

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA,
ATHEER FAWOZI ALI,
ALI AL-DILAMI,
HABIL NISSAN,
JIHAN ASKER
MOAYAD JALAL BARASH,
SAMI ISMAEL AL-ISSAWI, on behalf
of themselves and all those similarly
situated,

Petitioners,

Civil No. 17-11910

v.

Honorable Mark A. Goldsmith
Mag. Judge David R. Grand

REBECCA ADDUCCI, Director of the
Detroit District of Immigration and
Customs Enforcement,,

Respondent.

**RESPONDENT'S RESPONSE IN OPPOSITION TO
PETITIONER'S MOTION FOR A TEMPORARY RESTRAINING
ORDER AND/OR A STAY OF REMOVAL**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF ISSUES PRESENTEDv

MOST CONTROLLING AUTHORITY..... vi

I. INTRODUCTION1

II. BACKGROUND2

III. LAW AND ANALYSIS3

 A. The district court lacks subject matter jurisdiction to hear Petitioners’
 claims pursuant to the REAL ID Act, 8 U.S.C. § 1252(g). 3

 B. Petitioners cannot establish an exception to the REAL ID Act because it
 does not violate the Suspension Clause..... 9

IV. CONCLUSION11

CERTIFICATE OF SERVICE12

TABLE OF AUTHORITIES

CASES

Am. Telecom Co. v. Republic of Lebanon, 501 F.3d 534 (6th Cir. 2007)8

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006)8

Ba v. Holder, No. 09-14645, 2009 WL 5171793 (E.D. Mich. Dec. 24, 2009)5

Benitez v. Dedvukaj, et al., 656 F.Supp.2d 725 (E.D. Mich. 2009)6

Deljevic v. Baker, 463 F. Supp. 2d 699 (E.D. Mich. 2006).....6

Elgharib v. Napolitano, 600 F.3d 597 (6th Cir. 2010)4, 5

Haddad v. Gonzales, 437 F.3d 515 (6th Cir. 2006).....9

INS v. St. Cyr, 533 U.S. 289 (2001).....8

Jama v. INS, 329 F.3d 630 (8th Cir. 2003).....8

Kellici v. Gonzales, 472 F.3d 416 (6th Cir. 2006).....8

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).....3

Liu v. INS, 293 F.3d 36 (2nd Cir. 2002).....9

Muka v. Baker, 559 F.3d 480 (6th Cir. 2009).....4, 5, 8, 9

Mustata v. U.S. Dept. of Justice, 179 F.3d 1017 (6th Cir. 1999)6, 7

Nken v. Holder, 556 U.S. 418 (2009)10

Paljusevic v. Dedvukaj, No. 09-13659, 2009 WL 3125540
(E.D. Mich. Sept. 25, 2009)6

Palmore v. United States, 411 U.S. 389 (1973).....3

Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).....4

STATUTES and REGULATIONS

8 C.F.R. § 1003.29, 10

8 C.F.R. § 1003.23(b)9, 10

8 U.S.C. § 1229a(c)(7)(C)(ii).....9

8 U.S.C. § 1252*passim*

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Does the district court have subject matter jurisdiction to enjoin execution of Petitioners' final orders of removal in light of 8 U.S.C. § 1252(g) that provides "no court shall have jurisdiction to hear any cause or claim...arising from the decision or action by the Attorney General to...execute removal orders against any alien..."
2. Does application of 8 U.S.C. § 1252(g) comply with the Suspension Clause where Petitioners have an adequate and effective mechanism for relief because they can seek a stay of removal and file a motion to reopen their removal proceedings on an emergent basis before the immigration court or Board of Immigration Appeals, and may seek judicial review of any resulting decision on the motion before the court of appeals?

