UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFI; SAED 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 Investigations; JAMES W. ZIGLAR, former 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 ROES 1-20, Federal Bureau of Investigation and /or Immigration and Naturalization Service Agents, Defendants.	)	Civil Action No. 02 CV 2307 (JG) (Gleeson, J.)

REPLY TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT ON BEHALF OF THE DEFENDANTS IN THEIR OFFICIAL CAPACITIES

PETER D. KEISLER
Assistant Attorney General

LAURA L. FLIPPIN
Deputy Assistant Attorney General

DAVID J. KLINE
Principal Deputy Director

DAVID V. BERNAL
Assistant Director

PAPU SANDHU
Senior Litigation Counsel

M. JOCELYN LOPEZ WRIGHT
Senior Litigation Counsel

ERNESTO H. MOLINA, JR.
Senior Litigation Counsel
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Attorneys for the Named Defendants in Their Official Capacities

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Selected Sections of the Immigration and Nationality Act of 1952, as amended

FEDERAL REGULATIONS

The named defendants in their official capacities, through their undersigned attorneys, hereby provide their reply to Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint ("Pl. Supp.").

ARGUMENT

I. THE PLAINTIFFS' ARGUMENTS URGING JURISDICTION LACK MERIT

A. Plaintiffs Lack Standing To Pursue Injunctive Relief In Claims Seventeen Through Twenty-Two

Plaintiffs suggest that they have standing to bring Claims Seventeen through Twenty-two. See Pl. Supp. at 2 n.1. However, plaintiffs do not have standing to obtain declaratory and injunctive relief regarding these claims because they cannot show any "continuing, present, adverse effects" from the actions challenged. See City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). Accordingly, Claims Seventeen through Twenty-Two should be dismissed insofar as they seek declaratory and injunctive relief.

B. Section 1252(g) Bars The Court's Jurisdiction Over Claim Seventeen

Plaintiffs argue that 8 U.S.C. § 1252(g) does not preclude review of Claim Seventeen because they challenge their "detention" based on the failure of the Immigration and Naturalization Service ("INS") to issue charging documents rather than the authority of the INS to commence their proceedings. Pl. Supp. at 6-7. Plaintiffs' argument lacks merit.

The fact is that plaintiffs really do allege in their complaint that their rights were violated by "Delays in Serving Charging Documents." Second Amended Complaint ("Sec. Am. Comp.") at 70. Thus, it is self-evident that this claim for injunctive and declaratory relief concerns the Attorney General's discretion as to when to commence proceedings and should be dismissed.[1]

---

[1] Plaintiffs' argument that constitutional claims are not precluded by section 1252(g) (Pl. Supp. at 7 n.6.) is misplaced. The government argued that their constitutional claims, if they are reviewable at all, must be reviewed during immigration proceedings and "not be made the bases

C. 8 U.S.C. § 1252(b)(9) Divests The Court Of Jurisdiction Over Claims Seventeen, Eighteen, Nineteen, Twenty-One, And Twenty-Two

Plaintiffs' argument that 8 U.S.C. § 1252(b)(9) does not apply to their case because they are not challenging their "removal orders" is unavailing. First, it is clear that section 1252(b)(9) is not limited to whether or not the alien is challenging a "removal order," but applies more generally to any issues "arising from any action taken or proceeding brought to remove an alien . . ." 8 U.S.C. § 1252(b)(9). There can be no question that the issuance of a notice to appear, the opposition to bond, the availability of counsel for removal proceedings, and the timing of removal are "actions taken" to remove an alien. Thus, Court's jurisdiction is barred.

Plaintiffs' argument that Section 1252(b)(9) does not bar "collateral challenges" to removal proceedings is mistaken. See Pl. Supp. at 5 (citing McNary v. Haitian Refugee Center, 498 U.S. 479 (1991)).[2] McNary was decided before 8 U.S.C. §§ 1252(b)(9) and 1252(g) were enacted. As the Supreme Court explained, Section 1252(g) (and by extension, the broader "zipper" clause of section 1252(b)(9)) was intended to reach issues which previously were seen as outside the scope of a "final order of deportation." AADC, 525 U.S. at 485. Thus Section 1252(b)(9) bars exactly the type of "collateral challenges" that plaintiffs raise.

