



D STATES DISTRICT COURT
RICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11391-RWZ

WEI ZHOU

V.

STEVEN FARQUHARSON, DISTRICT DIRECTOR, et. al.

MEMORANDUM AND ORDER

October 19, 2001

ZOBEL, D.J.

According to his complaint, Plaintiff is an alien who is in INS custody awaiting deportation to his native country, China. He seeks an order that Defendant comply with 8 U.S.C. § 1231, the post removal detention statute, and either release him from custody or proceed with the deportation proceedings without further delay.

Alternatively, he seeks a writ of habeas corpus ordering his immediate release.

The complaint states that Plaintiff, in 1997¹, was convicted of assault and battery in the Suffolk Superior Court. He was given a suspended sentence and placed on probation. Later he was charged with other offenses in the Norfolk Superior Court. Although he was released on bail from Norfolk, the Suffolk authorities then required Plaintiff to serve the one-year sentence that had been suspended. While he was in jail, the INS lodged a detainer against Plaintiff pending deportation proceedings, and on January 11, 2000, it issued an order of deportation which Plaintiff has apparently not

¹ The INS brief, which remains unopposed, recites 1996 as the year in which Plaintiff was convicted.

contested. On September 26, 2000², he completed his criminal sentence but was immediately taken into INS custody pursuant to the detainer and has been in INS custody ever since. This case was filed on August 10, 2001, following the decision of the Supreme Court in Zadvydas v. Davis, 121 S.Ct. 2491, 2505 (2001).

In Zadvydas, the Supreme Court addressed the precise issue of whether immigrants may be detained indefinitely pending deportation. The Court read a six-month constitutional time limitation into the holding of an alien under § 1231(a)(6), after which time, the government bears the burden of disproving an alien's "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Id. Defendant, pursuant to the new interim standards promulgated by the Attorney General in response to Zadvydas, determined on September 13, 2001, to continue Plaintiff's detention.

Although a federal habeas court must give deference to INS decision-making authority, it does not have to accept the INS view about whether the implicit statutory limitation is satisfied in a particular case. Id. at 2503. Rather, it is the court's function to question "whether the detention is, or is not, pursuant to statutory authority," by ascertaining whether "a set of particular circumstances amounts to detention, within, or beyond, a period reasonably necessary to secure removal." Id. at 2504. "[F]or detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." Id. at 2505. Although, according to the INS, the Attorney General and Secretary of State have approached the government of China in order to expedite the issuance of

² The INS brief recites September 27, 2000, as the day that Plaintiff completed his sentence.

travel documents for nationals awaiting removal, Petitioner's ever-increasing 13-month detention far exceeds Zadvydas' presumptively constitutional six-month time limit.

Given the amount of time that he has been in detention and the lack of assurances from the INS that the necessary paperwork from China is currently on its way, Plaintiff has no reason to believe that he will be removed in the reasonably foreseeable future.

Accordingly, it is ordered that the writ for habeas corpus shall issue if Plaintiff is not repatriated within 60 days.

DATE

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE