No. 05-2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBIN BAKER,
Detroit Field Office Director,
U.S. Immigration and Customs Enforcement,

Appellant,

v.

IBRAHIM PARLAK,
Agency No. A71803930,

Appellee,

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
Case No. 05-70826

APPELLANT'S MOTION TO DISMISS APPEAL AS MOOT AND VACATE THE DISTRICT COURT'S DECISION, AND HOLD BRIEFING SCHEDULE IN ABEYANCE PENDING DISPOSITION OF THIS MOTION

The Government moves to dismiss the appeal and vacate the lower court's decision, because subsequent to the district court's grant of Ibrahim Parlak's challenge to his pre-removal order detention under Immigration and Nationality Act (INA) Section 236, 8 U.S.C. § 1226, and the taking of this appeal, the Board

of Immigration Appeals (Board) issued a final order of removal. (Exhibit A, November 23, 2005, Board Decision). Parlak is no longer detained under Section 236. Once the Board issues a final removal order, INA section 241(a)(2), 8 U.S.C. § 1231(a)(2), commands that the Government detain him. Because the Government has an independent, superceding authorization for detaining him, his petition for writ of habeas corpus, the grant of which this appeal challenges, is moot. The appeal should therefore be dismissed, and pursuant to the Court's equitable authority, the district court's decision should be vacated. The Government also respectfully requests that the Court suspend the briefing schedule pending resolution of this motion.

Prior to the issuance of a final removal order, aliens in removal proceedings may be detained under INA Section 236, 8 U.S.C. § 1226. See Demore v. Kim, 538 U.S. 510, 522 (2003) (upholding aliens' detention during removal proceedings). After the issuance of the final removal order, detention authority comes under INA section 241. See INA § 241, 8 U.S.C. § 1231. In fact, INA section 241(a)(2) mandates that certain aliens be detained during the removal

period, which commenced when the removal order became final. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2).[1]

The Eleventh Circuit in a similar case held that "[o]nce a final order of deportation is entered, an alien who may seek bond must do so through a process entirely distinct from that used before a final order is in place. While bond proceedings before a final order are handled by an IJ in adversary proceedings with appeal to the BIA, see 8 C.F.R. § 242.2(d) (1995), bond after the entry of a final order is obtained solely at the discretion of the [INS] District Director." Najjar v. Ashcroft, 273 F.3d 1330, 1336-39 (11th Cir. 2001). The Court then emphasized that "[s]imply put, a post-final order bond determination is a completely different entity presented to a completely different decision-maker on a wholly different foundation than the pre-final order bond determination that is the subject of this appeal." Id. Indeed, the court held that "[b]ecause the Attorney General now has the unfettered power to detain Al Najjar, it is utterly unnecessary to take up the question addressed by the district court--whether classified

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[1] Under INA section 241(a)(1)(B)(i), the "removal period" began when the removal order because "administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). The Government is filing this motion at this time, because on January 27, 2006, the Court denied Parlak's motion for stay of removal. Parlak v. Gonzales, No. 05-4488. Under INA 241(a)(1)(B)(ii), grant of that motion would have delayed commencement of the removal period.

information can be used to deny bond in a pre-final order detention hearing. In fact, the "case or controversy" requirement of Article III unambiguously forbids us from considering the question in the absence of a live dispute." Id. at 1339.

Other cases have held likewise. See Wang v. Ashcroft, 320 F.3d 130, 147 (2d Cir. 2003) (citing Najjar for the proposition that "a challenge to pre-final order detention [becomes] moot once the final order has been entered"); De La Teja v. United States, 321 F.3d 1357 (11th Cir. 2003) ("Because the Attorney General no longer is acting pursuant to § 1226(c), it is unnecessary and altogether inappropriate for us to take up the question addressed by the district court--whether De La Teja's detention pursuant to that provision violates the Due Process Clause of the Fifth Amendment"); Marogi v. Jenifer, 126 F. Supp. 2d 1056, 1064 (E.D. Mich. 2000) (section "1226(c) only governs detention prior to entry of a final order of removal. Once the final order is entered, § 1231 governs"); cf. Murphy v. Hunt, 455 U.S. 478, 481-82 (constitutional claim to pretrial bail becomes moot following criminal conviction).

Likewise, while this case began as a pre-final order bond challenge, it is now controlled by the post-final order rules. As his brief indicates, Appellant's custody was controlled by Section 236 when he filed his habeas petition. Pet. Br. at 9 ("the appropriate analysis here is under § 236(a)"); Id. at 29-41 (arguing that

the district court's application of section 236 should be affirmed).[2] It is now controlled by Section 241. See Walker v. Wainwright, 390 U.S. 335, 336 (1968) ("[w]hatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention.") (emphasis added).

Further, the district court's decision was based primarily on this Court's decision in Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003). See Parlak v. Baker, 374 F. Supp.2d 551, 561 (E.D. Mich. 2005). The Court in Ly expressly avoided deciding the case on constitutional grounds, and instead "constru[ed] the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time." Ly v. Hansen, 351 F.3d at 270 (emphasis added).

