IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KINGSLEY CHUKWUEZI,	:	
	:	
Petitioner	:	
	:	
vs.	:	**CIVIL ACTION NO. 3:CV-99-2020**
	:	**(CHIEF JUDGE VANASKIE)**
JANET RENO, et al.,	:	
	:	
Respondents	:	

M E M O R A N D U M

Pending in the above-captioned matter are the objections of respondent Attorney General Janet Reno to Magistrate Judge Thomas M. Blewitt's Report and Recommendation, which proposes that the challenge of petitioner Kingsley Chukwuezi to the mandatory detention provisions of 8 U.S.C. § 1226(c) be sustained. Specifically, Magistrate Judge Blewitt found persuasive those district court decisions which found unconstitutional section 1226(c)'s mandatory detention of an alien pending the outcome of removal proceedings that had been instituted on the ground that the alien had been convicted of an "aggravated felony."

Chukwuezi, a native and citizen of Nigeria, was lawfully admitted to the United States in 1990, and became a lawful permanent resident alien in May of 1997. Chukwuezi alleges that he has been married to a United States citizen since December of 1992. The factual premise for the decision to commence removal proceedings against Chukwuezi is his January 28, 1998 conviction in the United States District Court for the District of Maryland of the offense of fraud and misuse of an alien registration card in violation of 18

U.S.C. § 1546(a).

On or about May 17, 1999, Chukwuezi completed his 15-month sentence for this conviction. Upon his discharge from confinement by the federal Bureau of Prisons, Chukwuezi was taken into custody by the Immigration and Naturalization Service (INS) under the authority of section 236(c)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1).[1] The INS asserts that Chukwuezi is deportable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), on the ground that his conviction constitutes an aggravated felony as defined in Section 101(a)(43)(P) of the Act, 8 U.S.C. § 1101(a)(43)(P).[2] On September 2, 1999, Chukwuezi was ordered deported to Nigeria based upon his conviction. He was also denied release pending the completion of removal proceedings due to the mandatory detention provisions of 8 U.S.C. § 1226(c).

Contending that his offense should not be regarded as a deportable aggravated felony, Chukwuezi has appealed the order of removal to the Board of Immigration

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[1]Section 1226(c) states that "[t]he Attorney General shall take into custody any alien who . . . is deportable by reason of having committed . . . any [aggravated felony as defined in 8 U.S.C. § 1101(a)(43)] . . . when the alien is released [from confinement pursuant to a conviction]." Section 1226(c)(1) thus contemplates that, upon discharge of a sentence of imprisonment, an alien will be taken into INS custody and remain detained until completion of removal proceedings. Only if the release of such an alien is necessary to provide protection to a witness or person cooperating with a criminal investigation and the Attorney General is satisfied that such an alien will not pose a danger to other persons or property and will not flee may the alien be released while removal proceedings are pending. See 8 U.S.C. § 1226(c)(2).

[2]Section 101(a)(43)(P) defines the term aggravated felony as including "an offense of . . . (I) . . . falsely making, forging, counterfeiting, mutilating or altering a passport or instrument in violation of Section 1543 of Title 18, or is described in Section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months . . . ." 8 U.S.C. § 1101(a)(43)(P).

Appeals. On November 17, 1999, he filed in this Court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the mandatory detention provisions of § 1226(c) as unconstitutional on its face and as applied to him.[3]

As Magistrate Judge Blewitt observed, the judicial decisions on the validity of the mandatory detention provisions of 8 U.S.C. § 1226(c) are in conflict. In Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999), Galvez v. Lewis, 56 F.Supp. 2d 637 (E.D. Va. 1999), and Diaz-Zaldierna v. Fasano, 43 F.Supp. 2d 1114 (S.D. Cal. 1999), attacks on the constitutionality of the mandatory detention provisions of § 1226(c) were rejected. By way of contrast, in Bouayad v. Holmes, 74 F.Supp. 2d 471 (E.D. Pa. 1999); Danh v. Demore, 59 F.Supp. 2d 994 (N.D. Cal. 1999), Van Eeton v. Beebe, 49 F.Supp. 2d 1186 (D. Ore. 1999), and Martinez v. Greene, 28 F.Supp. 2d 1275 (D. Colo. 1998), the mandatory detention provisions were found to be unconstitutional.

