UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFI; SYED AMJAD ALI JAFRI; 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 of the Federal Bureau of Investigation; JAMES W. ZIGLAR, Commissioner of the Immigration and Naturalization Service; DENNIS HASTY, former Warden of the Metropolitan Detention Center; MICHAEL ZENK, Warden of the Metropolitan Detention Center; JOHN DOES 1-20, Metropolitan Detention Center Correctional Officers, and JOHN DOES 1-20, Federal Bureau of Investigation Agents and/or Immigration and Naturalization Service Agents, Defendants.	)	No. 02 CV 2307 Gleeson, J.

DEFENDANT ROBERT MUELLER'S REPLY TO PLAINTIFFS' OPPOSITION TO HIS SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Plaintiffs' Supplemental Memorandum Of Law In Opposition To Defendants' Motion To Dismiss The Second Amended Complaint ("Opposition" or "Opp.") fails to refute any of the grounds for dismissal set out in defendant Robert Mueller's supplemental memorandum. Plaintiffs have failed to show how a Bivens claim can proceed in the face of the Immigration and Nationality Act (INA) and its limits on judicial review; they have failed to articulate a

constitutional violation by Mr. Mueller, the critical step in constructing any Bivens claim; and they have failed to overcome his defense of qualified immunity. Each of these, which would alone support dismissal, is addressed below, consistent with the Court's direction that these supplemental memoranda not restate arguments already presented in the briefs of the parties.

1. The Comprehensive INA Statutory Scheme Is A Special Factor Counseling Against Creation Of A Bivens Remedy Here.

The preclusive effect of the INA is explained in the memoranda submitted on behalf of the governmental defendants. Director Mueller notes additionally that plaintiffs have fundamentally misconstrued the arguments of all defendants on this point in a crucial respect. Plaintiffs contend (Opp. at 9-12) that the INA does not constitute a "special factor counseling hesitation" in the creation of the Bivens remedy. They emphasize the availability vel non of particular remedies for specific alleged violations, Opp. at 3-9, but that is altogether the wrong focus.

The Supreme Court has made clear that the key question is rather the comprehensiveness of the statutory scheme. Thus, the fact that some aggrieved individuals had some statutory remedies in Schweiker v. Chilicky, 487 U.S. 412 (1988), was not central to the Supreme Court's decision that individual liability Bivens actions were unavailable. In Chilicky, Social Security benefit claimants sought to maintain damages claims under 42 U.S.C. § 1983 against federal and state officials who had allegedly violated their constitutional rights in the course of denying benefit claims. Those officials argued, and the Supreme Court agreed, that the comprehensive, elaborate review and benefit restoration provisions of the Social Security Disability Benefits Reform Act of 1984 precluded their damages claims. "The absence of statutory relief . . . for a

constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." 487 U.S. at 421-22.

The decision in Chilicky rested largely upon the Supreme Court's earlier decision in Bush v. Lucas, 462 U.S. 367, 368 (1983), where the Court found a "special factor" in a system of "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." Notable for purposes of the present case, the Court reached this conclusion notwithstanding that the statutory scheme there at issue, the Civil Service Reform Act, did not provide complete relief for the plaintiff. The Court emphasized that the critical question was not one "concerning the merits of the particular remedy that was sought," but rather "who should decide whether such a [damages] remedy should be provide[d]," Congress or the Judiciary. Id. at 380. That question was answered in favor of the former. See also Spagnola v. Mathis, 859 F.2d 223, 226-28 (D.C. Cir. 1988)(en banc)(in light of Chilicky and Bush, CSRA precludes Bivens claims against federal managers for alleged constitutional violations, even where plaintiffs themselves have little or no remedy under CSRA itself).

Plaintiffs' Bivens claims cannot withstand dismissal given the rationale underlying Bush, Chilicky, and similar decisions cited in earlier briefs. Plaintiffs attempt to avoid this result by pointing to limitations on the reach of the INA, but these efforts only confirm that plaintiffs have missed the essence of the holding of these cases. They argue, for example, that 8 U.S.C. § 1252 (g) does not bar claims related to their detention, because it is the fact of that detention, and not the "commencement" of removal proceedings as such, that forms the basis of their claim. Opp. at 6-7. Plaintiffs similarly contend that the discretion accorded the Attorney General by 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii) does not defeat their claims because those claims are grounded

in actions that, in plaintiffs' view, are ultra vires. Opp. at 8-9.