D. Plaintiffs' Claims Eighteen Through Twenty-Two Should Be Dismissed For Failure To Exhaust Administrative Remedies

Plaintiffs argue that no exhaustion is required because (1) exhaustion would have been futile and (2) defendants allegedly interfered with their ability to seek relief. See Pl. Supp. at 12-

---

for separate rounds of litigation." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 485 (1999) ("AADC"). Plaintiffs failed to raise these claims in removal proceedings.

[2] Plaintiffs assert that INS v. St. Cyr, 533 U.S. 289 (2001), supports their argument that jurisdiction under 28 U.S.C. § 1331 survives. Pl. Supp. at 4 n.3. This reliance is misplaced because Section 1331, unlike habeas corpus, does not carry with it the same presumptions against repeal by implication. See, e.g., AADC, 525 U.S. at 476 (noting that section 1252(g) is sufficient to bar action under 28 U.S.C. § 1331).

14.[3] Plaintiffs' arguments are meritless.[4]

1. The futility doctrine is inapplicable

The futility doctrine is inapplicable. The exhaustion of administrative remedies is a jurisdictional prerequisite. See 8 U.S.C. § 1252(d)(1). Where Congress requires exhaustion of remedies, futility is not a defense. See Weinberger v. Salfi, 422 U.S. 749, 766 (1975).

In any event, the exhaustion of remedies would not have been futile. With regard to Claims Eighteen and Nineteen (challenging the opposition to bond), a deportable alien may seek redetermination before an immigration judge and ultimately appeal to the Board of Immigration Appeals ("BIA" or "the Board"). See 8 C.F.R. § 236.1(d) (2002). Plaintiffs do not allege that these independent adjudicators' decisions were preordained.

Similarly, plaintiffs' argument that they had no need to exhaust their remedies under claims Twenty-One and Twenty-Two (challenging the limitations on communication) is ill-founded. Plaintiffs do not allege that they were denied *all* communications. Rather, they only assert that they were denied adequate access to the telephone. The fact that some plaintiffs were able to use the phone frequently in October is sufficient to require exhaustion.

2. Plaintiffs cannot allege interference with administrative remedies

Plaintiffs' argument that the exhaustion of administrative remedies is excused because defendants "interfered" with the availability of administrative remedies is meritless. Pl. Supp. at 14. The named plaintiffs do not claim to have been denied the handbook. Moreover, once

---

[3] Plaintiffs also argue that exhaustion is not required because it would not have resulted in the monetary relief they seek. Pl. Supp. at 13. This argument is not relevant to the case of defendants sued in their official capacity.

[4] Plaintiffs also allege that the failure to exhaust is not a jurisdictional issue. They are wrong. See DiLaura v. Power Auth., 982 F.2d 73, 79 (2d Cir. 1992); Giwah v. McElroy, 1999 WL 104593 at *3 (E.D.N.Y. 1999).

plaintiffs obtained counsel, it was their counsel's responsibility to investigate the available remedies and to see that they were exhausted rather than await a handbook.

Similarly, plaintiffs cannot suggest that they should not have been required to apply for relief because of an alleged "effort to seek continuances." Pl. Supp. at 14. Bond may be sought from immigration judges who are independent adjudicators. 8 C.F.R. §§ 3.10 & 3.19 (2002).

Plaintiffs' argument that they relied on "false statements" by immigration judges and INS officers that they would be released in a matter of days is also ill-conceived. When that removal did not happen within the time frame desired, they could have sought bond and then filed a habeas petition, which would then have been reviewed in light of the discretion afforded the government during the removal period under Zadvydas v. Davis, 533 U.S. 678, 699 (2001).[5]

II. THE COURT SHOULD DISMISS PLAINTIFFS' NEW CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE CLAIMS ON WHICH RELIEF CAN BE GRANTED

A. Claim Seventeen Should Be Dismissed For Failure To State A Claim

Plaintiffs claim that defendants' delay in serving them with charging documents violated their clearly established rights to substantive and procedural due process. Pl. Supp. at 15-21. They are wrong. First, plaintiffs cannot argue that they have "the right to know the reason for [their] detention" because they admit that they were served with charging documents notifying them of this information within days of their arrest. Rather, their claim raises the issue of whether they have a clearly established constitutional right to receive notice of the immigration charges against them within a certain number of hours after their arrest. See Reno v. Flores, 507 U.S. 292, 301 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right. . . ."); Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999). Plaintiffs have

