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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jean Polh Mboussi-Ona, Petitioner, vs. Phillip Crawford, Respondent.	No. CV 06-02897 PHX-NVW (BPV) **ORDER**

Pending before the court is the Report and Recommendation ("R&R") of the Magistrate (Doc. # 10) regarding Petitioner Jean Pohl Mboussi-Ona's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. (Doc # 1.) The question posed is whether, in the absence of bad faith or unreasonable delay on the part of the government, the time required for a judicial appeal from a Board of Immigration Appeals order of removal justifies habeas corpus relief from mandatory detention under 8 U.S.C. § 1226(c). The court holds that it does not.

I. Background

Mboussi-Ona is a citizen and native of Cameroon who on January 29, 1994, was admitted to this county on a six month visitor visa. Soon after his arrival, he took employment in California, but in August of 1997 was convicted of two counts of Grand Theft of Personal Property for stealing from that employer. (Resp., Ex. 13.) At his request and

after serving three years probation, these convictions were expunged in November of 2000. (*Id.*, Ex. 4.)

On May 18, 2001, the Immigration and Naturalization Service ("INS") brought removal proceedings against Mboussi-Ona pursuant to section 237(a)(1)(C)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(C)(i), for failing to maintain or comply with conditions of his nonimmigrant status; pursuant to section 237(a)(2)(A)(i) of the INA, 8 U.S.C. § 1227(a)(2)(A)(i), for his conviction of a crime involving moral turpitude committed within five years of his admission and for which a sentence of one year or longer may be imposed; and finally, pursuant to section 237(a)(2)(A)(ii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(ii), for his conviction of at least two crimes of moral turpitude not arising out of a single scheme of criminal misconduct. (*Id.*, Ex. 7.)

Mboussi-Ona was detained on June 29, 2005. He first appeared before an Immigration Judge ("IJ") for removal proceedings on July 18, 2005; however, the proceeding was continued on several occasions at his request so he could seek legal representation. (*Id.*, Ex. 13 at 14, 40-41, 45-46.) In the interim, on September 6, 2005, the IJ granted his request for a change in custody status and ordered his release upon posting a bond of $25,000. (*Id.*, at 44-45.) He chose not to post the bond. When appealing the IJ's decision, he said he refused to pay it because he "consider[ed] it too much." (Resp., Ex. 10 at 3.) In his objections to the Magistrate Judge's R&R, he stated that had "done nothing" and "[would] not lower [his] standard to bail out for whatever amount. . . ." (Doc. #15 at 2.) Whatever his reason, he failed to appeal the bond determination, never made a showing or asserted that he was unable post it, and so remained in custody for the balance of his administrative proceeding.

On September 19, 2005, Mboussi-Ona appeared at his proceeding pro se, and the IJ sustained all three charges of removability. He then requested more time to apply for a waiver of inadmissibility, for which the proceeding was continued twice, to October 19 and then again to December 20, 2005, a total of three additional months. (*Id.*, Ex. 13 at 62, 69.)

After an opportunity to present evidence, the IJ denied his waiver and ordered him removed to Cameroon. He appealed to the Board of Immigration Appeals ("BIA"), which summarily affirmed on April 6, 2006. (*Id.*, Ex. 12.) Although his administrative process lasted roughly ten months, given the three month delay at his request to seek a lawyer and the additional three month delay at his request to apply for a waiver of removal, the net duration of his administrative confinement was, at most, between four and five months.