But plaintiffs cannot parse the statute that discretely. They cannot deny that all those alleged acts and omissions underlying their lawsuit occurred *following their detention for immigration violations that they do not contest*. At that point, the plaintiffs were fully engaged in the system of procedures, rights and remedies crafted by the INA, and they were thus situated in no materially different way from the plaintiffs in Bush, Chilicky and Spagnola. They cannot escape dismissal by affixing an "ultra vires" label to defendants' actions, for if that were enough it would empty the Supreme Court's special factors jurisprudence of any meaning. By definition, a government official is alleged to be acting "ultra vires" when engaging in conduct that violates an individual's constitutional rights. That label alone cannot be a talisman to open the door to Bivens damages actions.

2. Plaintiffs' Bivens Claims Fail To Overcome Director Mueller's Immunity From Suit.

Even if the INA did not preclude plaintiffs' Bivens claims, dismissal of all claims against Director Mueller would still be mandated because plaintiffs have failed to allege acts or omissions that would constitute the violation of a clearly established constitutional right of which a reasonable person would have known. E.g., Anderson v. Creighton, 483 U.S. 635 (1987). The analytical starting point in reviewing Bivens claims, as the Supreme Court has emphasized, is to consider whether plaintiffs have alleged any constitutional violation at all; if that question is answered in the negative, the inquiry need not proceed further. Conn v. Gabbert, 526 U.S. 286, 290 (1999); Siegert v. Gilley, 500 U.S. 226, 233 (1991). Only if a constitutional violation is pled does the need then arise to proceed to the "clearly established" inquiry. Plaintiffs fail the

threshold test with respect to many, if not most of their claims, and the balance are disposed of at the second analytical step.

A. Plaintiffs Failed To Identify A Clearly Established Constitutional Right To Be Released Or Deported Within Six Months.

Plaintiffs argue first that the alleged failure to provide timely notice of the reasons for detention and a Notice to Appear (NTA) violated substantive and procedural due process guarantees.[1] Opp. at 15-21. Our prior memorandum noted, however, that not all plaintiffs joined this claim. See Supplemental Memorandum of Defendant Robert Mueller, filed July 2, 2003 (Mueller July 2 Mem.), at 10. Significantly, even those who did failed to allege how they were prejudiced by this delay, and their Opposition memorandum does not cure that critical omission. See id. at 18-19. Plaintiffs assert in a conclusory manner that this point "finds no support," id. at 18, but they nowhere come to grips with United States v. Fernandez-Antonia, 278 F.3d 150, 157-58 (D.C. Cir. 2002) and Douglas v. INS, 28 F.3d 241, 244, 246 (2d Cir. 1994), see Mueller July 2 Mem. at 11, that stand for exactly that proposition.

Plaintiffs do at least make an effort, albeit an ultimately unsuccessful one, to explain away the holding in Zadvydas v. Davis, 533 U.S. 678, 701 (2001), which Director Mueller previously cited for the rule that a six-month detention on immigration violations was presumptively reasonable. Mueller July 2 Mem. at 5. Plaintiffs urge that the case stands for no more than that such a detention is permissible for a presumptively dangerous individual. Opp. at

[1]The fact that only four of the seven named plaintiffs and putative class representatives make this claim underscores the lack of commonality and typicality among the claims in the proposed class, and also demonstrates that these seven cannot be adequate class representatives. Plaintiffs thus fail to meet three of the four essential requirements for maintenance of a class action under Fed. R. Civ. P. 23(a).

24. But 8 U.S.C. § 1231(A)(6), the detention statute at issue in Zadvydas, applies to aliens removable not only as a result of violations of criminal law, but also for violations of status requirements, entry conditions, or reasons of national security or foreign policy. Id., cited in Zadvydas, 533 U.S. at 682. The Supreme Court adopted this six-month presumptive rule without any distinctions drawn on the basis of grounds for removal, id. at 700-01, so plaintiffs read the case too narrowly. Even were their reading supportable, it would fall far short of the clearly established state of the law necessary to overcome the qualified immunity of Director Mueller and the other defendants.

