled because Petitioner Ali is unlikely to comply with the removal order and because of the class action injunction imposed by *Ali v. Ashcroft.* Petitioner Ali opposes the Government's objections.

The Court adopts Magistrate Judge Mayeron's recommendation that Petitioner Ali be released from detention. First, the Court finds that even if the Eighth Circuit's most recent decision in *Jama* applies, *Jama* does not mandate Petitioner Ali's continued detention. Petitioner Ali's petition will not be affected as immediately by the *Jama* decision in the same manner as Jama himself will be affected. Due to the injunction set in place by *Ali v. Ashcroft,* Petitioner Ali's removable is not likely in the reasonably foreseeable future. Thus, Magistrate Judge Mayeron correctly recommended that

Petitioner Ali's release is appropriate even in light of *Jama.*

***2** The Court also finds that Petitioner Ali's *Zadvydas* challenge to his detention is appropriate and ripe for review. Regardless of whether the petition was initially brought prior to the expiration of the six-month period prescribed by *Zadvydas,* Petitioner has been detained for more than six months while the Government attempted to effect his removal. In addition, the Court is not willing to review the Government's belated attempts to raise concerns about Petitioner Ali's likelihood of compliance with the removal order. As such, Magistrate Judge Mayeron properly recommended Petitioner Ali's release from custody under appropriate supervisory release conditions.

REPORT AND RECOMMENDATION

MAYERON, Magistrate J.

This matter is before the undersigned Magistrate Judge of the District Court on the petition of Ahmed Hassan Ali for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner, an alien from Somalia, claims that he is being detained by the Bureau of Immigration and Customs Enforcement ("BICE"), in violation of his rights under federal law and the Constitution. He is seeking a writ of habeas corpus that would direct Respondents to release him from custody. Respondents have filed an answer to the petition, contending that Petitioner is not entitled to the relief he is seeking.

The matter has been referred to this Court for report and recommendation under 28 U.S.C. § 636 and Local Rule 72.1(c). For the reasons discussed below, the Court recommends that Petitioner's habeas corpus petition be GRANTED, and that Petitioner be released from custody, subject to such terms and conditions as may be necessary to ensure that Respondents will be kept apprised of his whereabouts.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was born in Somalia in 1967. He first came to the United States in January 1995, arriving on a plane from Sweden. At that time, Petitioner presented a Swedish passport that identified him as Mohamed Jama. Upon being questioned by federal immigration officials, Petitioner admitted that he was from Somalia, and that he had used a false passport to gain entry into the United States. He claimed that his real name was Ahmed Warsame, and that he would be persecuted if he returned to his homeland. Petitioner then asked for a hearing to determine his immigration status.

The Immigration and Naturalization Service, ("INS"), immediately initiated exclusion proceedings against Petitioner, but he was granted parole status, and he was allowed to stay in the United States pending the resolution of his immigration status. Petitioner gave the INS an address in Virginia, and said he could be contacted there. According to Respondents, however, Petitioner never went to the Virginia address that he gave to the INS. Instead, he fled immediately to Canada, and he applied for asylum there on January 30, 1995—two weeks after he first arrived in the United States.[1]

[1] Canada did not grant Petitioner's application for asylum. However, about six months after the first entered Canada, Petitioner was granted "convention refugee status," which allowed him to remain in Canada temporarily.

While Petitioner's asylum request was pending in Canada, the INS set a hearing for March 10, 1995, to determine his immigration status in this country. Petitioner apparently did not appear for that hearing. However, Petitioner evidently found out about the hearing that he had missed, and he asked the INS to reschedule the hearing and move the site of the hearing from New York to Virginia. The INS agreed to both of those requests, and scheduled another hearing for August 17, 1995. When Petitioner failed to appear for that rescheduled hearing, a removal order was entered against him by default. (Respondents' "Exhibit List," [Docket No. 11], [hereafter "Respondents' Exhibits"], Exhibit 1 at pp. 19–20, 35–36.)