On April 26, 2006, Mboussi-Ona filed a Petition for Review of Removal Order with the Court of Appeals for the Ninth Circuit, along with a motion for stay of removal. (*Id.*, Ex. 17.) The court of appeals immediately granted a temporary stay. (*Id.*) In the months that followed, the government filed a timely response to the motion for stay of removal and a motion to dismiss, and he filed a motion for appointment of counsel. (The court takes judicial notice of the Ninth Circuit's general docket). On October, 13, 2006, the court of appeals concurrently granted the motion to stay removal pending review, denied the government's motion to dismiss, and granted Petitioner's motion for appointment of counsel. Counsel was not actually appointed for another month, on November 14, 2006, and at that time a briefing schedule was adopted calling for his opening brief to be filed roughly three months later. However, Mboussi-Ona requested an extension of that deadline and was granted an additional six weeks for filing. In turn, two weeks after service of his brief, the government also requested and was granted a seven week extension to file its response. The appeal is scheduled for oral argument on October 19, 2007. Despite both parties' requests for extensions, the length of the appeal has not been unusually long.

On July, 3, 2006, just over two months after the order granting a temporary stay of his removal, Immigration and Customs Enforcement ("ICE") informed Mboussi-Ona of its decision to continue his detention during his appeal to the Ninth Circuit. (*Id.*, Ex. 20.) He sought reconsideration and, when ICE did not respond, filed this Petition for Writ of Habeas Corpus (Doc. #1) on December 1, 2006, questioning the constitutionality of his "prolonged" detention under *Zadvydas v. Davis*, 533 U.S. 678 (2001).

The Magistrate Judge's June 28, 2007, R&R (Doc. # 10) recommends that this court grant habeas relief on the basis of *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), and order the government to provide Mboussi-Ona with an individualized bond hearing before an IJ within 60 days. (Doc. #10.) The Magistrate Judge concludes that he is entitled to habeas relief based solely on the length of his detention during judicial proceedings. (*Id.*, at 9.) ("What is clear is that Petitioner's detention since April 26, 2006, has exceeded the 'expedited removal' permissible pursuant to *Tijani*.") Respondent filed written objections to the R&R, arguing: 1) that *Tijani* does not govern this case; 2) that the Magistrate Judge failed to give sufficient weight to both the reasonableness of Mboussi-Ona's administrative proceedings and the significance of his prior bond hearing; and 3) that he, not the government should bear the burden of proof at any bail hearing. (Doc. # 13.)

The court has considered these objections and reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that the court must make a de novo determination of those portions of the Report and Recommendation to which specific objections are made). For the reasons set forth below, the court rejects the R&R and denies the Petition. *See* 28 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate").

II. *Zadvydas* Does Not Apply in This Case Because There is No Showing that Mboussi-Ona Will Be Detained Indefinitely

Mboussi-Ona's ground for relief that his detention is unconstitutional under *Zadvydas v. Davis*. *Zadvydas* concerned the indefinite detention of criminal aliens pursuant to 8 U.S.C. § 1231(a) following a final order of removal. 533 U.S. at 682. Mboussi-Ona is being detained pursuant to a different statute, 8 U.S.C. § 1226(c), because, as a result of the stay granted by the court of appeals, his removal order is not yet final. *See* 8 U.S.C. § 1231(a)(1)(B) ("The removal period begins on the latest of the following: . . . (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order."). In *Zadvydas*, several aliens were detained indefinitely

because no country would take them. 533 U.S. at 684-86. Mboussi-Ona will either be deported to Cameroon or be released from custody, depending on the outcome of his judicial appeal. Therefore, he does not face indefinite detention, and *Zadvydas* does not require habeas relief in this case.

III. *Tijani v. Willis*

Mboussi-Ona's own argument having failed, the court now turns to the basis for relief recommended by the Magistrate Judge, *Tijani v. Willis*. In that case, an alien detained pursuant to 8 U.S.C. § 1226(c) sought by habeas proceedings to compel a bond hearing. 430 F.3d at 1242. Except for limited circumstances, § 1226(c) mandates that an alien convicted of qualifying crimes be detained pending a decision on whether he is to be removed from the United States. *See* 8 U.S.C. § 1226(c)(2). At the time of the decision, Tijani had been in federal custody for over thirty-two months. *Tijani*, 430 F.3d at 1242. He had spent twenty of those months in the administrative process. *Id.* at 1246 (Tashima, J., concurring) (noting that the IJ took almost seven months to issue a decision and the BIA review took an additional thirteen months). In addition, the time of detention during judicial review was prolonged by the government's requests for extensions. *Id.* at 1242.

