UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA

Rushinga Francois Muzaliwa Petitioners, v. JOEL BROTT, Sherburne County Sheriff; SCOTT BANIECKE, Field Office Director, Immigration and Customs Enforcement; SARAH SALDAÑA, Director, Immigration and Customs Enforcement; JEH JOHNSON, Secretary, Department of Homeland Security; LORETTA LYNCH, Attorney General of the United States. Respondents.	Civil Action No: _____ **PETITION FOR WRIT OF HABEAS CORPUS** **CLASS ACTION**

CLASS ACTION PETITION FOR WRIT OF HABEAS CORPUS

1. Respondents are unlawfully detaining Petitioner Rushinga Francois Muzaliwa and all other similarly situated individuals (collectively, "Petitioners") under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(2). Respondents are currently subjecting Petitioners to what Respondents say is a mandatory 90-day detention period despite the fact that an Immigration Judge has granted each Petitioner in the Class humanitarian relief from removal in the form of withholding or deferral of removal under the Convention Against Torture ("CAT"), 8 C.F.R. § 1208.16 *et seq.*, or withholding of removal under 8 U.S.C. § 1231(b)(3). Because of the humanitarian relief granted, Immigration and Customs Enforcement ("ICE") is prohibited by law from removing Petitioners to their home countries, where an Immigration Judge found that they would

likely either face threats to their life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion or they would be tortured.

2. None of the Petitioners have ties to any third country that would make removal to a country other than their home countries possible, and it is extremely unlikely that any of the Petitioners will ever be removed from the United States. Despite knowing this, Respondents continue to hold Petitioners in custody in violation of the INA, the U.S. Constitution, Supreme Court precedent and decisions from this District Court, as well as national ICE policy. Petitioners' detention is only lawful so long as their removal is reasonably foreseeable. Zadvydas v. Davis, 533 U.S. 678, 699–700 (2001). When, as here, "removal is not reasonably foreseeable," ICE has no interest in holding the Petitioners and "the court should hold continued detention unreasonable and no longer authorized by statute." Id.

3. To remedy this unlawful detention, Petitioners, on behalf of themselves and all others similarly situated, seek immediate release from detention absent a showing by the Respondents that there is a significant likelihood of the Petitioners' removal in the reasonably foreseeable future. See Zadvydas, 533 U.S. at 701. Petitioners bring this action as a class action petition for writ of habeas corpus under 28 U.S.C. § 2241 or, in the alternative, pursuant to this Court's inherent judicial authority.[1]

PARTIES

I. PETITIONERS

[1] *See* United States ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974) (allowing Petition for Writ of Habeas Corpus to proceed under the court's inherent judicial authority).

4. Petitioner Rushinga Francois Muzaliwa is a native and citizen of the Democratic Republic of Congo who entered the United States in 2010 as a refugee. He was granted DCAT on January 14, 2016 and has remained detained at Sherburne County Jail ever since.

II. RESPONDENTS

5. Respondent Joel Brott is named in his official capacity as the Sheriff of Sherburne County, Minnesota. In that capacity, Sheriff Brott is responsible for the Sherburne County, Jail - a detention facility under contract with ICE and the physical location where at least one Petitioner or proposed class member is currently in custody. The address for Sherburne County Jail is 13880 Business Center Dr. NW, Elk River, MN 55330.

6. Respondent Scott Baniecke is named in his official capacity as the Field Office Director for the St. Paul Field Office for ICE within the United States Department of Homeland Security ("DHS") for St. Paul, Minnesota. In that capacity, Field Director Baniecke has supervisory authority over the ICE agents responsible for not releasing petitioners. The address for the St. Paul Field Office is 1 Federal Drive Suite 1601, Fort Snelling, MN 55111.

7. Respondent Sarah Saldaña is named in her official capacity as the Director of ICE within DHS, located in Washington, D.C. In that capacity, Director Saldaña has supervisory capacity over ICE personnel in Minnesota, and she is the head of the agency that retains legal custody of the Petitioners. The address for ICE Headquarters is 500 12th St. S.W., Washington, D.C. 20536.

8. Respondent Jeh Johnson is named in his official capacity as the Secretary of Homeland Security at DHS. In this capacity, Secretary Johnson is responsible for the administration of the immigration laws pursuant to § 103(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1103(a) (2012), routinely transacts business in the District of Minnesota, supervises the St. Paul ICE Field Office, and is legally responsible for pursuing the Petitioners' detention and removal, and as such is the Petitioners' legal custodian. Secretary Johnson's address is U.S. Department of Homeland Security, Washington, D.C. 20528.