***3** About seven months later, in March 1996, Petitioner presented himself to an INS office in Texas, and filed an application for asylum. (*Id.,* Exhibit 1 at pp. 21–27.) At that time, Petitioner told the INS that his name was Ahmed Hassan Ali, that he was from Somalia, and that he had just recently entered the United States from Mexico. Because Petitioner was using a new name and new biographical information when he applied for asylum in Texas, the INS did not realize that there already was a removal order pending against him. Based on the information Petitioner gave to the INS in 1996, which did not include any of his previous immigration history, the INS granted his application for asylum. (*Id.,* pp. 28–30.)

After September 11, 2001, the INS stepped up its efforts to complete the removal of aliens who had previously been ordered to leave the United States. On January 30, 2002, the INS issued a warrant against Petitioner to effect his removal pursuant to the pre-asylum removal order that had been entered against him in 1995. (*Id.,* Exhibit 1 at pp. 33–34.)

In July of 2002, the INS located Petitioner in Minnesota. He was apprehended and taken into custody pursuant to the removal warrant that had been entered against him. The INS then discovered that Petitioner had been granted asylum, under a different name, less than a year after the original removal order had been entered in 1995. (*Id.,* Exhibit 1 at pp. 37–40.) Upon making that discovery, the INS rescinded its 1996 ruling that granted Petitioner asylum in the United States. (*Id.,* Exhibit 1 at 31.)

The INS's asylum rescission letter, which is dated September 3, 2002, states in part:

> April 25, 1996, you were granted asylum by the Immigration and Naturalization Service (INS). It has recently come to our attention, however, that you were already in Deportation, Exclusion or Removal proceedings at the time of the asylum decision.
>
> Only an Immigration Judge may decide an Asylum application filed by a person who has been placed in deportation, exclusion or removal proceedings before an immigration court. Since this office did not have jurisdiction over your asylum request, this office rescinds your grant of asylum.

(*Id.*)

On September 6, 2002, three days after the INS's asylum rescission letter, Petitioner was charged in the District of Minnesota with several federal criminal offenses. *See United States v. Warsame,* Crim. No. 02–272 (JRT/FLN). The charges against Petitioner included "use of a false passport," "social security fraud," and "false statement in immigration matter." *Id.* On February 24, 2003, Petitioner pled guilty to use of a false passport. He was sentenced to "time served," and the remaining charges against him were dismissed. Petitioner was then turned over to INS—soon to be known as BICE[2]—to carry out the removal order that had been entered against him in 1995. Petitioner has been continuously detained by BICE, pending the completion of his removal, since February 24, 2003.

[2] On or about March 1, 2003, the United States customs and immigration agencies were reorganized under the newly created Department of Homeland Security. As a result, the agency formerly known as INS became BICE. For purposes of this case, the Court will use those two names interchangeably throughout this Report.

***4** Prior to being taken into BICE custody, Petitioner was employed at the St. Jude Medical facility in Minnetonka, Minnesota. As far as the Court can tell, he has not been convicted of any crime in this country, aside from the federal offense stemming from his illegal entry into the United States, discussed above.

Even though Petitioner's original removal order was entered more than eight years ago, and even though Petitioner has been in BICE custody awaiting execution of his removal order for more than one full year, BICE still has not completed Petitioner's removal to Somalia. The reason for this delay is no mystery. Respondents' own submissions clearly show that Petitioner is still here in the United States because BICE has been enjoined from removing him by a federal court order. That order was entered on January 17, 2003, in the United States District Court for the Western District of Washington, in the case of *Ali v. Ashcroft,* 213 F.R.D. 390 (W.D.Wash.), *aff'd,* 346 F.3d 873 (9th Cir.2003).[3]

[3] By coincidence, Petitioner in the Washington case and Petitioner here are both named Ali. To avoid confusion, the Court will continue to refer to the instant petitioner as "Petitioner," and will use *"Ali"* to identify the Washington case.