MOST CONTROLLING AUTHORITY

8 U.S.C. § 1252

Muka v. Baker, 559 F.3d 480, 483 (6th Cir. 2009)

I. INTRODUCTION

Petitioners have, and have always had, a mechanism available to seek relief from their removal orders based on changed conditions in Iraq. Petitioners can seek to stay their removal and reopen their removal proceedings on an emergent basis in the immigration court or Board of Immigration Appeals (BIA). Petitioners can also seek judicial review of an adverse decision by the BIA in the court of appeals. Indeed, contemporaneous with this motion, several Petitioners filed for such relief in the immigration court and at least two of the Petitioners received a stay of their removals while the immigration court considers their claims. Thus, Petitioners have an opportunity to seek relief based on changed conditions in Iraq, and an adequate and effective means to seek judicial relief.

However, Petitioners are not free to choose what court has jurisdiction to hear their claims and provide relief. Pursuant to the REAL ID Act, 8 U.S.C. § 1252(g), Congress expressly divested district courts of jurisdiction to hear any cause or claim in a habeas petition such as this one, that challenges the execution of final orders of removal. Petitioners are not deprived of their ability to seek the relief described in their petition; they just cannot seek it in the district court. Rather, Petitioners are only entitled to judicial review in the court of appeals, after exhausting their administrative remedies. Because this Court is without subject matter jurisdiction to restrain execution of Petitioners' orders of removal, the

motion should be denied.

II. BACKGROUND

The named petitioners in this case all have final orders of removal to Iraq, the validity of which they do not challenge in this action. (Mot., Dkt. #11, Pg ID 70). The Petitioners have all previously or contemporaneously sought relief from their orders of removal:

- Usama Jamil Hamama – Hamama was ordered deported on June 29, 1994. In December 1995, he filed a motion to reopen with the BIA which was denied, *see* Declaration of Vernon Liggins, attached as Ex. A;
- Atheer Fawozi Ali – Ali was ordered removed on March 22, 2004. On May 18, 2017, Ali filed a motion to reopen his removal action before the BIA, citing materially changed country conditions in Iraq for Christians but did not request a stay of removal. His motion is pending, *see* Declaration of Vernon Liggins, attached as Ex. B;
- Ali Al-Dilaimi – Al-Dilaimi was ordered removed on May 21, 2004. In November 2012, he filed a motion to reopen removal proceedings, citing materially changed country conditions in Iraq that was denied, *see* Declaration of Kristopher Crowley, attached as Ex. C;
- Habil Nissan – Nissan was ordered removed in absentia on November 8, 2007. On June 16, 2017, he filed an emergency motion to reopen his removal proceedings and stay his removal before the immigration court. His motion is pending, *see* Declaration of Vernon Liggins, attached as Ex. D;
- Jihan Asker – Asker was ordered deported *in absentia* on June 13, 1986. On June 15, 2017, she filed an emergency motion to reopen her removal proceedings and stay her removal before the immigration court. Her request for stay was granted, *see* Declaration of Parminderjit Sidhu, attached as Ex. E;
- Moayad Jalal Barash – Barash was ordered deported on October 26, 1993. In

March 2011, Barash filed a motion to reopen his removal proceedings and seek relief under the Convention Against Torture based on changed country conditions in Iraq. His motion was denied, see Declaration of Parminderjit Sidhu, attached as Ex. F; and

- Sami Ismael Al-Issawi – Al-Issawi was ordered removed on September 10, 2013. On June 15, 2017, he filed a motion to reopen his removal proceedings with the immigration court and an emergency motion to stay his removal. His request for stay was granted, *see* Declaration of Parminderjit Sidhu, attached as Ex. G.

On June 15, 2017, Petitioners filed a Habeas Corpus Class Action Petition alleging various theories to avoid their removal based on conditions in Iraq. (Pet., Dkt. #1). Also on June 15, 2017, Petitioners filed a motion seeking to enjoin their removals while the immigration court reviewed their requests for relief. (Mot., Dkt. #11). Although at least two Petitioners, Asker and Al-Issawi, have already received a stay of their removal from the immigration court, they have not been dismissed from this petition. Respondent seeks denial of Petitioners’ motion for lack of subject matter jurisdiction.