[5] An alien found to be inadmissible has no constitutional right to release at all. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1952); cf. Zadvydas, 533 U.S. at 695.

failed to show that they have any such due process right.[6]

Furthermore, plaintiffs' interest is minimal and is outweighed by, not only a legitimate reason, but a *compelling* one in protecting the Nation's security through a wide-ranging investigation intended to find the perpetrators of the September 11 attack and to prevent future attacks. The government's actions were necessarily the result of the need to protect these interests in the midst of an extraordinary national emergency. Indeed, plaintiffs' own citation to County of Riverside supports the government's argument by providing an exception to the requirement that a criminal suspect be granted a probable cause hearing within forty-eight hours of arrest where there are "extraordinary circumstance[s]."[7] County of Riverside, 500 U.S. at 55.

Moreover, plaintiffs cannot show that the delays resulted in "an erroneous deprivation of liberty" (see Pl. Supp. at 20) because they were all served with the charging documents within a few days of their arrest and had the opportunity to obtain legal counsel, seek release, and challenge the charges against them in immigration court. Indeed, they admit that they were illegally present in the United States. Sec. Am. Comp. at ¶¶ 71, 94, 109, 128, 140, 153.

Finally, plaintiffs have failed to demonstrate prejudice. Plaintiffs argue that there is no

---

[6] Plaintiffs' reliance on County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991), a criminal case (Pl. Supp. at 17), is misplaced. "Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984); see also United States v. Mendoza-Lopez, 481 U.S. 828, 838 (1987).

[7] Plaintiffs briefly suggest that the government cannot defend its position based on the extraordinary circumstances in the aftermath of the September 11th attack because these facts were not alleged in the complaint. Pl. Supp. 19 n.20. That assertion is without merit. Clearly, there is no factual dispute regarding the chaos that resulted after the terrorist attacks of September 11, as even plaintiffs admit. See, e.g., Sec. Am. Comp. ¶¶ 1, 2, 4, 9, 17. In fact, plaintiffs allege that they were detained to enable law enforcement authorities to "determine whether they had any ties to terrorism." Pl. Opp. at 8. Moreover, it is the plaintiffs who have incorporated the OIG Report, which explains the context of the response to a terrorist attack in which the OIG investigation occurred. See, e.g., OIG Report at 1-4.

requirement that they establish prejudice to succeed on their constitutional claim. Pl. Supp. at 18. Such as assertion is flatly contrary to the requirement that a showing of prejudice is necessary to establish a due process violation in immigration proceedings. See United States v. Fernandez-Antonia, 278 F.3d 150, 157-58 (2d Cir. 2002); Douglas v. INS, 28 F.3d 241, 244, 246 (2d Cir. 1994). For all of these reasons, Claim Seventeen should be dismissed.

B. Claims Eighteen And Nineteen Should Be Dismissed For Failure To State A Claim

Plaintiffs fail to make any response to the argument that none of the named plaintiffs raising the claims have made sufficient allegations to establish a prima facie case.[8]

Plaintiffs argue that the government errs when it asserts that an illegal alien has no liberty interest in bond. They claim that the government's argument is foreclosed by Zadvydas, 533 U.S. at 690. Pl. Supp. at 22. Yet the Supreme Court in Zadvydas avoided the constitutional question. See Id. at 696. The Zadvydas decision cuts against plaintiffs' claims because it specified that a deportable alien's detention pending removal is presumptively valid for at least 180 days. Id. at 699. Thus, plaintiffs had no liberty interest to release on bond.

Moreover, plaintiffs attack the Attorney General's prosecutorial discretion by arguing that defendants cannot oppose release on bond unless there is an individualized showing of flight risk or dangerousness. The Supreme Court has rejected the argument that individual determinations of dangerousness and risk of flight and are required. DeMore v. Kim, 123 S. Ct. 1708 (2003);

---

[8] Plaintiffs' argument that procedural due process does not cure deprivation of substantive due process (Pl. Supp. at 23) puts the cart before the horse because it presumes that there is a substantive liberty interest in release on bond. Plaintiffs, however, as aliens admitted present in the United States did not have a liberty interest in being free in the United States pending removal proceedings or for 180 days after being ordered removed. See Parra v. Perryman, 172 F.3d at 958; Zadvydas, 533 U.S. at 699. Thus, absent a liberty interest, there is no violation of constitutional due process and the only protections afforded are those provided by statute. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 (1972).