Ali was a habeas corpus action brought by several Somali aliens who claimed that they could not legally be removed to Somalia, because there is no functioning government there that could accept their return. Petitioners in *Ali* asked the district court to enjoin federal immigration authorities, including the INS and the Attorney General, from removing them to Somalia without some formal acceptance by a functioning government in that country.

Petitioners in *Ali* also asked the district court to grant class action status for *all* individuals facing removal to Somalia, claiming that the United States should not be allowed to remove any person to that country without acceptance by a functioning government. The court granted the petitioners' request for class action status, and certified a nationwide class consisting of:

> 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 of 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).

213 F.R.D. at 396.

After granting class action certification, the district court in *Ali* also granted the petitioners' request for a

nationwide permanent injunction. The court ruled that U.S. immigration authorities, including the INS and the Attorney General, "are ORDERED not to remove to Somalia any person in the above nationwide class." *Id.*

The *Ali* class action certification, as well as the permanent injunction against removals to Somalia, were upheld in a comprehensive opinion by the Ninth Circuit Court of Appeals. *Ali v.. Ashcroft,* 346 F.3d 873 (9th Cir.2003). Therefore, as of now, the *Ali* injunction is valid and enforceable.[4]

[4] In the *Abukar v. Ashcroft,* No. 01–242 (JRT/AJB), Order dated March 17, 2004 [Docket No. 40], just recently issued by the District Court of Minnesota, the Court stated that the Government advised the Court that on December 12, 2003, it had filed a petition for rehearing en banc in *Ali. Id.* at 5. The Government did not similarly apprise this Court of its petition for rehearing, however, this Court has confirmed that the Government did file a petition with the Ninth Circuit requesting a rehearing on January 26, 2004, and that petition is currently pending. Nevertheless, that does not change the fact, that for now, the injunction is in effect, and BICE is abiding by it.

As previously noted, BICE has expressly recognized that the *Ali* injunction applies to Petitioner in the present case, and makes it impossible to remove him to Somalia at this time. (*See* "Decision to Continue Detention," dated June 6, 2003; Respondents' Exhibit 1 atpp. 71–77.) Respondents have not shown—or even claimed—that it might be possible to actually remove Petitioner to Somalia at any time in the foreseeable future.

***5** Petitioner is now seeking a writ of habeas corpus that would compel Respondents to release him from BICE custody. He contends that BICE cannot remove him because of the *Ali* injunction, and BICE cannot simply detain him indefinitely, when there is no reason to believe that his removal will be effected in the foreseeable future. Therefore, Petitioner claims, BICE must release him from custody at this time. For the reasons set forth below, this Court agrees.

II. THE LEGAL BASIS FOR PETITIONER'S CLAIM—*ZADVYDAS v. DAVIS*

Petitioner's demand for release from BICE custody is based on the United States Supreme Court's decision in *Zadvydas v. Davis,* 533 U.S. 678 (2001). There, the Court held that the federal immigration statutes do not permit immigration authorities to detain an alien indefinitely after a removal order has been entered against him.

Before reaching the issue of whether indefinite detention is authorized by federal law, the Supreme Court in *Zadvydas* first considered the constitutionality of detaining removable aliens indefinitely. The Court did not find the post-removal-period detention statute, 8 U.S.C. § 1231(a)(6), to be unconstitutional—either on its face, or as applied to the particular aliens involved in the *Zadvydas* case. The Court strongly suggested, however, that the statute would be unconstitutional if it allowed the INS to detain removable aliens indefinitely. *Id.* at 690 ("[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem").[5] Ultimately though, the Court stopped short of actually deciding the constitutionality of the statute. Instead, the Court applied the " 'cardinal principle' of statutory interpretation," that says "when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." ' *Id.* at 689, quoting *Crowell v. Benson,* 285 U.S. 22, 62 (1932).

