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

GOVERNMENT'S REPLY TO PARLAK'S OPPOSITION TO MOTION TO DISMISS APPEAL AS MOOT

The Government established in its motion that a post-final order bond determination is "a completely different entity" from the pre-final order bond determination that is the subject of this appeal. Najjar v. Ashcroft, 273 F.3d 1330, 1336-39 (11th Cir. 2001). Parlak does not dispute that the statutory basis of his detention, challenged in his petition and at issue before the district court, is not the

statutory basis on which he is now detainable. He can not dispute that the Court in Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003), the case applied by the district court, made clear that it was only construing the statute -- the pre-final order statute, INA section 236, 8 U.S.C. § 1226, and not issuing a constitutional holding. Parlak also does not dispute that the post-final order statute, INA section 241, 8 U.S.C. § 1231, provides the Government with unfettered detention authority, and was construed by the Supreme Court in Zadvydas v. Davis, 533 U.S. 678 (2001), to provide that detention for six months after the final removal order is issued is presumptively reasonable, and that 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. He acknowledges that Zadvydas "impos[es] a six-month benchmark of reasonableness for post final-order detention." Opposition at 11. He makes no effort to distinguish the Government's cases holding that habeas petitions challenging post-final removal order custody filed prior to the expiration of this six month period must be dismissed. Indeed, it is indisputable that if Parlak were detained and filed a habeas petition today challenging his custody, such petition must be dismissed as unripe. Finally, it is not contested that habeas corpus exists only to challenge the current validity of a person's custody. There can be no dispute that in light of the Supreme Court's

construction of section 241, Parlak's current custody would be lawful. Because the petition can challenge only his current custody, his current custody is lawful, and the Supreme Court has made clear that any challenge to post-order custody must wait 180 days (of actual custody), this action is clearly moot. For the reasons set forth in the Government's motion, the lower court decision should be vacated.

The jurisdiction of federal courts is limited to "actual, ongoing controversies between litigants." Deakins v. Monaghan, 484 U.S. 193, 199 (1988); Grider v. Abramson, 180 F.3d 739, 746 (6th Cir. 1999). An actual controversy must exist at all stages of review. Thomas Sysco Food Servs. v. Martin, 983 F.2d 60, 62 (6th Cir. 1993); Cleveland Branch, NAACP v. City of Parma, Ohio, 263 F.3d 513, 530 (6th Cir. 2001) ("A federal court has no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue."). "Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." Carras v. Williams, 807 F.2d 1286, 1289 (6th Cir. 1986). Here, the issuance of the final removal order with its attendant effect on the Government's statutory detention authority, has rendered the courts unable to grant Parlak's relief. He challenged the unlawfulness of his detention under section 236; he is now lawfully detainable and remains detained under section 241.

Parlak argues the case is not moot because reversing the district court's decision would affect his legal interests and leave him exposed to re-arrest. What affected his legal interests and exposed him to re-arrest, however, was the issuance of the final removal order and the change in statutory detention authority. This fact is not altered by the fact that the Government has not detained him pursuant to INA section 241(a)(2), 8 U.S.C. § 1231(a)(2), in the face of a district court release order. Respect for the process required that the matter be placed before the Court before the Government made any such detention decision. Such respect should not be construed as demonstrating that there is a live case or controversy.

Parlak next argues that the case is not moot because in Ly the removal order likewise became final before the appeal was decided. Opp. at 6. While the Government in that case apparently moved to remand the case to the district court after the order became final, the parties did not move to dismiss the appeal as moot. Ly at 266. Moreover, the Court also did not characterize the case as a post-

final removal order case, but rather continued to construe section 236.[1] For whatever reason, the Court did not consider the effect of section 241.[2]

Most importantly, Ly also made clear that it its holding was not based on the Due Process Clause, but rather was one of statutory construction. Id. at 270 ("by construing the pre-removal detention statute to include an implicit requirement that removal proceedings be concluded within a reasonable time, we avoid the need to mandate the procedural protections that would be required to detain deportable aliens indefinitely"). Ly did not construe section 241, but, as discussed, Zadvydas did -- and held that post-final removal order detention was presumptively reasonable for six months, and thereafter until the alien demonstrates no significant likelihood of repatriation in the reasonably foreseeable future. For that reason, the case is moot.

Parlak also argues for application of the exception to the mootness doctrine found in exceptional circumstances where an appeal presents an issue capable of

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[1] Indeed, the Court in Ly even stated that "[o]ne point of difference between this case and Zadvydas is that the post-removal statute is permissive, whereas the pre-removal statute, as applied to specified criminal aliens, is mandatory." Id. at 269.