Carlson v. Landon, 345 U.S. 524 (1952).[9]

As for plaintiffs' allegations of discrimination based on nationality or religion (Pl. Supp. at 24), plaintiffs' admit elsewhere that the appropriate standard is the "facially legitimate and bona fide reason" standard of Kleindienst v. Mandel, 408 U.S. 753, 762 (1972). Pl. Supp. at 35 n.36. Plaintiffs were all being investigated for having possible connections with or information pertaining to terrorist activity. That is a facially legitimate reason for opposing their release on bond. The Court may not look behind or test that reason. Kleindienst, 408 U.S. at 769-70.

C. Claim Twenty Should Be Dismissed For Failure To State A Claim

Plaintiffs' twentieth claim, that their procedural due process rights were violated because of their "arbitrary assignment" to the ADMAX SHU at MDC, should be dismissed. Plaintiffs do not claim that defendants placed them in SHU in order to punish them. See Bell v. Wolfish, 441 U.S. 520, 536-37 (1979). "Absent a showing of an expressed intent to punish, the determination whether a condition is imposed for a legitimate purpose or for the purpose of punishment 'generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" Benjamin v. Fraser, 264 F.3d 175, 187 (2d Cir. 2001).

Classifications which are necessary to identify those aliens who might pose a particularly high risk of terrorist involvement, to limit the release of information from those aliens, and to maintain security within the prison facilities are permissible. See Benjamin, 264 F.3d at 190. These considerations distinguish this case from the Second Circuit's decision in Benjamin. Pl.

---

[9] Plaintiffs' rhetorical citation of Korematsu v. United States, 323 U.S. 214 (1944), is misplaced. See Pl. Supp. at 26 n.25. Korematsu involved limitations imposed on United States citizens and foreign nationals alike. 323 U.S. at 215-16. The situation here is dissimilar. The political branches may impose distinctions regarding aliens which could not be made regarding citizens. See Kim, 123 S. Ct. at 1717. An alien unlawfully in the United States cannot challenge his removal based on a claim of selective prosecution. AADC, 525 U.S. at 488.

Supp. at 31. In Benjamin, there was no clear, much less compelling, reason why the required administrative reviews had not been performed. Benjamin, 264 F.3d at 190 (finding "no substantial government need for denying subsequent review"). Due process does not require periodic review and hearings on how and why law enforcement agencies reach their classification decisions where such decisions involve national security concerns. Mathews v. Eldridge, 424 U.S. 319, 324 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); cf. Center for National Security Studies v. U.S. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003) ("CNSS"). Certainly, assuming the plaintiffs' allegations as true, defendants' actions were objectively reasonable in light of the extraordinary circumstances after September 11. Thus, there is no merit to plaintiffs' twentieth claim.

Plaintiffs further argue that they have a "liberty interest" based on regulations. See Pl. Supp. at 30. This claim is not fairly made in plaintiffs' complaint. See Sec. Am. Comp. at ¶¶ 263-67. Even if it were, however, it does not constitute a claim for which relief can be granted. This is so because, although the regulations do not address the national security interests involved here, plaintiffs fit the criteria for administrative detention nevertheless, see 28 C.F.R. § 541.22(a)(3) & (a)(5), and, therefore, they can have no liberty interest in living in the prison's general population. It follows that, whatever procedural violations plaintiffs might conceivably allege, those violations would be harmless as a matter of law. See United States v. Yousef, 327 F.3d 56, 113-14 (2d Cir. 2003); United States v. Felipe, 148 F.3d 101, 108 (2d Cir. 1998).[10]

---

[10] The case of Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000), is inapposite because the inmate there did not plainly fall within any of the categories in § 541.22, no exceptional circumstances existed, and an extended administrative detention period was dependent on a BOP determination. 280 F.3d at 82-83. Here it is clear that plaintiffs fall within the regulation's categories, that national security concerns constitute exceptional circumstances, and that plaintiffs were not detained in administrative detention longer than it took to obtain security clearance from the FBI. Thus, no "liberty interest" was implicated.