[5] The Court explained, at length, why it probably would be unconstitutional to allow the INS to detain removable aliens indefinitely. *Id.* at 690–96.

Thus, after explaining its serious doubts about the constitutionality of indefinite INS detention of removable aliens, the Supreme Court considered (at Part IIIB of the majority opinion) whether § 1231(a)(6) could somehow be construed in a manner that would ensure its constitutionality. In doing so, the Court rejected the Government's assertion that § 1231(a)(6) authorizes indefinite INS detention, and finding that, in fact, there is no "clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." 533 U.S. at 697. "We have found nothing in the history of these statutes," the Court wrote, "that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." *Id.* at 699.

The Court then concluded in *Zadvydas* that the post-removal-order detention statute (§ 1231(a)(6)) gives the INS only limited authority to detain removable aliens after the statutory 90–day removal period specified in § 1231(a)(1). "[I]nterpreting the statute to avoid a serious constitutional threat," the Court determined that after the expiration of the 90–day removal period, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* In other words,

> ***6** "the statute, *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."

Id. at 689 (emphasis added). "[I]f removal is not reasonably foreseeable," a federal court reviewing an alien's habeas corpus petition, "should hold continued detention unreasonable and no longer authorized by statute." *Id.* at 699–700.

The Supreme Court also found it to be "practically necessary to recognize some presumptively reasonable period of detention" after the expiration of the statutory 90–day removal period. *Id.* at 701. That "presumptively reasonable period of detention" was set at 90 days beyond the initial 90–day removal period. *Id.* Thus, according to *Zadvydas,* BICE can legally detain a removable alien, with virtually unfettered discretion, during the first six months after the entry of a removal order against the alien. However, "[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." *Id.* If BICE cannot show some good reason to believe that the alien will in fact be removed "in the reasonably foreseeable future," then the alien must be released from custody.

Finally, it should be noted that when an alien is released pursuant to *Zadvydas,* he is not entitled to the full range of freedoms accorded to most American citizens. The alien can be granted a supervised release that includes terms and conditions designed to ensure that he can be found and deported when his removal actually does become practicable. *Id.* at 696 ("[t]he choice ... is not between imprisonment and the alien 'living at large;' ... [i]t is between imprisonment and supervision under release conditions that may not be violated"). The Supreme Court clearly explained that "we nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." *Id.* at 695, citing 8 U.S.C. § 1231(a)(3) ("granting authority to Attorney General to prescribe regulations governing supervision of aliens not removed within 90 days") and § 1253 ("imposing penalties for failure to comply with release conditions").

In the present case, Petitioner's removal order was entered almost nine years ago, and he has been detained by BICE for more than one year. Furthermore, because of the *Ali* injunction, it does not appear that Petitioner will be removed any time in the "reasonably foreseeable future." As the Court has already pointed out, Respondents have made no effort to show that Petitioner will be sent back to Somalia anytime soon.[6] Therefore, Petitioner appears to have satisfied the basic prerequisites for a conditional release pursuant to *Zadvydas.*

[6] On September 30, 2003, counsel for Petitioner sent to this Court for its consideration the decision by the Ninth Circuit in *Ali v. Ashcroft,* 346 F.3d 873 (9th Cir.2003), for the purpose of informing this Court that Petitioner cannot be removed to Somalia based on the nationwide injunction issued by the Washington District Court and affirmed by the Ninth Circuit. Respondents did not respond to the letter by Petitioner's counsel, and to date, have provided the Court with no additional information from which it could conclude that Petitioner is likely to removed to Somalia in the near future.