9. Respondent Loretta Lynch is the Attorney General of the United States and the head of the Department of Justice, which encompasses the BIA and immigration judges as a subunit – the Executive Office of Immigration Review. Ms. Lynch shares responsibility for implementation and enforcement of the immigration laws along with Respondent Johnson. Ms. Lynch is a legal custodian of the Petitioners. Ms Lynch is sued in her official capacity.

JURISDICTION AND VENUE

10. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question), § 1361 (federal employee mandamus action), § 1651 (All Writs Act—mandamus), and § 2241 (habeas corpus); and Art. I § 9, cl. 2 of the U.S. Constitution ("Suspension Clause"), the Administrative Procedure Act, 5 U.S.C. § 702; and the Declaratory Judgment Act, 28 U.S.C. § 2201. Because Petitioners and the detainees they seek to represent challenge their custody as a violation of the Constitution, laws, or treaties of the United States, jurisdiction is proper in this court. While the courts of appeals have

jurisdiction to review removal orders directly through petitions for review, see 8 U.S.C. § 1252(a)(1), (b), the federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas petitions by noncitizens challenging the lawfulness of their detention. See, e.g., Demore v. Kim, 538 U.S. 510, 516–17 (2003); Moallin v. Cangemi, 427 F. Supp. 2d 908, 920–21 (D. Minn. 2006).

11. Venue is proper as some of the Respondents are headquartered within this District and the Petitioners and proposed class members are detained within this District. 28 U.S.C. § 2241(d). Venue is proper pursuant to 28 U.S.C. § 1391(b) as a substantial part of the events giving rise to these claims occurred in this District.

EXHAUSTION

12. Petitioners have exhausted their administrative remedies to the extent required by law, and judicial action is their only remaining remedy.

13. No statutory exhaustion requirement applies to Petitioners' claim of unlawful detention.

FACTS

I. INDIVIDUAL ALLEGATIONS AND PROCEDURAL HISTORY

14. Petitioner Rushinga Francois Muzaliwa is a native and citizen of the Democratic Republic of Congo who entered the United States in 2010 as a refugee. He adjusted status to that of a lawful permanent resident in 2011. On May 21, 2013, Mr. Muzaliwa was convicted of Domestic Violence in violation of Mich. Comp. Laws § 750.81, subd. 2 and Third Degree Child Abuse in violation of Mich. Comp. Laws § 750.136b, subd. 5. On August 26, 2015, DHS initiated removal proceedings against Mr.

Muzaliwa in the Bloomington Immigration Court located at Fort Snelling, Minnesota, taking the position that he was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(i) and § 1227(a)(2)(E)(i).

15. For the duration of his removal proceedings, ICE subjected Mr. Muzaliwa to mandatory detention pursuant to 8 U.S.C. § 1226(c). On January 14, 2016, IJ Nickerson, ordered Mr. Muzaliwa removed to the Democratic Republic of Congo, denied his applications for asylum and withholding of removal, and granted his application for DCAT. Both sides waived appeal and the removal order became administratively final on the same day, pursuant to 8 C.F.R. § 1003.39. IJ Nickerson's DCAT order prohibits Mr. Muzaliwa's removal to the Democratic Republic of Congo. Both parties waived appeal of IJ Nickerson's removal and DCAT order.

16. ICE continued to detain Mr. Muzaliwa even after he was granted DCAT on January 14, 2016, and to this day he is detained at Sherburne County Jail, located at 13880 Business Center Dr. NW, Elk River, MN 55330. For the duration of his detention in this matter, Mr. Muzaliwa has never been subject to an individualized review of the necessity for detention in his case. Mr. Muzaliwa has no citizenship or relevant ties to any country other than the Democratic Republic of Congo and the United States. ICE has never articulated attempts or plans to arrange removal of Mr. Muzaliwa to any specific, named third country. ICE has never requested or instructed Mr. Muzaliwa to attempt to arrange removal to any specific, named third country.