III. LAW AND ANALYSIS

A. **The district court lacks subject matter jurisdiction to hear Petitioners’ claims pursuant to the REAL ID Act, 8 U.S.C. § 1252(g).**

“Federal courts are courts of limited jurisdiction [and] possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Defining the jurisdiction of federal district courts is “left to the discretion of Congress.” *Palmore v. United States*, 411 U.S.

389, 401 (1973). Congress exercised its discretion to define the scope of federal district court jurisdiction in the REAL ID Act, 8 U.S.C. § 1252, by channeling judicial review of claims related to orders of removal to the court of appeals and eliminating habeas petitions as a means of review of removal orders. *See Elgharib v. Napolitano*, 600 F.3d 597, 600 (6th Cir. 2010) (“In the REAL ID Act, Congress sought to channel judicial review of an alien’s claims related to his or her final order of removal through a petition for review at the court of appeals.”); *Muka v. Baker*, 559 F.3d 480, 483 (6th Cir. 2009) (“[T]he REAL ID Act of 2005 clearly eliminated a habeas petition as a means for judicial review of a removal order.”).

Relevant to this case is Congress’ decision to divest district courts of jurisdiction to hear any claims arising from decisions or actions taken to execute removal orders. Except as provided elsewhere in the REAL ID Act and “notwithstanding any other provision of law (statutory or nonstatutory), including section 2241...no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.” *See* 8 U.S.C. § 1252(g). “[It] is abundantly clear that...a district court is expressly precluded from considering a petition for a writ of habeas corpus” by the REAL ID Act. *Muka*, 559 F.3d at 484. *See also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (holding that “many

provisions of [the Act that enacted § 1252(g)] are aimed at protecting the Executive’s discretion from the courts – indeed, that can fairly be said to be the theme of the legislation.”).

The REAL ID Act eliminates a habeas petition as a means of judicial review of removal proceedings and replaces it with a mechanism to petition for review in the court of appeals. *See Muka*, 559 F.3d at 484 (“[The REAL ID Act did not simply remove the availability of habeas relief and leave aliens without any avenue to challenge the legality of removal order...[it] provides an exclusive mechanism for review of such decisions via petitions for review filed in the court of appeals.”). *See also* 8 U.S.C. § 1252(a)(5) (“[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal.”).

While Petitioners argue that their claims are not subject to the REAL ID Act because they “are not directly challenging their removal orders,” that is not the inquiry. (Mot., Dkt. #11, Pg ID 70). While the REAL ID Act vests exclusive jurisdiction to review removal orders in the court of appeals, the REAL ID Act also expressly divests the district court of jurisdiction to hear any “cause or claim,” whether based on “statutory or nonstatutory” law arising from the decision or action to “execute removal orders.” *See* 8 U.S.C. § 1252(g). *See Elgharib*, 600 F.3d at 605 (holding that district court does not have jurisdiction to review an order

of removal even where constitutional violations are alleged); and *Ba v. Holder*, No. 09-14645, 2009 WL 5171793, at *2 (E.D. Mich. Dec. 24, 2009) (denying motion for injunctive relief and dismissing case for lack of jurisdiction finding that even though the plaintiff claimed to be asserting a due process or equal protection claim, the REAL ID Act applies to both direct and indirect challenges to a removal order). Petitioners' habeas petition asks this Court to hear claims arising from the decision to execute Petitioners' removal orders, namely, that other provisions of law should preclude Petitioners' removal. (Pet., Dkt. #1). Petitioners specifically ask the Court to enjoin or stay execution of their orders of removal. (Mot., Dkt. #11). Regardless of how Petitioners' frame their claims, because they arise from the execution of their removal orders, the REAL ID Act applies.

