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A LEGAL GUIDE FOR INS DETAINEES:

PETITIONING FOR RELEASE FROM INDEFINITE DETENTION

American Bar Association
Commission on Immigration Policy, Practice and Pro Bono
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PREFACE

Welcome to *A Legal Guide for INS Detainees: Petitioning for Release from Indefinite Detention*. The American Bar Association's Commission on Immigration Policy, Practice and Pro Bono created this manual. The manual is for INS detainees interested in understanding the administrative process of obtaining review of continued custody and the procedure for seeking release in federal court.

This manual is intended for educational and informational purposes only. Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own attorneys. This booklet was not prepared by the Immigration and Naturalization Service ("INS"), or by any other part of the United States government. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be considered as representing the official policy of the American Bar Association.

This manual details how to seek release from indefinite detention. It explains how to petition for administrative review of your custody, how to seek release in federal court if you are not released after your custody review, how to file motions for appointment of counsel and how to have any filing fees waived if you do not have the means to pay for them (*i.e.* proceeding *in forma pauperis*). It also addresses the special cases of Mariel Cubans. In the appendices of this handbook you will find sample forms, addresses of the U.S. District Courts, and a list of resources where you might seek additional assistance. Before filing any petition for release with a court, you should attempt to contact the assistance of one of the organizations listed in the appendix to help you in the process.

At any time during this process, you should feel free to send your questions or concerns to: American Bar Association, Attn. Commission on Immigration Policy, Practice and Pro Bono, 740 15th Street, NW, 9th Floor, Washington, DC 20005-1022, tel. 202-662-1008, fax 202-638-3844, or by email at nugentc@staff.abanet.org. **PLEASE DO NOT SEND ORIGINAL DOCUMENTS. NO COLLECT CALLS PLEASE.**

INTRODUCTION: A BRIEF SUMMARY OF ZADVYDAS v. DAVIS

In June 2001, the U.S. Supreme Court issued Zadvydas v. Davis,¹ a decision with tremendous significance for aliens in INS detention who are under final orders of removal. The decision resolved the case of two aliens, Kestutis Zadvydas and Kim Ho Ma, and required the INS to change the way it handles aliens in detention after a final removal order has been entered. As a result, the INS cannot detain an alien under a final order of removal for longer than six months if there is no significant likelihood the alien will be removed in the reasonably foreseeable future.

Kestutis Zadvydas

Mr. Zadvydas was born in 1948 to Lithuanian parents in a displaced persons camp in Germany. In 1956, he immigrated with his family to the United States and became a legal permanent resident (*i.e.*, green card holder), but never became a U.S. citizen. He has lived in the United States ever since.

Mr. Zadvydas had a long criminal record, involving drug crimes, attempted robbery, attempted burglary, and theft. He also had a history of failing to appear at both criminal and deportation proceedings. In 1992, Mr. Zadvydas was convicted in Virginia for cocaine possession with intent to distribute and sentenced to 16 years in prison. After two years, he was paroled, then taken into INS custody, and in 1994, ordered deported to Germany. Later that year, Germany told the INS that it would not accept Mr. Zadvydas because he was not a German citizen. Lithuania also refused to accept him because he was neither a Lithuanian citizen nor a permanent resident of Lithuania.

In September 1995, Mr. Zadvydas filed a petition for a writ of habeas corpus challenging his continued detention.² In October 1997, the District Court for the Eastern District of Louisiana granted his petition and authorized his supervised release. However, the Fifth Circuit Court of Appeals reversed the lower court's decision in 1999 because it believed that there was still a possibility that Mr. Zadvydas could be removed. As a result of the Fifth Circuit's ruling, Mr. Zadvydas faced continued detention by the INS for an indefinite period of time.

¹ 533 U.S. 678 (2001).

² A writ of habeas corpus is an independent judicial proceeding instituted to determine whether the defendant is being unlawfully deprived of his or her liberty. It is not a review of the validity of a final removal order.

Kim Ho Ma

Mr. Ma was born in Cambodia in 1977. When he was two years old, he and his family fled Cambodia to refugee camps in Thailand, and then the Philippines. Eventually, Mr. Ma came to the United States with his family, where he has lived as a legal permanent resident since he was seven.

In 1995, at the age of 17, Mr. Ma was involved in a gang-related shooting, convicted of manslaughter, and sentenced to 38 months in prison. After serving two years, Mr. Ma was released from prison, taken into INS custody, and ordered deported by an immigration judge. The INS, however, was unable to deport him because Cambodia did not have a repatriation agreement³ with the United States.

In 1999, Mr. Ma filed a petition for a writ of habeas corpus challenging his continued detention. The District Court for the Western District of Washington granted his petition and authorized his supervised release. The Ninth Circuit Court of Appeals agreed with this decision and also granted supervised release for Mr. Ma.

The Supreme Court Decision

The Supreme Court decided to review Mr. Zadvydas' and Mr. Ma's cases together to resolve the opposite outcomes. It ruled that the indefinite detention of removable aliens, such as Mr. Zadvydas and Mr. Ma, is not allowed when the alien is unlikely to be removed in the reasonably foreseeable future. For certain aliens who have entered the United States, the Court recognized that the INS generally cannot detain an alien for longer than six months after the issuance of a final removal order.