II. CLASS ACTION ALLEGATIONS

17. Petitioners bring this action for themselves and as a class action on behalf of others similarly situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), or, in the alternative, as a class action habeas. The Class is defined as:

> All individuals under the jurisdiction of the St. Paul ICE Field Office who are or will be subjected to detention in Minnesota under 8 U.S.C. § 1231 despite no significant likelihood of removal in the reasonably foreseeable future because they have an administratively final grant of withholding of removal under 8 U.S.C. § 1231(b)(3), withholding of removal under the Convention Against Torture, 8 C.F.R. § 1208.16, or deferral of removal under the Convention Against Torture, 8 C.F.R. § 1208.17 and they are not removable to any third country making their removal a practical impossibility.

18. It is the St. Paul Field Office's policy or practice to detain for up to 90 days under § 1231(a)(2) noncitizens granted the humanitarian relief described in the preceding paragraph despite the effective impossibility of removing them. The St. Paul Field Office considers this detention to be mandatory during the removal period. See Letter from Scott Baniecke. Exhibits 1 & 2. The Field Office oftentimes detains noncitizens past the 90-day period.

19. The field office makes no attempt to remove noncitizens in the class to a third country. See Declarations of Makeer Mayour, Rushinga Francois Muzaliwa, Ilmoge Ibrahim Abdi, Nelson Kargbo, Ahmed Aweys Sheikh, Abdiweli Ali, Said Umar Abdullahi, Exhibits 3-9.

20. Additionally, as a condition of release, the field office may require these noncitizen class members, who have been granted humanitarian relief precluding removal to their home countries, to attempt to secure travel documents to the very

countries that the immigration judges have protected these class members from. Failing to get these travel documents may lead to the noncitizen being re-detained by ICE. See exhibit 10.

21. This policy affects many more noncitizens than the proposed class. The St. Paul Field Office sets policy for detention standards for noncizitens held in Minnesota, North Dakota, South Dakota, Iowa and Nebraska. This policy affects noncitizens held in those states as well. See Declaration of attorney Brian J. Blackford. Exhibit 11.

22. The elements for class certification are met in this case.

a. Numerosity: The proposed Class meets the requirements of Federal Rule of Civil Procedure 23(a)(1) because it is so numerous that joinder would be impracticable. On information and belief, more than 40 people under the jurisdiction of the St. Paul ICE Field Office have been subjected to the unlawful detention complained of in this petition by immigration authorities in the last four years. Additionally, other individuals will be subject to the St. Paul ICE Field Office's detention policy at issue here in the future. See Declarations of attorneys Magdalena B. Metelska, Kimberly Hunter, Graham Ojala-Barbour, Marc Prokosch, Bruce D. Nestor, Anne Carlson. (Exhibits 12-17). Moreover, the equitable nature of the class and the inherent transitory state of the putative class members—who are detained for 90-day periods and then released from custody or detained pursuant to a different statutory authority—further demonstrates that joinder is impracticable.

b. Commonality: The proposed Class meets the requirements of Federal Rule of Civil Procedure 23(a)(2) because there are several common questions of

law and fact in the action. These common questions include 1) whether ICE's St. Paul Field Office has a policy or general practice of detaining noncitizens granted withholding or CAT relief pursuant to 8 U.S.C. § 1231(a)(2) even when their removal is not reasonably foreseeable, 2) whether this detention policy or practice is authorized by statute, and 3) whether this detention policy or practice violates the U.S. Constitution.

c. Typicality: The requirements of Federal Rule of Civil Procedure 23(a)(3) are satisfied. The named Petitioners' claims are typical of those of the proposed Class as a whole: Petitioners and the class of individuals they seek to represent have all been subjected to detention or will be subjected to detention after being granted withholding of removal or relief under the Convention against Torture that prohibits the United States Government from removing them to their home countries. Petitioners assert this detention violates the Constitution and 8 U.S.C. § 1231(a)(2). Their claims therefore raise the same legal and factual question that lies at the core of the Class claims.

d. Adequacy: The requirements of Federal Rule of Civil Procedure 23(a)(4) are satisfied. Petitioners will adequately represent the proposed Class because their claims are identical to the members of the proposed Class and they do not have any interests adverse to those of the proposed Class as a whole. In addition, the proposed Class is represented by counsel from the American Civil Liberties Union Foundation of Minnesota, The Center for New Americans Legal Clinic from the University of Minnesota Law School, and attorneys from Dorsey & Whitney LLP. These counsel have experience litigating the specific issues raised in this case and litigating class actions, and Counsel for

the Petitioners know of no conflicts among the members of this Class or between the attorneys and members of the Class.