In an effort to avoid constitutional difficulties, the *Tijani* court construed § 1226(c) to require detention of criminal aliens only in "expedited" removal proceedings. *Id.* at 1242. The court did not elaborate on this standard, instead summarily concluding that "[t]wo years and eight months of process is not expeditious . . . ." *Id.* The text of § 1226(c) has no reference to expediency either. Other cases interpreting *Tijani* fall into two categories, those that limit its application to detention during unreasonably long administrative proceedings,[1]

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[1] *See Ibeagwa v. Crawford*, 2007 U.S. Dist. LEXIS 68709, at *6-7 & n.2, 2007 WL 2702006, at *2-3 & n.2 (D. Ariz. Sept. 14, 2007) (noting that, but for alien's decision to file judicial appeal, he would no longer be in detention and also reasoning that should his removal proceeding be remanded to the IJ or BIA then "new concerns" might arise regarding the "expeditiousness" of the proceedings); *Valdez-Bernal v. Chertoff*, 2007 U.S. Dist. LEXIS 61688, at *6 (S.D. Cal. Aug. 22, 2007) (pointing out that alien's administrative proceeding

and those that apply its standard to judicial appeal time as well.[2] None of the cases offers extended analysis. Therefore, this court must determine the meaning of *Tijani* for this case.

A. Mboussi-Ona's Administrative Process Was Expeditious

The court first must address whether Petitioner's administrative process exceeded *Tijani's* "expedited" standard. For at least two reasons, it did not.

First, unlike the alien in *Tijani*, whose administrative process lasted twenty months, the government was responsible for no more than five months of Petitioner's administrative process. Five months is well within administrative norms. *See Demore v. Kim*, 538 U.S. 510, 529 (2003) (noting that when aliens are detained pursuant to § 1226(c) "removal proceedings are completed in an average time of 47 days" and when those decisions are appealed to the BIA, on average that appeal takes an additional four months). While Mboussi-Ona's administrative proceeding lasted roughly ten months, continuances granted solely for his benefit should not count against the *Tijani* standard. *See id.* at 530-31 (immigrant's request for continuance justified the "somewhat longer than average" length of detention). To do so would fault the government for Petitioner's own delay.

Second, Mboussi-Ona was granted release after two months in custody, but he declined to post bond. This option was available to him until the BIA affirmed the IJ's decision. For the remainder of the administrative process he had the ability to free himself, but chose to remain in custody. This self-chosen detention occasions no due process grievance and should not count against *Tijani's* expedited standard.

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lasted ten months, while the one year of continued detention during judicial appeal was his "own doing") (not reported in Westlaw); *Passano v. Gonzalez*, 2007 U.S. Dist. LEXIS 39844, at *1, 2007 WL 1577908, at *1, 3 (D. Ariz. May 31, 2007) (declining to apply *Tijani* because majority of alien's detention occurred during his judicial appeal).

[2] *See Singh v. Crawford*, 2007 U.S. Dist. LEXIS 57249, at *4-5, 2007 WL 2237637, at *2, 5 (D. Ariz. Aug. 3, 2007) (comparing the sum of alien's detention during administrative and judicial proceedings against the detention in *Tijani* and rejecting argument that only alien's administrative time should be considered).

B. Detention During Normal Judicial Appeal Alone Does Not Violate *Tijani*

Given that the duration of his administrative detention neither exceeds nor counts against the expedited standard, Mboussi-Ona is left only with the argument that the *Tijani* gloss on § 1226(c) entitles him to habeas relief based solely on the length of detention during his judicial appeal.