Because Petitioners' claims arise from U.S. Immigration and Customs Enforcement's execution of their removal orders, this Court cannot exercise subject matter jurisdiction. *See Benitez v. Dedvukaj*, 656 F.Supp.2d 725 (E.D. Mich. 2009) (dismissing habeas petition for lack of jurisdiction and vacating order staying removal); *Deljevic v. Baker*, 463 F. Supp. 2d 699, 701 (E.D. Mich. 2006) (dismissing action for lack of jurisdiction under REAL ID Act); *Paljusevic v. Dedvukaj*, No. 09-13659, 2009 WL 3125540 (E.D. Mich. Sept. 25, 2009) (denying emergency motion for stay of removal for lack of subject matter jurisdiction).

Petitioners cite *Mustata v. U.S. Dept. of Justice*, 179 F.3d 1017 (6th Cir.

1999), for the proposition that limitation on jurisdiction under § 1252(g) must be narrowly construed but do not explain how that precludes application of § 1252(g) to this case. (Mot., Dkt. #11, Pg ID 71-72). In *Mustata*, which was decided prior to the 2005 amendments to the REAL ID Act, the court permitted a habeas petition for ineffective assistance of counsel where it determined the petitioners were not challenging a decision or action “to commence proceedings, adjudicate cases, or execute removal orders” under 8 U.S.C. § 1252(g). *Mustata*, 179 F.3d at 1020-22. The court explained that the claim arose prior to execution of the removal order because it challenged the underlying proceeding. *Id.* at 1022 (“The facts relevant to their claim – essentially that their counsel failed to investigate and present relevant evidence – took place well before any decision by the Attorney General to execute a removal order.”).

In this case, Petitioners’ are plainly challenging the decision to execute their removal orders and *Mustata* is inapposite. The removal orders have been in place for years and it was not until the decision to execute the orders and remove Petitioners that they sought relief based on changed conditions in Iraq. It is indisputable that the only impetus for the habeas petition is the execution of their removal orders. The only Respondent is the Field Office Director for the Detroit District of ICE, named because she “has responsibility for and authority over the detention and removal of noncitizens in Michigan.” (Pet., Dkt. #1, Pg ID 10, ¶ 19).

Petitioners ask that this Court “enjoin the government from removing Petitioners to Iraq” while they present theories to halt enforcement of their orders of removal. *Id.* at Pg ID 24. Because § 1252(g) of the REAL ID Act divests this Court of jurisdiction to hear claims arising from the decision to execute orders of removal, this Court is without jurisdiction to hear Petitioners’ claims or enter orders in furtherance of Petitioners’ claims.

Petitioners also attempt to distinguish the REAL ID Act by noting that their argument regarding the change in conditions in Iraq could not have been made during their removal proceedings. (Mot., Dkt. #11, Pg ID 70). The timing of Petitioners’ grounds for requesting relief do not impact the applicability of the REAL ID Act. Section 1252(g) applies to decisions to execute removal orders, which necessarily applies to divest jurisdiction in cases, like this one, where a final order of removal has already been entered. None of the cases cited by Petitioner hold that habeas petitions seeking to avoid execution of removal orders evade the REAL ID Act based on when the facts giving rise to the challenge become known. (Mot., Dkt. #11, Pg ID 70-71). *See Jama v. INS*, 329 F.3d 630, 632 (8th Cir. 2003) (permitting a habeas petition challenging statutory construction under the pre-2005 REAL ID Act, and noting that the petitioner was not objecting to a “decision or action to execute the removal order”); *Kellici v. Gonzales*, 472 F.3d 416, 420 (6th Cir. 2006) (permitting a habeas petition that “challenged only the constitutionality

of the arrest and detention, not the underlying administrative order of removal”); *Liu v. INS*, 293 F.3d 36 (2nd Cir. 2002) (permitting habeas petition challenging denial of interview for asylum petition before entry of order of removal under the pre-2005 REAL ID Act).

Petitioners argue that even if this Court lacks subject matter jurisdiction to hear their claims, it somehow still has jurisdiction to stay removal while they seek relief from the agency. (Mot., Dkt. #11, Pg ID 71). Petitioners do not cite any authority that would permit a court, after determination that it lacked subject matter jurisdiction, to nonetheless, enter orders. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (“when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.”); and *Am. Telecom Co.*, 501 F.3d at 539 (if federal district courts act beyond their jurisdictional authority “their judgments and orders are regarded as nullities.”).