23. Finally, the proposed Class satisfies Federal Rule of Civil Procedure 23(b)(2) because immigration authorities have acted on grounds that are generally applicable to the proposed Class, in that immigration authorities have applied a clear and consistent, though incorrect, interpretation of 8 U.S.C. § 1231 in imposing mandatory detention on members of the proposed Class. Classwide injunctive and declaratory relief are therefore appropriate.

LEGAL BACKGROUND

24. The Due Process Clause of the Fifth Amendment requires that "[n]o person shall . . . be deprived of liberty . . . without due process of law." "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." Zadvydas, 533 at 690 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). In the context of immigration detention, at a minimum, detention must "bear[] a reasonable relation to the purpose for which the individual [was] committed." Id. (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)). If "detention's goal is no longer practically attainable," detention becomes unreasonable and therefore violates the Fifth Amendment right to due process. Id.

25. The Fifth Amendment Due Process Clause also requires that Respondents follow procedures that are adequate to establish that detention is both statutorily and constitutionally valid. See Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) ("due process places a heightened burden of proof on the State in civil proceedings in which the

individual interests at stake . . . are both particularly important and more substantial than mere loss of money.")

26. Under the canon of constitutional avoidance, no immigration detention statute should be construed in a way that would violate the Constitution where it is "fairly possible" to avoid doing so. Zadvydas, 533 U.S. at 689. Thus, the Supreme Court has held that where a person's removal is not significantly likely in the reasonable foreseeable future, detention is no longer authorized by 8 U.S.C. § 1231. Id. at 699.

27. Petitioners and the proposed Class members are noncitizens who were previously in removal proceedings or who will be in removal proceedings in the future, and whose proceedings culminated in or will culminate in the entering of a final removal order as well as a grant of either withholding of removal under 8 U.S.C. § 1231(b)(3), withholding of removal under CAT (which is legally distinct from withholding of removal under § 1231(b)(3)), or deferral of removal under CAT. For those granted withholding of removal, an immigration judge issued or will issue an order prohibiting removal to the home country after determining that it is more likely than not that if returned to that country, the noncitizen's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, pursuant to 8 U.S.C. § 1231(b)(3). For those granted withholding of removal under CAT or deferral of removal under CAT, an immigration judge issued or will issue an order prohibiting removal to the home country after determining that it is more likely than not that if returned to that country, the noncitizen would be tortured. 8 C.F.R. §§ 1207.16, 1207.17, 1207.18.

28. Petitioners and proposed Class members have no known ties to any specific third country that could provide the basis for removal to that third country. Petitioners and proposed Class members were not ordered removed to any countries other than those to which their removal is also prohibited because of a humanitarian relief, as described in the preceding paragraph.

29. Because removal to their home country is prohibited and they are not removable to any third country, there is no significant likelihood of removal of Petitioners or Class members in the reasonably foreseeable future. See Zadvydas, 533 U.S. at 701.

30. ICE officials in the St. Paul Field Office have continued to detain Petitioners and current class members after the immigration judge's order prohibiting removal to the home country became administratively final as defined in 8 U.S.C. § 1231. This continued detention is purportedly based on the St. Paul Field Office's reading of 8 U.S.C. § 1231(b)(2) as requiring mandatory detention of Petitioners and proposed Class members despite the fact that their removal is not reasonably foreseeable.

31. ICE officials in the St. Paul Field Office have a general pattern or practice of detaining noncitizens for up to 90 days, and even longer in some cases, after a grant of withholding or CAT relief becomes administratively final pursuant to the same interpretation of § 1231(b)(2) described in the preceding paragraph.

32. National DHS guidance to field offices provides that when a noncitizen is granted humanitarian relief, that person should generally be released. See Strait memo, exhibit 18. When the St. Paul Field Office continues to detain noncitizens after they are

granted withholding or CAT relief, they are acting in contravention to this national DHS guidance.

33. In the case of Petitioners and proposed class members, there is no individualized examination of whether detention is justified. Rather, Respondents have adopted a blanket policy, in violation of ICE memoranda, to hold all such class members for the entire 90-day period, and sometimes longer, despite the fact that removal is not reasonably foreseeable. Only once that period is over do Respondents even begin to individually examine Petitioners and proposed class members to determine if their removal can be effectuated in the reasonably foreseeable future.

