UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFI; SYED AMJAD ALI JAFFRI; YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; and AKIL SACHVEDA on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director Federal Bureau of Investigation; JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service; DENNIS HASTY, former Warden, Metropolitan Detention Center; MICHAEL ZENK, Warden of the Metropolitan Detention Center; JOHN DOES 1-20, Metropolitan Detention Center Corrections Officers, and JOHN DOES 1-20, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,

Defendants.

No. 02 CV 2307 (JG)

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT HASTY'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and the Court's Order of June 12, 2003, Defendant Dennis Hasty, former Warden of the Metropolitan Detention Center ("MDC"), hereby submits this Supplemental Memorandum of Law in support of his Motion to Dismiss Plaintiffs' Second Amended Complaint. As discussed below, Plaintiffs' claims against Hasty

should be dismissed pursuant to the qualified immunity doctrine and because Plaintiffs do not allege any personal involvement by Hasty in connection with any of the allegations asserted. Accordingly, the Second Amended Complaint should be dismissed as to Hasty.

INTRODUCTION

Defendants previously have offered a variety of reasons for why Plaintiffs' First Amended Complaint should be dismissed, including why Defendant Hasty and others are entitled to qualified immunity from suit.[1] The allegations that Plaintiffs have now added in their Second Amended Complaint bring nothing new to the analysis. Indeed, although Plaintiffs have undertaken to recast their allegations as new claims, at the end of the day we are left with nothing but more of the same. The additional claims that Plaintiffs propound in the latest iteration of their Complaint face the same insurmountable barriers as their previously pled claims. Plaintiffs' effort to bolster their case with these new claims therefore fails. Thus, Plaintiffs' Second Amended Complaint should be dismissed as to Hasty—with prejudice.

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[1] Defendant Hasty herein incorporates by reference the Memorandum of Law in Support of the United States' and the Named Defendants' Motion to Dismiss, the Reply Memorandum of Law in Support of the United States' and the Named Defendants' Motion to Dismiss, and the arguments made by Defendants before this Court in connection with their previous Motion to Dismiss.

I. PLAINTIFFS' NEW CLAIMS CANNOT OVERCOME HASTY'S QUALIFIED IMMUNITY.

Plaintiffs' new claims, like their previous claims, cannot clear the hurdle of qualified immunity. As Defendants previously discussed at length, to prevail, Plaintiffs must demonstrate: (1) that Hasty violated Plaintiffs' constitutional rights; (2) that those rights were clearly established at the time of the alleged conduct; and (3) that Hasty's conduct was not objectively reasonable under the circumstances. That analysis applies with equal force to Plaintiffs' new claims. Even accepting Plaintiffs' allegations as true for purposes of this motion, however, they fall far short of the requisite showing necessary to avoid dismissal on the basis of qualified immunity.

Plaintiffs' new claims are nothing more than redressed versions of their old, and fail for all the same reasons. As an initial but important matter, nothing in Plaintiffs' new allegations suffices to demonstrate that Hasty violated Plaintiffs' constitutional rights. Indeed, Hasty is not even mentioned in the amendments added to the Second Amended Complaint short of a passing, generic reference. (Second Am. Compl. ¶ 5.) The inquiry thus need go no further, and Hasty is entitled to qualified immunity on that basis alone. *See Cuoco v. Moritsugu*, 222 F.3d 99, 109 (2d Cir. 2000).

Even if Plaintiffs could overcome that deficiency, however, they run headlong into the fact that they do not—and cannot—meet their burden to establish that the rights they allege were violated were clearly established at the time of the alleged conduct. Moreover, Plaintiffs' reliance on generalized articulations of their

allegedly violated rights is a futile attempt to save their claims. Supreme Court and Second Circuit precedent make clear that Plaintiffs must demonstrate that any rights that Hasty allegedly violated were clearly established in a "more particularized, and hence more relevant, sense." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). It is not enough, therefore, to state generically—as Plaintiffs have done—that they had a clearly established due process or First Amendment right. Rather, Plaintiffs must demonstrate the violation of a clearly established right in the context of the specific conduct at issue. *See id.* at 201. This they have not done.

Plaintiffs' claim based on a supposed delay in serving charging documents (Seventeenth Claim for Relief) is wholly void of any articulation of a clearly established constitutional right. The minimal "delays" that certain Plaintiffs allege in receiving their Notices to Appear cannot carry the day. For all of the reasons set forth in the Supplemental Memorandum of the named Defendants in their official capacities (being filed on the same date as this Memorandum), the alleged delays of sixteen days for Plaintiffs Ebrahim and Ibrahim, seven days for Plaintiff Sachveda, and five days for Plaintiff Jaffri fall far short of stating a claim for violation of a clearly established right. Plaintiffs' contention that the so-called "delay" impaired their ability "to know the charges on which they are being held, obtain legal counsel, and seek release on bond" (Second Am. Compl. ¶ 250) does not suffice to resurrect their claim. For the reasons that Defendants previously presented to the Court, and those outlined in the Supplemental Memorandum of the named

plaintiffs in their official capacities, Plaintiffs had no clearly established right to immediate, unfettered access to counsel or to seek release on bond. They do not dispute that they were notified of the charges against them in relatively short order, and therefore were able to avail themselves of all the legal resources and processes available to them. Thus, no claim can be stated based on any delay in issuing charging documents.

Equally deficient are Plaintiffs' claims regarding the alleged no bond policy. Plaintiffs first attempt to state a Due Process claim based on Defendants' alleged no bond policy (Eighteenth Claim for Relief). Tellingly absent from that claim, however, are any facts that could establish that Hasty (or any other Defendants for that matter) violated Plaintiffs' clearly established rights. Contrary to Plaintiffs' assertion that they had a right "not to be detained arbitrarily" (Second Am. Compl. ¶ 255), the clearly established law provides that aliens subject to removal can be detained pending resolution of their removal proceedings. *See, e.g., Demore v. Kim*, 123 S. Ct. 1708, 1720-22 (2003); *Doherty v. Thornburgh*, 943 F.2d 204, 208-10 (2d Cir. 1991). Further, Plaintiffs are not automatically entitled to bond, which has been deemed a privilege rather than a right. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). Plaintiffs have all conceded that they were guilty of immigration violations and that they were in the United States illegally. Thus, far from arbitrary, Plaintiffs' detentions were legitimate and well within the bounds of the law.

Similarly, Plaintiffs' new Equal Protection claim based on the alleged no bond policy (Nineteenth Claim for Relief) suffers from the same flaws as their Equal

Protection claim based on being detained longer than necessary for removal from the United States (Fifth Claim for Relief). It is in fact nothing more than a reiteration of that claim. As Defendants explained in their prior submissions, the Equal Protection Clause is virtually inapplicable in the context of determining how to detain illegal aliens. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-91 (1999). The United States' legitimate—indeed, compelling—interests in treating some aliens differently from others in wake of the September 11 terrorist attacks are no less applicable to detaining them for a sufficient amount of time to determine whether they posed a real threat. In short, illegal aliens have no clearly established right to receive immediate bond, or for bond determinations to be made with no regard to their national origin or religion. The claims based on the alleged no bond policy therefore must fail.

Plaintiffs' claim regarding their assignment to the Special Housing Unit ("SHU") of MDC based on their classification as "of high interest," "Witness Security," and/or "Management Interest Group 155" (Twentieth Claim for Relief) suffers the same fate. As Defendants previously demonstrated, a claim regarding assignment to the SHU is not actionable because of the legitimate non-punitive purposes for segregating certain post-September 11 detainees from the general prison population. *See Bell v. Wolfish*, 441 U.S. 520, 535-41 (1979). Plaintiffs' attempt to restate this claim here cannot overcome the well-settled law, and fails to assert the violation of a clearly established right.

Plaintiffs' claims regarding the alleged communications blackout are no more successful. Plaintiffs posit both a First Amendment claim and a Due Process claim (Twenty-First and Twenty-Second Claims for Relief), but fail to articulate the violation of a clearly established right. In bringing these claims, Plaintiffs ignore the compelling, legitimate interests that the government had in restricting information about its terrorist investigations. These interests were directly related to matters of national security and should be afforded great deference. *See Fiallo v. Bell*, 430 U.S. 787, 794 n.5 (1977). Nonetheless, Plaintiffs attempt to hang their hat on the allegation that the alleged blackout impeded their access to lawyers and the courts. But, as Defendants previously demonstrated, Plaintiffs have failed to articulate any facts that would entitle them to immediate, unfettered access to counsel and the court system. Therefore, no claim based on the alleged communications blackout can be stated.

In sum, Plaintiffs have failed to assert any allegations sufficient to establish that Hasty's actions were anything but lawful and objectively reasonable. *See Anderson*, 483 U.S. at 640-41. Given the context of the post-September 11 war on terrorism, and the state of the law at the time, the objective legal reasonableness of Hasty's actions is clear. At the very most, the propriety of Hasty's alleged conduct is debatable among reasonable officials. *See Saucier*, 533 U.S. at 208-09. Hasty thus is entitled to qualified immunity.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT HASTY WAS PERSONALLY INVOLVED IN THE CONDUCT THAT FORMS THE BASIS OF THEIR CLAIMS.

Plaintiffs' new claims suffer from another infirmity: They fail to allege that Hasty was personally involved in the conduct on which those claims are based. Even if the conduct alleged did violate Plaintiffs' clearly established rights, their claims still cannot succeed because they have not attributed any of that conduct directly to Hasty.