1. *Tijani's* References to Judicial Appeal Time are Not a Holding Binding on Lower Courts

In applying its new standard, the *Tijani* court did not differentiate between the period of detention resulting from Tijani's extraordinarily long administrative process and that attributable to his judicial appeal. 430 F.3d at 1242 (noting simply that "[t]wo years and eight months of process is not expeditious"). The concurrence specifically identifies the entire "thirty months that [he] [had] so far been detained" and states:

> In absolute terms the length of time is unreasonable - it is more than eighteen times the average length of detention (five times the average when the alien chooses to appeal), and is five times as long as the six months the Supreme Court suggested would be unreasonable in *Zadvydas*.

Tijani, 430 F.3d at 1249 (Tashima, J., concurring). This comparison first sums the administrative and judicial periods and then compares that total to "averages" which are solely administrative. *See Kim*, 538 U.S. at 529. Neither the majority nor the concurring opinion in *Tijani* discusses whether the normal judicial review process alone can fail the expedited standard.

Tijani's twenty-month administrative process was clearly unreasonable, exceeding the "expedited" standard by a multiple. Consequently, although the court mentioned the length of Tijani's judicial appeal, that fact was not encompassed within an articulated rationale of the court.

2. The *Tijani* Standard of "Expedited" Proceedings Does Not Apply to Normal Judicial Appeal Time

Mboussi-Ona's judicial appeal time is within the norm for civil appeals in the Ninth Circuit. He cannot complain about delay from his own extensions, and the government's

request for a single seven-week extension was reasonable in light of the much more generous time given to Petitioner to file his brief. If this were a case in which the government had prolonged the appeal unreasonably, then it might violate the *Tijani* standard, but this case presents no such facts. This conclusion narrows Mboussi-Ona's case to a general contention that the normal judicial appeal time itself exceeds what the *Tijani* gloss on what § 1226(c) permits.

If the *Tijani* gloss applies in this manner, then every judicial appeal will exceed this "expedited" standard. This would mean that by merely seeking judicial review, every alien found removable would be entitled to an individualized bond hearing and possible release. As the Supreme Court stressed in *Demore v. Kim*, Congress enacted § 1226(c) with evidence that more than one out of every five deportable criminal aliens released on bond fail to appear for their removal hearings. 538 U.S. at 519-20. The Court also noted specifically the congressional concern with the practice of filing frivolous appeals as a major cause of systemic failures in the deportation process. *Id*. at 530 n.14. *Cf*. *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) ("[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens"). A rule creating a universal right to an individualized bond hearing merely by seeking judicial review would bring the art of delay to perfection.

Moreover, the *Tijani* court's motivation for narrowing its interpretation of § 1226(c) was to avoid serious due process concerns. In this case, however, where the only relevant detention is during normal judicial review, such constitutional problems are attenuated. Unlike the alien still in administrative removal proceedings, upon judicial review an alien already has had extensive process in the form of notice, hearing, presentation of evidence, a decision by the IJ, and an administrative appeal to the BIA. If mandatory detention during the normal administrative process does not offend due process before a finding of removablity, then detention should be less concerning while judicially reviewing the large amount of due process already given.

A final judicial appeal proceeds against the presumption of a valid agency decision. *See I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (reviewing court must uphold an administrative determination in an immigration case unless the evidence compels a conclusion to the contrary). Therefore, any due process claim to release pending judicial review diminishes in light of the finding, after ample process, that the alien is removable. These considerations weigh against taking the *Tijani* gloss to guarantee every administratively adjudicated removable alien an opportunity, merely by filing a judicial appeal, to request bond.

IT IS THEREFORE ORDERED that the Report and Recommendation (Doc. # 10) is rejected.

IT IS FURTHER ORDERED that the Clerk of the Court enter judgment denying the Petition for Writ of Habeas Corpus (Doc. # 1). The clerk shall terminate this case.

DATED this 27th day of September 2007.

Neil V. Wake
United States District Judge