The Court ruled that, **after six months of post-removal order detention, if the alien can provide good reason to believe that he or she is unlikely to be removed in the reasonably foreseeable future, and the INS cannot provide evidence showing otherwise, the alien must be released.** The Supreme Court did not define a time frame for what would be the "reasonably foreseeable future," but it did state that the longer an alien has been detained, the shorter the "reasonably foreseeable future" becomes.

In light of the Supreme Court's ruling, both Mr. Zadvydas and Mr. Ma were released under supervision.

³ A repatriation agreement is an agreement made between two countries to govern the return of a person to his or her country of origin.

CRITERIA TO DETERMINE WHETHER YOU ARE AFFECTED BY THE ZADVYDAS DECISION

- 1. You must be under a final order of removal.**
 - After an immigration judge has ordered you removed, the judge's order becomes final when:
 - a. you waive your right to appeal; or
 - b. the 30 day time period to make an appeal expires; or
 - c. the appeal is dismissed by the Board of Immigration Appeals; or
 - d. the Board of Immigration Appeals makes a decision to uphold the removal order.

- 2. You have been admitted to the United States (for example, you were a legal permanent resident, a visa-holder, an alien admitted as an overseas refugee, or you entered illegally prior to 1996).**
 - Note that in some jurisdictions, even if you were never formally "admitted" to the United States (such as Cubans who arrived in the Mariel boatlift), you are eligible for release under Zadvydas.
 - If you are detained in **Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, or Washington**, you may be eligible for release according to a recent decision interpreting Zadvydas. See Special Cases: Habeas Corpus for Mariel Cubans.
 - If you are currently detained in **Michigan or Minnesota**, you may be eligible for release under Zadvydas.
 - If you are currently detained in any other state, your eligibility for release under Zadvydas is unclear.

- 3. There is no significant likelihood that you will be removed from the United States in the reasonably foreseeable future.**
 - Chances of being able to show this are greater if you are:
 - stateless (*i.e.* have no citizenship);
 - from a country which has no repatriation agreement with the United States, such as Cuba, Vietnam, or Laos; or
 - you have been detained by the INS for longer than six months after your removal order becomes final, and you have reason to believe your removal will not take place in the near future.

If you fulfill all of these criteria, you are probably eligible for release from INS detention under Zadvydas. The rest of this manual will help you seek release from INS detention through an administrative procedure and through a court procedure.

Example of An Alien Who Is Eligible for Release under Zadvydas:

Question: Mr. Li has been in INS detention for 10 months since receiving a final removal order. He is a citizen of China. The INS submitted a request to China for his travel documents. China responded to the INS with a statement that it will not issue travel documents for Mr. Li because of his criminal conviction. Is he eligible for release under Zadvydas?

Answer: Yes, Mr. Li is eligible for release under Zadvydas because he has been in detention for longer than six months, and China has refused to issue travel documents. There is no significant likelihood that Mr. Li can be removed to China in the near future.

Example of An Alien Who Is NOT Eligible for Release under Zadvydas:

Question: In January 2001, the INS issued a final order of removal for Ms. Rios, a citizen of Mexico who entered the United States without inspection. She waived her right to appeal so the removal order is now final. It is now March 1, 2001. Is Ms. Rios eligible for release under Zadvydas?

Answer: No, Ms. Rios is not eligible for release under Zadvydas because she has only been in detention for two months. The INS has six months to try to remove her.

Example of An Alien Whose Eligibility for Release under Zadvydas Is Not Clear:

Question: Mr. Ibarra was paroled into the United States in 1980 as part of the Mariel boatlift. He committed several crimes in the 1980s and as a result the INS revoked his parole. He has been in INS detention for eight years. Is Mr. Ibarra eligible for release under Zadvydas?

Question: Mr. Ndjani entered the United States seeking asylum from Cameroon. He was apprehended by INS at the airport. The INS classifies him as an arriving, or “inadmissible,” alien. Mr. Ndjani was denied asylum and ordered removed. Is Mr. Ndjani eligible for release under Zadvydas?

Answer: Maybe. As of August 2002, Mariel Cubans and other “inadmissible” aliens such as those apprehended at the airport or at sea, are eligible for release in the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. They may be eligible for release in Michigan and Minnesota. In other states, however, it is unclear whether Zadvydas applies to Mariel Cubans or inadmissible aliens. See Special Cases: Habeas Corpus for Mariel Cubans, in this handbook, for more information.

**TIME-LINE OF ADMINISTRATIVE AND FEDERAL COURT
PROCEEDINGS FOR SEEKING RELEASE FROM
INS INDEFINITE DETENTION**

Below is a time-line for seeking administrative review of your detention and for filing a habeas petition in federal court. The sections that follow this time-line will walk you through each of these steps.

Step One

Ninety days after your order of removal becomes final, you may submit a letter to INS requesting release from detention. See Form 1.



Step Two

Six months after your order of removal becomes final, you may submit a letter to the INS Headquarters Post-Order Detention Unit (HQPDU) requesting release from detention.
See Form 2.



Steps Three, Four, and Five

If HQPDU decides not to release you or fails to make a prompt decision, and you have good reason to believe that you cannot be removed in the reasonably foreseeable future, you may file a petition for a writ of habeas corpus in federal court. See Form 3.

At the same time, if you do not have a lawyer, you may file a motion for appointment of counsel.
See Form 4.

If you do not have enough money to pay the filing fee for the habeas petition, you may also file a motion to proceed *in forma pauperis*.
See Form 5.