Having given plenary consideration to the matter, as required when a party files objections to a Magistrate Judge's Report and Recommendation, 28 U.S.C. § 28 U.S.C. §636(b)(1)(C); Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3rd Cir. 1989); Henderson v. Carlson, 812 F.2d 874, 878 (3rd Cir.), cert. denied, 484 U.S. 837 (1987); Owens v. Beard, 829 F. Supp. 736 (M.D. Pa. 1993), I find that the decisions rejecting constitutional challenges to § 1226(c) are limited to the factual scenarios presented in those cases and that those factual scenarios are materially distinguishable from that presented here. For example, in Parra, the Seventh Circuit relied upon the fact that the petitioner conceded

[3]Chukwuezi's habeas petitions also challenged the Immigration Judge's determination that Chukwuezi's offense of conviction is an aggravated felony. Because that matter is still before the Board of Immigration Appeals, consideration of that issue in this case is premature.

that he was a removable alien because of his conviction of aggravated sexual assault. Because of this concession, the petitioner effectively had the keys to his release as he could have simply consented to his removal to his native Mexico. Judge Easterbrook, writing for the unanimous appeals court panel, observed that "[a] criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay [to effect removal], and the United States has a powerful interest in maintaining the detention in order to ensure that removal actually occurs." 172 F.3d at 978. In Galvez, the petitioner was an illegal alien with a drug conviction. In finding that mandatory detention as applied in Galvez was not unconstitutional, the court explained that "[t]his case turns on Petitioner's unlawful alien status in this country." 56 F.Supp. 2d at 646. In Diaz-Zaldierna, the petitioner had been convicted of possession of crack cocaine, and the court concluded that the "controlled substances conviction is a sufficient ground to detain him without possibility of bail, at least for a reasonable time while his removal is adjudicated." 43 F. Supp. 2d at 1120.

In this case, unlike Parra, Chukwuezi does not concede that his conviction requires his removal from the United States. Unlike Galvez, Chukwuezi is not an illegal alien in this country; he has attained lawful permanent residence status. And unlike Diaz-Zaldierna, Chukwuezi does not stand convicted of a drug offense. Because the rationale of Parra, Galvez, and Diaz-Zaldierna were so linked to the factual settings of those cases, their holdings are unpersuasive here.

More persuasive are those decisions that have recognized that mandatory detention whenever the Attorney General charges an alien with an aggravated felony conviction sweeps too broadly. Those cases have recognized that INS detention is

indistinguishable from punitive incarceration. Although INS detention is plainly regulatory and not intended as punishment, see Martinez, 28 F. Supp. 2d at 1282, the reality is that it is as restrictive as punitive confinement. As Judge Weis remarked recently:

> Characterizing prolonged detention as anything other than punishment might be somewhat puzzling to petitioner, who remained in jail under the same conditions as before the state released him, although his status had technically changed from that of a state inmate to an INS "detainee." Similarly, an alien whose detention occurs in a maximum security federal prison may be forgiven for wondering when his punishment stopped and detention began. As Justice Jackson remarked, "[i]t overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound." Mezei, 345 U.S. at 220 (Jackson, J., dissenting). It is similarly unrealistic to believe that these INS detainees are not actually being "punished" in some sense for their past conduct.

Ngo v. INS, 192 F.3d 390, 397-98 (3d Cir. 1999). Finding a fundamental liberty interest implicated in the detention of aliens awaiting a final removal decision, the courts that have found § 1226(c) unconstitutional have applied the compelling interest test of United States v. Salerno, 481 U.S. 739 (1987). See, e.g., Danh, 59 F. Supp. 2d at 1000-01; Van Eeton, 49 F. Supp. 2d at 1189-90; Martinez, 28 F. Supp. 2d at 1281. Concluding that mandatory detention of all criminal aliens is "excessive" in relation to the purposes sought to be advanced by § 1226(c) -- prevention of flight, protection of the community, and assure enforcement of the immigration laws -- those courts have directed that the INS afford some process by which a criminal alien can secure release pending the outcome of removal proceedings.

As note above, I find the rationale of cases such as Danh, Van Eeton and Martinez to be compelling. Clearly in a case such as this one, involving a lawful permanent resident, incarceration implicates a liberty interest. Equally clearly, a statute that presumes that all criminal aliens will abscond or pose a threat to safety sweeps too

broadly.

In some cases, § 1226(c) would ensnare a person who has resided in the United States for decades and has an arguable claim to citizenship. See e.g., Van Eeton, supra. As to such a person, he or she would be detained notwithstanding the existence of a bona fide challenge to the removal proceedings and the absence of any evidence of a flight risk or threat to safety. Unlike the situation confronting the court in Parra, a person subject to the removal process who claims citizenship cannot be regarded as having the keys to liberty. On the contrary, compelled confinement may provide the motivation to forego pursuit of an arguably valid defense to removal.

Also swept up in § 1226(c) is a lawful permanent resident alien's challenge to a determination by the INS that the offense of conviction constitutes an "aggravated felony." Section 101(a)(43) of the Immigration and Naturalization Act is a lengthy and complex provision. There will be cases where it is unclear that a criminal offense constitutes an "aggravated felony." In such cases, a lawful permanent resident of long standing will be forced to remain in custody while pursuing a challenge to the INS determination that he or she is subject to removal notwithstanding the absence of any evidence of a risk of flight or danger to the community.