***7** Respondents, however, contend that Petitioner is not entitled to a conditional release under *Zadvydas* for three reasons. First, they assert that Petitioner's *Zadvydas* claim fails because it is based on the erroneous supposition that he is not currently removable by reason of the *Ali* injunction. In this regard, Respondents claim that Petitioner is not covered by that injunction, and that under the Eighth Circuit's decision in *Jama v. I.N.S.,* 329 F.3d 630 (8th Cir.2003), *pet. for cert. granted,* 2004 WL 323175 (U.S. Feb. 23, 2004), he is indeed removable. Second, Respondents contend that *Zadvydas* does not apply to this case, because Petitioner is not a removable/deportable alien, but rather, he is an inadmissible/excludable alien who should be treated, under federal law and the Constitution, as a person who never actually entered the United States. Third, Respondents contend that the holding of *Zadvydas* cannot be applied to this case, because Petitioner had not been detained by BICE for more than six months as of the date when he filed his habeas petition. Each of these arguments is considered below.

III. DISCUSSION

A. *The Ali Injunction*

Respondents initially argue that the *Ali* injunction does not apply to this case, and that consequently Petitioner is removable within "the reasonably foreseeable future." This argument fails for two reasons: First, BICE admitted one week before it filed its Response to the Petition that Petitioner cannot be removed to Somalia at this time because of the *Ali* injunction. (*See* Respondents's Exhibit 1 at p. 71.) BICE may believe that *Ali* was wrongly decided, and that therefore, it should not apply to Petitioner, but BICE nevertheless has admitted its acceptance of the nationwide injunction that was entered in *Ali* as to Petitioner, and it is readily apparent that BICE does not intend to ignore or violate the *Ali* injunction by removing Petitioner to Somalia while that injunction remains in effect. Moreover, this Court has been given no reason to believe that the *Ali* injunction will be vacated in the foreseeable future. That injunction has been upheld by

the Ninth Circuit, which expressly approved the nationwide scope of the injunction. *Ali,* 346 F.3d at 876, 889. Thus, while the injunction may not stand forever, the Court finds no reason to believe that it will be invalidated anytime soon.

Second, this Court rejects Respondents' contention that the nationwide injunction issued in *Ali* is not applicable to the District of Minnesota because it is inconsistent with the Eighth Circuit Court of Appeals' decision in *Jama,* or because the Ninth Circuit wrongly decided the case.[7] *See* Respondents' Response, [Docket No. 10], pp. 6–18. As a preliminary matter, this Court acknowledges that *Jama* held that, under 8 U.S.C. § 1231(b)(2), aliens *can* be removed to Somalia without the need for any acceptance by a functioning government in that country, (*id.* at 633),[8] and that the *Jama* decision is directly opposite the Ninth Circuit's decision in *Ali.* 346 F.3d at 886 ("we hold that § 1231(b)(2) does not authorize the Attorney General to remove Petitioners to Somalia because it lacks a functioning government that can accept them"). However, this apparent conflict is not germane to the instant case because *Jama* does not address the issue before this Court—the validity and application of the nationwide injunction that was entered in *Ali.*[9] Consequently, *Jama* provides no grounds for this Court to reject or overturn *Ali'* s nationwide permanent injunction, as Respondents urge.

7 Respondents argued to this Court that the Ninth Circuit's decision should be rejected because the court erroneously exerted extraterritorial jurisdiction, erroneously decided a political question reserved for the other branches, and the decision is contrary to 8 U.S.C. § 1252(g). Some of these arguments appear to have been raised with and rejected by the district court and Ninth Circuit in *Ali.*

8 Given the Supreme Court's recent order granting certiorari review in *Jama,* it appears that the Eighth Circuit's decision will not be the final word on the issues presented in that case.