B. Petitioners cannot establish an exception to the REAL ID Act because it does not violate the Suspension Clause.

The REAL ID Act does not violate the Suspension Clause, and thus, it is applicable and precludes jurisdiction in the district court. Under the Suspension Clause, there must be some opportunity for judicial intervention in deportation cases. *See Muka*, 559 F.3d at 483 (citing *INS v. St. Cyr*, 533 U.S. 289, 300 (2001)). “However, the writ of habeas corpus is not suspended in violation of this Clause if, when the right to habeas is eliminated, there is ‘the substitution of a new collateral

remedy which is both adequate and effective' in allowing an individual to challenge the legality of his or her detention." *Muka*, 559 F.3d at 483. The REAL ID Act does not violate the Suspension Clause "[b]ecause there is a remedy available, a petition for review filed with the court of appeals." *Id.* at 484.

In this case, Petitioners have an adequate and effective mechanism for relief from removal based on the alleged change in conditions in Iraq. At any time, Petitioners have been able to file a motion with the immigration court or BIA to reopen their removal proceedings based on the alleged changes in Iraq. *See* 8 C.F.R. § 1003.2(c)(3); § 1003.23(b)(4)(i). Petitioners, who did not initially claim fear of return, could have sought to reopen their removal proceedings to file for relief based on alleged changes in conditions in Iraq. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii). In satisfaction of the Suspension Clause, judicial review of the agency decisions is available in the court of appeals. *See Haddad v. Gonzales*, 437 F.3d 515, 517 (6th Cir. 2006) ("We have jurisdiction to review the denial of a motion to reopen.") (citing 8 U.S.C. § 1252(a)). Petitioners' statement that they are subject to removal "without any process or opportunity to show that they would be persecuted or tortured" if removed to Iraq is simply not true. (Mot., Dkt. #11, Pg ID 70).

Inasmuch as Petitioners allege that their imminent removal to Iraq precludes them from exhausting the remedies available to them before removal, thereby

necessitating a stay, Petitioners can also seek that relief in the immigration court or before the BIA, *see* 8 C.F.R. §§ 1003.2(f), 1003.23(b)(1)(v), or from the court of appeals, *see Nken v. Holder*, 556 U.S. 418, 422 (2009) (the court of appeals has authority to enter a stay of removal while it considers the legality of the removal order). In fact, Petitioners Asker and Al-Issawi have received a stay of their removal from the immigration court. *See* Dec., Ex. E, G. Petitioners also attach to their motion an order from the BIA granting relief to a Chaldean Christian based on changed conditions in Iraq, further demonstrating that relief is available. (Mot., Dkt. #11-11). Petitioners have always had the opportunity to seek reopening of their removal proceedings in order to seek relief based on changed conditions in Iraq. Although their imminent removal to Iraq has made their desire to seek such relief emergent, the process to do so has not changed and judicial review by the court of appeals remains an adequate and effective mechanism to challenge removal.

IV. CONCLUSION

As determined by Congress, this Court is not the proper forum to determine whether Petitioners are entitled to the relief they seek. Because the REAL ID Act, 8 U.S.C. § 1252(g), deprives the district court of jurisdiction for habeas claims arising from decisions to execute removal orders, Petitioners' motion should be denied.

Respectfully submitted,

DANIEL L. LEMISCH
Acting U.S. Attorney

By: /s/ Jennifer L. Newby

Jennifer L. Newby (P68891)
Attorneys for Respondent
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
(313) 226-0295
Jennifer.Newby@usdoj.gov

Dated: June 19, 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, the foregoing paper was filed with the Clerk of the Court using the ECF System which will notify all counsel of record.

I further certify that I have mailed by U.S. mail the paper to the following non-ECF participants:

Michael A. Steinberg
1000 N. Ashley Drive
Suite 801
Tampa, FL 33602

/s/ Jennifer L. Newby