The fact that an Immigration Judge will make an initial decision as to whether an offense of conviction constitutes an aggravated felony does not ameliorate the problem. Even where an Immigration Judge makes a determination that the detainee is not subject to removal, the INS may continue to detain the alien by filing its own notice of intent to

appeal. See 8 C.F.R. § 3.19(I)(2) (1999).[4] Thus, even a prompt determination by an Immigration Judge that an alien's conviction does not constitute an aggravated felony so that he or she is not subject to removal does not alter the alien's detention status under § 1226(c).

Our Court of Appeals' decision in Ngo v. INS, 192 F.3d 390 (3d Cir. 1999), lends additional support to a determination that the mandatory detention provisions of § 1226(c) do not pass constitutional muster. In Ngo, the court held that long term detention of an alien subject to a final removal order did not violate due process provided there was a possibility of the alien's eventual removal, there were adequate and reasonable procedures to seek release pending removal, and there was an adequate factual premise for a conclusion that detention was necessary to prevent a risk of flight or threat to the community. Id. at 397. If an alien who is subject to a final removal order is entitled to an opportunity to seek release pending execution of the removal order, then an alien who is not yet subject to a final removal order should be accorded the same opportunity. As explained by Judge Katz in Bouayad:

> As the Third Circuit recognized in Chi Thon Ngo, due process demands an underlying justification for the detention of aliens. The petitioner in Chi Thon Ngo was an alien whose order of removal was final but who was still detained in the United States because his native country, Vietnam, refused to accept

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[4] Section 3.19(I)(2), in pertinent part, provides:

> If an alien is subject to [8 U.S.C. § 1226(c)(1)], . . . any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon the Service's filing of a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR-43) with the Immigration Court on the day the order is issued, and shall remain in abeyance pending decision of the appeal by the Board of Immigration Appeals. [Emphasis added.]

> him. The court emphasized the need for an individualized evaluation of the petitioner's detention: "The process due even to deportable and excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight."
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> The interest affected by the mandatory detention provisions is not whether an alien may remain in this country, but whether the alien must be automatically detained while removal proceedings are pending. The Third Circuit's holding in Chi Thon Ngo clarifies that the issue of removability is distinguishable from the issue of detention. In Chi Thon Ngo, the petitioner was under a final order of removal; there was no question that he would have to leave this country when and if Vietnam agreed to accept him. However, the court found that due process still necessitated meaningful periodic reviews of the reasons for the petitioner's continued detention -- namely whether he presented a risk of flight or a danger to the community.
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> Admittedly, the petitioner in Chi Thon Ngo was unable to return to Vietnam and so could not simply end his detention by leaving this country . . . . However, where, as here, a petitioner contests whether he is removable under 8 U.S.C. § 1227, the option of ending detention by departing this country does not cure any constitutionality infirmity in the mandatory detention provisions. To hold otherwise would be to put the cart before the horse by requiring an alien who is subject to mandatory detention and not yet under a final order of removal to forego any challenges to the removal proceeding in order to secure his or her liberty.

74 F.Supp. 2d at 475, 476.

In this case, Chukwuezi is pursuing a challenge to the fact of removability. He has been detained for approximately one year as a consequence of his challenge to removability. While it may be that he should not be released while he pursues his challenges, either because of factors such as the nature of his conviction or evidence that he poses a flight risk or danger to some person or the community, he should be afforded

an opportunity to seek his release. Because § 1226(c) denies Chukwuezi such an opportunity, it is unconstitutional. Accordingly, Chukwuezi is entitled to be released unless the INS affords him a meaningful opportunity to be heard on the question of his release pending the outcome of the removal proceedings.[5] An appropriate Order is attached.[6]

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

May 16, 2000

[5]Respondent is reminded of the admonition in Ngo, 192 F.3d at 398, and Bouayad, 74 F.Supp. 2d at 477, that "grudging and perfunctory review is not enough to satisfy the due process right to liberty, even for aliens."

[6]In light of this decision, there is no need to rule on Chukwuezi's pending motions for a temporary restraining order and for appointment of counsel.

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JANET RENO, et al.,	:	
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ORDER

NOW, this ____ day of May, 2000, for the reasons set forth in the foregoing Memorandum, **IT IS HEREBY ORDERED THAT**:

1. The Report and recommendation of Magistrate Judge Blewitt (Dkt. Entry 11) is **ADOPTED**.

2. The petition for a writ of habeas corpus is **GRANTED** and the petitioner shall be released unless within **thirty (30) days** the respondent accords petitioner the review process that was found acceptable in Ngo, supra, or applies to petitioner other procedures that are at least as favorable to the petitioner.

3. The Clerk of Court is directed to mark this matter **CLOSED**.

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Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

FILED: May 16, 2000
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