9 This Court also notes that as a practical matter, there is no inherent conflict between *Jama* and *Ali,* as far as the nationwide injunction is concerned, because the *Ali* injunction expressly excludes the petitioner in *Jama,* and all other removable Somalis who had independently applied for habeas corpus relief before the injunction was entered. 213 F.R.D. at 396 (the injunction applies to all removable Somalis, except for "any person with a habeas petition pending, or on appeal, raising the issue of unlawful removal to Somalia"). For the same reason, the two cases cited in Respondents "Response" and "Exhibit List"—*Jama v. INS,* No. 01–1172 (JRT/AJB), and *Abukar v. Ashcroft,* No. 01–242 (JRT/AJB)—are distinguishable from the present case, because in both of those cases, the Somali habeas petitioners had filed their petitions *before* the *Ali* injunction was entered. As a result, petitioners in those two cases, unlike Petitioner here, were expressly excluded from the *Ali* injunction. Here, because Petitioner did not file his present petition until after the *Ali* injunction was entered, he is not excluded from the coverage of that injunction.

***8** As to other grounds articulated by Respondents for rejecting *Ali,* if Respondents believed that the Ninth Circuit made a wrong decision by affirming the district court's granting of a nationwide injunction, the proper recourse for expressing their disagreement with the decision lies with the Ninth Circuit or the Supreme Court. This Court will not recommend that an injunction order entered in another district court, which has been upheld by that court's supervising Court of Appeals, be rejected, vacated or ignored. *Ali* clearly bars BICE from deporting Petitioner to Somalia at this time, and this Court must accept that ruling.

B. *Does Zadvydas Apply To The Instant Petitioner?*

Respondents' second argument requires the Court to consider whether the *Zadvydas* restrictions on indefinite detention apply to Petitioner. Respondents contend that Petitioner is an "inadmissible" or "excludable" alien, rather than "removable" or "deportable" alien. They argue, in other words, that Petitioner should be treated as an alien who was stopped at the border and kept out, and not as an alien who entered this country and was later ordered to leave. Therefore, according to Respondents' argument, the *Zadvydas* restrictions on indefinite detention do not apply to Petitioner.

The distinction between inadmissible aliens and removable aliens is a critical one. *Zadvydas* itself expressly acknowledges that removable aliens are entitled to much greater constitutional protections than inadmissible aliens. In this regard, the Supreme Court stated:

> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.... It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.... But once an alien enters the country, the legal circumstance changes, for the

> Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

533 U.S. at 693 (citations omitted).

Although *Zadvydas* acknowledges the distinction between removable and inadmissible aliens, the Supreme Court did not say whether the restrictions on indefinite detention apply only to removable aliens, (such as the aliens involved in *Zadvydas* itself), or whether they also apply to inadmissible aliens as well, and there is no uniformity among the lower courts on this issue.[10] However, the Eighth Circuit has concluded that inadmissible aliens are *not* entitled to *Zadvydas* protection against indefinite detention in the case of *Borrero v. Aljets,* 325 F.3d 1003, 1007 (8th Cir.2003).

[10] Some lower federal courts have held that the *Zadvydas* restrictions on the detention of aliens must apply to both removable and inadmissible aliens. *See e.g., Xi v. I.N.S.,* 298 F.3d 832 (9th Cir.2002); *Rosales–Garcia v. Holland,* 322 F.3d 386 (6th Cir.) (*en banc*), *cert. denied,* 123 S.Ct. 2607 (2003). On the other hand, other courts, like the Eighth Circuit, have gone the other way, concluding that only removable aliens, not inadmissible aliens, can rely on *Zadvydas* to challenge indefinite detention. *See e.g., Benitez v. Wallis,* 337 F.3d 1289 (11th Cir.2003), *pet for cert. granted,* 124 S.Ct. 1143 (2004). The Supreme Court presumably granted certiorari in *Benitez* in order to resolve the split between the circuits on the issue of whether *Zadvydas* applies to inadmissible aliens.