34. Under statutory and constitutional law, as well as internal ICE policy, the Government may not detain Petitioners or proposed Class members as their removal is not reasonably foreseeable because they have been or will be granted humanitarian relief and they are not removable to any third country.

35. Most troubling, none of the proposed class members have a right to appointed counsel to challenge their detention, and most of the proposed class members have no access to lawyers to challenge their case on their behalf.

CLAIMS FOR RELIEF ON BEHALF OF PETITIONERS AND THE PROPOSED CLASS

I. VIOLATION OF 8 U.S.C. §1231

36. The foregoing allegations are realleged and incorporated herein

37. Under the canon of constitutional avoidance, "statute[s] must be construed, if fairly possible, so as to avoid not only the conclusion that [they are] unconstitutional

but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916). In keeping with this doctrine, because the Fifth Amendment Due Process Clause prohibits arbitrary detention, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by [8 U.S.C. § 1231]." Zadvydas, 533 U.S. at 699.

38. Removal of Petitioners and proposed Class members is no longer reasonably foreseeable because they have been granted humanitarian relief that bars removal to their home countries and they have no ties to any third country, which means their removal to a third country is not reasonably foreseeable.

39. Therefore, 8 U.S.C. § 1231(a)(2) does not authorize detention of Petitioners and the proposed Class members after their grant of humanitarian relief has become administratively final during the 90-day "removal period" defined in 8 U.S.C. § 1231(a)(1).

II. VIOLATION OF US CONSTITUTION 4th Amendment

40. The foregoing allegations are re-alleged and incorporated herein

41. The Fourth Amendment prohibits unreasonable seizures and does not allow the detention of individuals without a sufficient legal reason. The Government must always justify civil detention. If civil detention is no longer justified by a legal reason, such detention is unconstitutional.

42. Civil detention in the immigration context has been permitted when it is to make sure that an individual appears at deportation proceedings or to make sure that an individual will appear for removal. As removal is no longer reasonably foreseeable for

Petitioners and members of the Class – in fact, it is a near impossibility – the Constitution does not permit it.

43. Because Petitioners and Class members are not released after being granted withholding of removal or relief under the Convention Against Torture, their continued detention is in violation of the law.

III. VIOLATION OF US CONSTITUTION 5th Amendment

44. The foregoing allegations are re-alleged and incorporated herein.

45. The Fifth Amendment Due Process Clause protects against arbitrary detention by the executive branch. Zadvydas, 533 U.S. at 699.

46. Due process requires that detention be reasonably related to its purpose and accompanied by adequate procedures to ensure that detention is serving its legitimate goals. See Zadvydas, 533 U.S. at 690-91. As removal is no longer reasonably foreseeable for Petitioners and members of the Class—in fact, it is a near impossibility—their detention is arbitrary and unreasonable, and therefore in violation of the Fifth Amendment's guarantee of Due Process.

PRAYER FOR RELIEF

Petitioners ask that this Court grant the following relief:

1. Certify this matter as a class action, appoint Petitioners as class representatives, and appoint the undersigned counsel as class counsel;
2. Declare that Respondents' policy and practice of subjecting Petitioners and the members of the proposed Class to detention despite being granted humanitarian

relief in the form of withholding of removal or relief under CAT is a violation of 8 U.S.C. § 1231;

3. Enjoin the Respondents' from subjecting Petitioners and members of the proposed Class to detention despite being granted humanitarian relief in the form of withholding of removal or relief under CAT, as violative of 8 U.S.C. § 1231 the US Constitution, or both;
4. Declare that Respondents' policy and practice of subjecting Petitioners and the members of the proposed Class to mandatory detention despite being granted humanitarian relief from removal in the form of withholding of removal or relief under CAT is a violation of the Fourth and Fifth Amendments of the US Constitution;
5. Grant a writ of habeas corpus to named Petitioners Rushinga Francois Muzaliwa ordering his immediate release under conditions as required by Zadvydas;
6. Order that Respondents provide the Court and Petitioners' counsel with at least two business days' notice prior to any removal of the Petitioners from the jurisdiction;
7. Award attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and
8. Order any further relief this Court deems just and equitable, including appropriate relief to all class members upon consideration of Petitioners' accompanying motion for class certification.

DATED: April 11, 2016

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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