B. Plaintiffs Have Failed To Identify Clearly Established Law To Support Their Equal Protection Claim.

Next, plaintiffs seek to resurrect their equal protection claims by arguing that they have no obligation to identify a similarly-situated, non-minority group that was treated differently with respect to their detention. Opp. at 24-26. They contend that the Second Circuit's decisions in Pyke v. Cuomo, 258 F.3d 107 (2d Cir. 2001) and Brown v. Oneonta, 221 F.3d 329, 337 (2d Cir. 2000) eliminate such a pleading obligation, arguing that "[t]hose cases, like this one, challenged government investigatory actions that expressly relied in part on race." Opp. at 26 n.26. Pyke and Brown do not support plaintiffs, however. Each involved, respectively, an alleged failure to provide police protection to Native American victims of arson and violent crime, and police actions taken during the course of a criminal investigation, well before any decisions were made concerning who would be taken into custody. See 258 F.3d at 108-09; 221 F.3d at 333. Neither case involved application of the immigration laws, which permissibly draw numerous distinctions on the basis of national origin in a multitude of contexts. See DeMore v. Kim, 123 S.Ct. 1708,

1717 (2003)(distinctions may be imposed regarding aliens that could not be imposed as to citizens). And both Pyke and Brown squarely reiterate the requirement that plaintiffs advancing equal protection claims to identify a similarly-situated, non-minority group when alleging selective prosecution. 258 F.3d at 109; 221 F.3d at 337 (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)).

Plaintiffs in the present case were detained for, and charged with, violations of the immigration statutes that remain uncontested on this record. These plaintiffs were, after being taken into custody for specific immigration offenses, provided hearings and ultimately deported. Their circumstances are therefore fundamentally different from those of the plaintiffs in Pyke and Brown, and the claims they now assert are much more akin to those of selective prosecution. Accordingly, they should have identified a similarly-situated, non-minority comparator group, and having failed to do so their equal protection claims should be dismissed.

C. Plaintiffs Have Not Identified A Clearly Established Right To Be Detained In A Facility Of A Specific Security Level.

Plaintiffs' claims related to the alleged "no bond" policy, placement in the Administrative Maximum/Special Housing Unit (ADMAX SHU), and the purported communications blackout also fall short of establishing constitutional violations. Plaintiffs expend great effort in their Opposition to demonstrate that the rights of access to courts and to counsel, each implicated by the foregoing events, are clearly established. Opp. at 33-35. Similarly, they contend that their "arbitrary" assignment to the ADMAX SHU violated their due process rights, which are also clearly established. Opp. at 27-32. As a threshold matter with respect to all of these claims, of course, Director Mueller as head of the FBI has no line authority over the Bureau of Prisons or

any individual BOP facility. Beyond that, plaintiffs have succumbed to the fallacious reasoning that the Supreme Court rejected in Anderson v. Creighton, 483 U.S. 635 (1987), by defining the rights at issue at a level of generality that precludes any workable analysis. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640. Put another way, "in light of pre-existing law the unlawfulness must be apparent." Id.

Plaintiffs argue that the procedures specified in 28 C.F.R § 541.22 were violated and that plaintiffs, treated as the equivalent of pretrial detainees under Bureau of Prisons regulations, enjoy the right confirmed in case law to a hearing prior to being placed in unusually restrictive confinement. Opp. at 29-31. But the regulations that plaintiffs themselves rely upon also make clear that individuals may be placed in administrative segregation for their own protection. 28 C.F.R. §§ 541.22 (a); 541.23. Even assuming that the time periods for hearings specified in these regulations were not strictly met, that failure does not reach a constitutional level when it is remembered that all the plaintiffs ultimately did receive a hearing regarding their detention. No case cited by plaintiffs establishes, clearly or otherwise, the proposition that delay in providing a hearing to individuals held for immigration violations in the circumstances leading to plaintiffs' detention is unconstitutional.

D. Plaintiffs Have Filed To Identify Any Law That Clearly Establishes A Deportable Alien's Right To Release On Bond.

So too with respect to the denial of bond and the communications "blackout," plaintiffs have not surmounted the arguments for dismissal in our earlier memorandum. They fail to explain how the former can be the basis of a Bivens action in the face of the holdings in Carlson

v. Landon, 342 U.S. 524 (1952) and Demore v. Kim, supra, 123 S.Ct. 1708, that aliens have no constitutional right to release on bond. Their discussion of these cases (Opp. at 22-23), offered to support their generalized claim of a right, as aliens, to due process of law, does not inform the more particularized analysis required by Anderson v. Creighton. As for the alleged communications blackout, plaintiffs' Opposition does not dispute that, as noted in Director Mueller's July 2 Memorandum (at 9), each plaintiff was permitted to make contact with legal representatives and others. Plaintiffs have cited no case that clearly establishes the constitutional right to engage in contacts with outside world in a time and manner of one's own choosing from a place of detention.