Based on *Borrero,* the Court is satisfied that if Petitioner is deemed to be an inadmissible alien, then—in this Circuit, and at least for now—*Zadvydas* does not prohibit BICE from detaining him indefinitely. *See Borrero,* 325 F.3d at 1005 ("we conclude that *Zadvydas'* s narrowing construction of § 1231(a)(6) does not limit the government's statutory authority to detain inadmissible aliens"). Accordingly, the critical issue in this case is whether Petitioner should be viewed as a removable alien whose legal rights are governed by *Zadvydas,* or whether he should be viewed as an inadmissible alien whose rights are governed by *Borrero.*

***9** Respondents argue that Petitioner must be viewed as an inadmissible alien, for purposes of determining whether *Zadvydas* applies, because Petitioner accomplished his most recent entry into the United States by fraudulent means.[11] Petitioner does not deny that he is presently in this country pursuant to an illegal-entry. He claims, however, that even though he may have entered illegally, it cannot be denied that by the affirmative grant of asylum, he did effect an entry into the United States. *Zadvydas,* 533 U.S. at 693. Therefore, Petitioner contends, he must be viewed as a removable alien whose case is governed by *Zadvydas.* This Court agrees.

[11] It will be recalled that when Petitioner entered the United States and applied for asylum in 1996, he failed to tell the federal immigration authorities about his unsuccessful attempt to enter the country under a different name a year earlier, or that a removal order had been entered against him by default.

The Supreme Court has clearly and consistently recognized that an alien's status in this country—*i.e.,* whether he is removable or inadmissible—does not depend on whether he entered the country by legal or illegal means. As this Court has already pointed out, *Zadvydas* itself says that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, *whether their presence here is lawful, unlawful, temporary, or permanent."* 533 U.S. at 693 (emphasis added). This statement by the Court in *Zadvydas* is not merely isolated misleading dicta; it is a legal principle that the Court has reiterated on many occasions. *See Plyler v. Doe,* 457 U.S. 202, 210 (1982) (" 'all persons within the territory of the United States,' *including aliens unlawfully present,* may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government") (emphasis added); *Mathews v. Diaz,* 426 U.S. 67, 77 (1976) ("[t]here are literally millions of aliens within the jurisdiction of the United States," and "the Fifth Amendment ... protects every one of these persons from deprivation of life, liberty, or property without due process of law ... [;] *[e]ven one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection"*) (emphasis added); *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 212 (1953) ("aliens who have once passed through our gates, *even illegally,* may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law") (emphasis added). Thus, as articulated by the Supreme Court, illegal entry into the United States cannot be the test by which an alien is determined to be inadmissible or removable.

The question then is what distinguishes this case from the circumstances presented in *Borrero* where the Eighth Circuit held that the petitioner was an inadmissable alien and not entitled to the constitutional protections of *Zadvydas?* In *Borrero,* the alien was a Marielboatlift Cuban who was legally paroled into this country, and lived here with the knowledge and consent of federal immigration authorities for many years before he was ordered to be removed. 325 F.3d at 1005. However, unlike our case, the statutes governing parole of illegal aliens explicitly provide that by granting such aliens

parole into this country, they are not to be considered admitted. *See* 8 U.S.C. §§ 1101(a)(13), 1182(d)(5)(A). Rather, through the parole process, these aliens are granted temporary, unofficial entry into the United States pending resolution of their status. *See Benitez v. Wallis,* 337 F.3d at 1296. They remain "inadmissible alien[s] and [are] similar to any other alien who has not gained entry and is stopped at this country's border." *Id.* (citation omitted). Here, however, Petitioner gained entry into this country by an affirmative grant of asylum by BICE. The fact that he gained entry illegally does not change the fact that he got in, and resided in this country for a period of time, free of restraint. *Id.* at 1301. Therefore, he cannot be treated as if he was stopped at the border. On this basis, this Court concludes that this case is distinguishable from *Borrero,* that the instant Petitioner should not be treated as an inadmissible alien, and that the *Zadvydas* restrictions on post-removal-order detention should apply to this case.