But decided after final order entered

The post-order detention statute was not at issue in Ly, and the pre-order detention statute is no longer at issue here. The post-order statute, section 241,

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[2] Parlak's section headings and argument also highlight this point: "1. Absent Threat or Flight Risk, section 236(a) Detention or Mr. Parlak is Impermissible;" Pet. Br. at 30; "2. The Government May Not Avoid section 236(a) Analysis By Relying on Section 236(c);" Pet. Br. at 34; "a. Applying section 236(c) To Mr. Parlak Violates the Landgraf Retroactivity Rules;" Pet. Br. at 36; "b. Applying section 236(c) to Mr. Parlak Violates the Express Directive of the IIRIRA;" Pet. Br. at 39; "B. The Habeas Order Should be Also be Affirmed Based on section 236(c) Mandatory Detention;" Pet. Br. at 41; "The Government criticizes the district court for 'assuming Parlak will . . . (3) receive a stay of removal." Pet. Br. at 51.

was construed by the Supreme Court, however, in Zadvydas v. Davis, 533 U.S. 678 (2001). In Zadvydas, the Supreme Court held that "where detention's goal is no longer practically attainable, detention no longer bear[s][a] reasonable relation to the purpose for which the individual [was] committed," but it construed INA section 241(a) to provide that detention for six months after the final removal order was issued was presumptively reasonable. Thereafter "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." Id. at 701.

In light of this holding, courts have dismissed habeas petitions challenging post-order detention filed before the end of the 180 day period. See Akinwale v. Ashcroft, 287 F.3d 1050, 1052 (11th Cir. 2002) ("to state a claim under Zadvydas the alien not only must show post-removal order detention in excess of six months but also must provide evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future"); Khotesouvan v. Morones, 386 F.3d 1298, 1301 (9th Cir. 2004) (rejecting an alien's due process claim, despite his claim that repatriation was futile, holding

that "[b]ecause petitioners filed their habeas petitions during the 90-day removal period, the district court correctly dismissed the petitions").[3]

Finally, when a controversy becomes moot on appeal, the proper course is to vacate the order and to remand to the district court with instructions to dismiss the complaint. United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950); United States v. Taylor, 8 F.3d 1074, 1077 (6th Cir. 1993). "Whether any opinion should be vacated on the basis of mootness is an equitable question." United States v. City of Detroit, 401 F.3d 448, 451-52 (6th Cir. 2005). The Court has held, however, that "the Supreme Court's decision in [Munsingwear] indicates that generally mootness does justify vacatur of the judgment under review." Id. The Court observed that "[t]he Munsingwear rule is an equitable one that is employed

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[3] The probability of repatriation question could not be determined until there was an executable final order, because INA section 241(b) provides a process which mandates certain removal destinations, but qualifies them in turn with alternatives that may be triggered, variously, by the refusal of the nationality country to accept the alien, determinations by the Attorney General that removal to such country would be "prejudicial to the United States," or where removal to a specified range of countries with which the alien has any nexus would be "impracticable, inadvisable, or impossible." See INA § 241(b)(2)(D) & (E); 8 U.S.C. § 1231(b)(2)(D)&(E) (alternative and additional removal countries for aliens ordered removed); Jama v. Immigration and Customs Enforcement, ___ U.S. ___, 125 S.Ct. 694 (2005) ("[t]he statute . . . provides four consecutive removal commands"). Id. at 699. None of these removal commands can be executed until there is a final removal order. See INA § 241(b)(2)(A) (applying to alien "who has been ordered removed).

where necessary "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." Id.; see also De La Teja v. United States, 321 F.3d at 1364 ("when an issue in a case becomes moot on appeal, the court not only must dismiss as to the mooted issue, but also vacate the portion of the district court's order that addresses it").[4]

The Government, "as a repeat player before the courts, is primarily concerned with the precedential effect of the decision below . . . and has an institutional interest in vacating adverse rulings of potential precedential value. Arevalo v. Ashcroft, 386 F.3d 19, 20-21 (2004) . "A case that becomes moot pending appeal, necessarily untested by appellate scrutiny, lacks the stamp of reliability that is required to warrant preclusive effect." Id. Parlak is currently not in detention, and even if he were redetained, vacating the district court's order

[4] No exceptions to the mootness doctrine apply to this case. As the Eleventh Circuit held in a similar case:

> The narrow exception for actions that are capable of repetition yet evading review applies only to the exceptional circumstance in which the same controversy will recur and there will be inadequate time to litigate it prior to its cessation. . . . This exception does not apply because the controversy at issue in the district court's opinion necessarily cannot arise again, as De La Teja is now, and will be, subject to a final order of deportation.

De La Teja v. United States, 321 F.3d at 1363.

would not prejudice him from refiling and presenting a challenge to his post-removal order detention, at the appropriate time and in the proper court. Thus, vacating the order harms neither party and leaves the interpretation of section 236 "to be litigated fully in a more appropriate case." Arevalo v. Ashcroft, 386 F.3d at 21.[5] Further, vacating the decision is necessary to ensure that the Government is no longer restrained by its terms, without having had an opportunity to test it on appeal.[6]

For the above reasons, the Court should dismiss the appeal as moot, vacate the district court's order, and remand the case to the district court with instructions to dismiss the petition. The Government also requests that the briefing schedule be held in abeyance pending disposition of this motion, and that if the motion to dismiss and vacate is denied, that the Court grant it thirty days from the date of the order to file its reply brief.

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[5] The lower court decision as been cited in Diomande v. Wrona, No. 05-73290, 2005 WL 3369498 (E.D. Mich. Dec. 12, 2005); 187 ALR Fed. 325 (2003) ("validity, construction, and application of mandatory predeportation detention provision of Immigration and Nationality Act (8 U.S.C. § 1226(b), as amended).

[6] It is noted that Parlak, in communications to DHS, has represented that even in light of the Board's issuance of a final order and the fact that the district court's decision was issued while section 236 was at issue, the district court's order nevertheless restrained DHS from redetaining him. While that position is questionable, it necessitates that the order be vacated.

Respectfully submitted,

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