[2] It is not clear from the decision if the final removal order was challenged and a stay of removal issued. As noted, a judicial stay of removal can effect detention authority. See 241(a)(1)(B)(ii), 8 U.S.C. § 1231(a)(1)(B)(ii).

repetition but evading review. Opp. at 8-12. See Weinstein v. Bradford, 423 U.S. 147, 148-49 (1975). This exception applies only where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Id. at 149. Parlak fails to demonstrate a reasonable expectation that he will again be subject to detention pursuant to section 236. He challenged his detention pending completion of removal proceedings, but those proceedings were concluded. As discussed, this is no mere technical distinction. Detention following issuance of a final removal order, particularly where no judicial stay is in effect, is a completely different entity from pre-final order detention.

In addition, while it is not inconceivable that the jurisdictional issues could repeat themselves, Parlak cites no authority where a case's substantive issues became moot, but the Court nevertheless continued to hear the case merely to resolve certain procedural or jurisdictional questions. If Parlak is redetained,[3] and, in accordance with the time-frame set forth in Zadvydas, he again challenges his

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[3] A decision on Parlak's future detention has not yet been made by the Department of Homeland Security. Further, whether or not Parlak prevails on his petition for review to this Court challenging his removal order could also affect whether or not he is detained.

custody, and again elects to file in a district other than the district of confinement, the matter at that time would be adjudicated by the district court with subsequent recourse to this Court.[4]

Finally, Parlak cites the district court's finding that he is a "model immigrant," in support of his argument that vacatur would not be equitable. Opp. at 14. Needless to say, most model immigrants do not conspire to murder Turkish border guards and are not found by the Board of Immigration Appeals to have engaged in terrorist activity. In denying his stay motion, this Court also implicitly found that he was unlikely to prevail on his challenge to that order. Congress has dictated that aliens who engage in terrorist activity should be deported, not deemed models.

Parlak is also incorrect in arguing against vacatur on the grounds that the issues in the re-litigated second habeas proceeding will be "precisely" the same as in the first. Opp. at 13. As discussed, after a final order becomes executable, the

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[4] The alternative would have the Court find that the substantive issues in the case are moot, take briefing only on the procedural issues, and issue an advisory opinion with respect to the proper respondent issue to assist Parlak in his future filings. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 99 (1998) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment-which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.").

Government has unfettered discretion to detain the alien. Najjar v. Ashcroft, 273 F.3d at 1336-39 ("the Attorney General now has the unfettered power to detain"). Whether the alien is a threat or flight risk is therefore not a litigable issue.[5] The only issues are, assuming the alien has not acted to prevent his removal, whether (i) six months of custody have transpired and (ii) the alien has demonstrated that there is no significant likelihood of repatriation in the reasonably foreseeable future.[6] For the reasons set forth in the Government's motion and this reply, vacatur is necessary and appropriate in this case. The Government respectfully requests that the Court find that the appeal is moot and vacate the district court's decision.

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[5] In any event, the issuance of a final order obviously is important to the flight risk issue.

[6] These issues are wholly distinct from issues involved in pre-final order detention cases. In fact, section 241(b), 8 U.S.C. § 1231(b), requires entry of a final order before consideration may be given to alternative countries of removal. See Jama v. Immigration and Customs Enforcement, 125 S.Ct. 694, 704 (2005) ("Removal decisions, including the selection of a removed alien's destination, may implicate our relations with foreign powers and require consideration of 'changing political and economic circumstances.") (internal quotations omitted).

Respectfully submitted,

DATED: March 7, 2006

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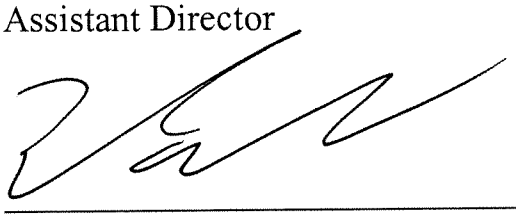

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2006, a true and correct copy of the foregoing was served by placing the same in the Department of Justice mail room for Federal Express delivery, to:

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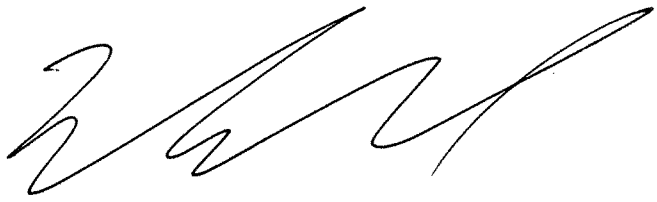

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