E. Plaintiffs Have Not Identified Acts Of Director Mueller Personally That Violated Their Rights.

Finally, as emphasized in Director Mueller's previous memorandum (at 11), plaintiffs have not tied him to the alleged constitutional wrongs they endured in a fashion that survives his motion to dismiss. They respond by urging that, under Second Circuit law, it suffices that they allege any of the following in order to maintain a Bivens claim against a supervisory official: direct participation in the constitutional violation; failure to remedy that violation after being apprised of it; creation of a policy or custom under which the unconstitutional practice occurred; gross negligence in supervising subordinates, or deliberate indifference to the rights of others by failing to act on information indicating that unconstitutional acts were occurring. Opp. at 38, citing Vazquez v. Parks, No. 02 Civ. 1735, 2003 U.S. Dist. LEXIS 3957, at *24 (S.D.N.Y. Jan. 27, 2003)(quoting Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 254 (2d Cir. 2001)(other citations omitted). Plaintiffs come up short on every prong of this test. Director

Mueller is not alleged to have participated personally in the acts that plaintiffs say violated their rights. Tellingly, the solitary paragraph relating to the specific alleged acts of Director Mueller in plaintiffs' Opposition actually describes not acts of the Director, but to those of the FBI. That is nothing more than an attempt to establish respondeat superior liability which falls outside Bivens claims. E.g., Ford v. Moore, 237 F.3d 156, 162-63 (2d Cir. 2001). There is a statement in the OIG Report that a call was placed to Director Mueller by former INS Commissioner Ziglar, OIG Report at 66, but few details are provided as to what was said and, in any event, plaintiffs' own allegations are that the call was actually returned by a subordinate who does not recall any such conversation with Mr. Ziglar.

The final three prongs of the test – creation of an unconstitutional policy, gross negligence in supervising subordinates, and deliberate indifference to the rights of others – all presuppose the existence of acts or omissions that amount to constitutional violations, a notion wholly refuted by the foregoing discussion. In addition, none of those experiences alleged by plaintiffs subsequent to their detention at the Metropolitan Detention Center can be laid at Mr. Mueller's feet, for he simply has no supervisory authority over the operation of that facility. At most, he could be argued to have authority over those FBI officials who, according to plaintiffs (Second Amended Complaint at ¶¶ 58), urged a hold-without-bond approach to dealing with the plaintiffs. For all the reasons already articulated, that was not an unconstitutional practice.

Conclusion

For all of the foregoing reasons and for those set out in his previous Supplemental Memorandum, Director Mueller respectfully submits that all claims against him in the Second Amended Complaint should be dismissed.

Respectfully submitted,

ROSCOE C. HOWARD, JR.
United States Attorney
District of Columbia

MARK E. NAGLE
Assistant United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant Mueller's Reply To Plaintiff's Opposition To His Supplemental Memorandum in Support of Motion to Dismiss the Second Amended Complaint was served by first class mail, postage prepaid this 23rd day of July, 2003, to:

Barbara J. Olshansky, Esq.
Nancy Chang, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

David Cole, Esq.
c/o Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Paul Hoffman, Esq.
Schonbrun, De Simone, Seplow,
Harris & Hoffman
723 Ocean Front Walk
Venice, California 90201

Martin Stolar
351 Broadway Ave.
New York, New York 10013

Counsel for Plaintiffs

Larry Gregg, Esq.
Office of the United States
Attorney, E.D. VA
Civil Division
2100 Jamieson Ave.
Alexandria, VA 22314

Counsel for Attorney General
John Ashcroft

Ernesto H. Molina, Jr., Esq.
Office of Immigration Litigation
1331 Pennsylvania Ave., N.W.
Suite 8038N
Washington, D.C. 20004

Counsel for the United States and
the Official Defendants

Michael L. Martinez, Esq.
Shari Ross Lahlou, Esq.
Crowell & Moring, LLP
1001Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595

Counsel for Dennis Hasty

William McDaniel, Esq.
McDaniel, Bennett & Griffin
118 West Mulberry St.
Baltimore, MD 21201-3606

Counsel for James Ziglar

Allan N. Taffet, Esq.
Duval & Stachenfeld, LLP
300 East 42nd St.
New York, NY 10017

Counsel for Michael Zenk

R. CRAIG LAWRENCE
Assistant United States Attorney
District of Columbia