It is well established in this Circuit that to state a *Bivens* claim, a Plaintiff must demonstrate the Defendant's direct or personal involvement in the actions that are alleged to have caused the constitutional deprivation. *See Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir. 1987). Here, Plaintiffs attribute no conduct specifically to Hasty short of a generic catch-all reference that "[i]n adopting, promulgating, and implementing this policy and practice, Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, and others have intentionally or recklessly violated rights guaranteed to Plaintiffs ...." (Second Am. Compl. ¶ 5.) But such a generalized reference is insufficient to support a *Bivens* claim. Plaintiffs' failure to allege any set of facts to establish Hasty's personal involvement in the conduct they claim violated their rights is dispositive of and fatal to their claims against Hasty.

Plaintiffs' own allegations undermine their attempt to state a claim against Hasty and demonstrate the impossibility of doing so. For example, with respect to Plaintiffs' claims regarding the alleged delay in serving charging documents, Plaintiffs allege that the "INS consistently delayed in issuing and serving the post-

9/11 detainees with charging documents." (Second Am. Compl. ¶ 52.) With respect to Plaintiffs' claims regarding the alleged no bond policy, Plaintiffs allege that "INS District Directors were ordered to make an initial determination of no bond for all post-9/11 detainees." (Second Am. Compl. ¶ 53.) Thus, Plaintiffs themselves direct these allegations at the INS—not at Hasty.

Plaintiffs' allegations with respect to being placed in SHU and being subjected to a so-called communications blackout fare no better. Regarding the former, Plaintiffs allege that after labeling certain detainees as "of high interest," the FBI requested that they be placed at MDC where "the Bureau of Prisons ("BOP") classified the detainees as 'Witness Security' and/or 'Management Interest Group 155' detainees without any individual assessment or uniform criteria of any sort." (Second Am. Compl. ¶ 54.) Plaintiffs further allege that "[o]fficials at MDC were told by BOP headquarters that until the FBI had cleared a particular detainee, that detainee's report was to be automatically annotated with the phrase 'continue high security,' no hearing was to take place, and the detainee was to remain under restrictive detention in the ADMAX SHU." (*Id.*) With respect to the communications blackout, Plaintiffs simply state that detainees "were subjected to a communications blackout" without attributing the conduct to any of the Defendants. (*Id.* ¶ 56.)[2] Again, Hasty simply is not implicated in these allegations.

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[2] The recently issued Inspector General's Report on which Plaintiffs rely attributes the order of a communications blackout to David Rardin, BOP's Northeast Region Director. (OIG Report at 113). Defendant Hasty takes no position with regard to the legitimacy of that proposition, but notes that it is clear

Plaintiffs attempt to overcome this obvious pitfall by contending that "Defendants" engaged in certain "policies" and "practices." As Defendants previously made clear, however, Plaintiffs cannot circumvent the requirement of showing that a Defendant was personally involved in the alleged conduct by merely relying on generalized statements referring to "policies and practices." While that remains an impediment to Plaintiffs' new claims, the absence of a claim against Hasty is further highlighted given Plaintiffs' failure even to allege that Hasty had any role whatsoever in formulating or implementing these supposed "policies." Nor does the Inspector General's report on which they rely make any such findings. Of course, Plaintiffs' failure to implicate Hasty in these allegations is not surprising given that as former Warden of the MDC, Hasty had no authority or ability to control the actions of anyone in the INS, the FBI, or even those above him in the BOP. Thus, Hasty is too removed from the alleged conduct for any claim against him to proceed.

In fact, this Circuit has found dismissal of claims warranted in cases in which there was far more of a connection between the Defendant and the conduct alleged. In *Sealey*, for example, the Court found dismissal of a Section 1983 claim against the Commissioner of the New York State Department of Correctional Services appropriate for insufficient personal involvement even though the prisoner-plaintiff had written two letters to the Commissioner relevant to his allegations. *Sealey v.*

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from Plaintiffs' claims and the IG Report that there is no basis for a claim against him regarding the alleged communications blackout.

Giltner, 116 F.3d 47, 51 (2d Cir. 1997). Similarly, in *Ford*, the Court held that a police supervisor could not be held liable for the excessive force of one of his subordinates even though the supervisor dispatched the officers and received periodic reports from the scene. *Ford v. Moore*, 237 F.3d 156, 163 (2d Cir. 2001). Here, Plaintiffs do not—and could not—allege any direct connection between Hasty and the conduct upon which they seek to base their claims.

To hold Hasty personally liable for conduct that he was not personally involved in is a non-sequitur. The claims against him therefore should be dismissed in their entirety. Any other result would require a complete departure from the well-settled law of this Circuit, and a blind-eye to the underlying purpose of a *Bivens* action.

CONCLUSION

For all of the foregoing reasons, Defendant Hasty respectfully requests that all claims against him be dismissed in their entirety with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2003, I caused a true and correct copy of the foregoing Supplemental Memorandum in Support of Motion to Dismiss to be served via overnight delivery, prepaid, on the following:

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