C. *The Ripeness Of Petitioner's Zadvydas Claim*

***10** Respondents' final argument pertains to the timing of Petitioner's habeas petition. They contend that the petition should be denied because Petitioner filed it before the expiration of the six-month period during which BICE is presumptively authorized to detain him under *Zadvydas*.

According to *Zadvydas,* the post-removal-order detention statute allows BICE to detain a removable alien during the first six months after entry of the removal order. In this case, the parties apparently agree that Petitioner's post-removal-order detention began when he was taken into BICE custody on February 24, 2003. Consequently, Respondents were correct when they argued that Petitioner had been held in post-removal-order detention for less than six months when he filed his current habeas petition on May 15, 2003. The six-month period discussed in *Zadvydas* did not expire in this case until August 24, 2003.[12]

[12] Respondents claim that the entry of the *Ali* injunction somehow interrupted or stayed the running of the six-month removal period discussed in *Zadvydas.* However, Respondents have failed to explain why that is so, and they have offered no legal authority to substantiate their assertion. *Ali* itself certainly does not suggest that the injunction causes *Zadvydas* to be "inapposite," as Respondents contend. (Respondents' "Response," p. 22.) Indeed, *Ali* expressly held that some of the individual petitioners in that case should be released *pursuant to Zadvydas,* because the injunction made it unlikely that they would be removed in the reasonably foreseeable future. In this regard, the very last sentence in the Ninth Circuit's decision in *Ali* reads as follows: "Because we hold that the INS may not remove Petitioners to Somalia, there is no significant likelihood of removal in the reasonably foreseeable future; consequently, the district court property released Petitioners pursuant to *Zadvydas."* 346 F.3d at 892.

If the *Zadvydas* six-month post-removal-order detention period were still unexpired at this time, this Court may very well have recommended that this action be dismissed as premature.[13] But now Petitioner has been in custody for more than a year. The six-month *Zadvydas* period has long since expired, and Petitioner's *Zadvydas* challenge is ripe. At this point, this Court can see no good reason to dismiss this action without prejudice on the grounds of pre-maturity. If the Court were to do that, Petitioner would undoubtedly file a new petition immediately, and his now ripe *Zadvydas* claims would have to be addressed on the merits. It would serve no useful purpose to force the parties and the Court to go through that exercise. Therefore, the Court will *not* recommend, under the circumstances of this particular case, that the action be dismissed on the grounds that it was brought too soon.

[13] The Court notes that when another Somali alien tried to bring a *Zadvydas* claim in this District less than six months after he was detained, his case was summarily dismissed as pre-mature. *Abed v. Cangemi,* Civil No. 03–5169 (DSD/AJB).

IV. CONCLUSION

Respondents have now been detaining Petitioner, while trying to effect his removal from the United States, for more than six months. In light of the *Ali* injunction, which this Court cannot properly set aside or ignore, there is no significant likelihood that Petitioner's removal will be completed in the reasonably foreseeable future.

The Court further finds that, for purposes of determining whether Petitioner can be detained indefinitely, he must be viewed as a "removable alien," rather than an "inadmissible alien." Even though he may have gained entry to this country by illicit means, he did, in fact, get in. Petitioner is therefore, entitled to the Due Process protection against indefinite detention that underlies the Supreme Court's decision in *Zadvydas.*

Based on these determinations, the Court concludes, pursuant to *Zadvydas,* that Petitioner has already been held in post-removal-order custody longer than the law allows. It will therefore be recommended that Petitioner's application for a writ of habeas corpus be GRANTED, and that Respondents be ordered to release Petitioner from custody immediately, subject to such terms and conditions as BICE reasonably believes are necessary to ensure that Petitioner will be available for removal when BICE is actually able to accomplish that objective.

V. RECOMMENDATION

***11** Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 be GRANTED; and

2. Respondents be ordered to release Petitioner from custody immediately, subject to such terms and conditions as Respondents reasonably deem necessary to ensure that Petitioner can be located and detained when Respondents are in a position to legally remove him from the United States.