D. Claims Twenty-One And Twenty-Two Should Be Dismissed For Failure To State A Claim

1. Plaintiffs do not deny that the alleged limitation on communications was a reasonable measure

Plaintiffs fail to challenge the legitimacy of the government's alleged actions.[11] While plaintiffs rely on cases such as Precunier v. Martinez, 416 U.S. 396, 419-20 (1974), overruled in part in Thornburgh v. Abbott, 490 U.S. 401 (1989), they fail to employ the test established by those cases. Limitations on communication are permissible if they are "generally necessary to protect one or more . . . legitimate governmental interests." Martinez, 416 U.S. at 414. Use of the least restrictive means to protect those interests is not required. Abbott, 416 U.S. at 411.

Plaintiffs do not dispute the fact that the alleged government actions were "generally necessary to protect one or more legitimate governmental interests" – namely, that the initial limitations on communication were imposed due to serious national security, foreign policy, and immigration interests. Similarly, plaintiffs admit that any "communication blackout" ended by mid-October, when plaintiffs Ebrahim and Ibrahim were able to make frequent use of the telephone. There is no doubt that any alleged brief limitation on communications following the attacks of September 11 would be appropriate to assure national security, and plaintiffs do not allege the contrary. Thus, under the access-to-the-courts line of cases, the court should defer to the legitimate governmental interests – national security, foreign policy, and immigration

---

[11] Plaintiffs argue that the test in Kleindienst v. Mandel, 408 U.S. 753 (1972), only applies to substantive, not procedural, decisions to "admit or exclude non-citizens." Pl. Supp. at 35 n.36. However, the Supreme Court has applied the deferential standard of review in both substantive and procedural areas. Kleindienst, 408 U.S. at 769 (denial of a visa); Mathews v. Diaz, 426 U.S. 67, 83-84 (1976) (denial of medical benefits); Fiallo v. Bell, 430 U.S. 787, 793-94 (1977) (challenges to visa standards); Reno v. Flores, 507 U.S. 292, 305-06 (1993) (detention procedures); cf. Kim, 123 S. Ct. at 1721-22 (2003) (mandatory detention). Indeed, in evaluating actions to combat terrorism, even greater deference is appropriate. See Zadvydas v. Davis, 533 U.S. 678, 695 (2001). Congress and the Executive may make decisions regarding aliens which would be unacceptable if applied to citizens. Kim, 123 S. Ct. at 1717.

concerns. See CNSS, 331 F.3d at 931 ("The court should not second-guess the executive's judgment in this area."); North Jersey Media v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

2. Plaintiffs lack the requisite actual injury

Plaintiffs allege that they are not required to show "actual injury" to establish a claim, relying heavily on the Sixth Amendment right to counsel. See Pl. Supp. at 35-36. Yet, there is no Sixth Amendment right to counsel in civil or immigration proceedings. See Evitts v. Lucey, 469 U.S. 387, 396 (1985). Thus, the Sixth Amendment standards do not apply.

Rather, the applicable test is found in Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003). There, a convict alleged a violation of access to the courts based on the First Amendment and Fourteenth Amendments, but the Second Circuit required that he show an "actual injury" resulting from the restrictions on his access to the courts. Davis, 320 F.3d at 351-52.

III. CONCLUSION.

For the above reasons, the named defendants in their official capacities request dismissal under Fed. R. Civ. P. 12(b)(1) and (6) of all plaintiffs' claims asserted against them.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

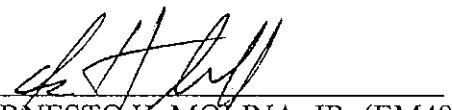
LAURA L. FLIPPIN
Deputy Assistant Attorney General

DAVID J. KLINE
Principal Deputy Director

DAVID V. BERNAL
Assistant Director

PAPU SANDHU
Senior Litigation Counsel

M. JOCELYN LOPEZ WRIGHT
Senior Litigation Counsel



ERNESTO H. MOLINA, JR. (EM4955)
Senior Litigation Counsel
U.S. Dept. of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 878
Washington, D.C. 20044
O: (202) 616-9344
F: (202) 616-4975
ATTORNEYS FOR THE NAMED DEFENDANTS IN THEIR OFFICIAL CAPACITIES

CERTIFICATE OF SERVICE

I CERTIFY that on July 23, 2003, I caused to be sent by Federal Express overnight delivery and facsimile transmission a copy of the foregoing pleading to the attorneys for plaintiffs and defendants, addressed to:

Nancy Chang
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Counsel for Plaintiffs

Larry Gregg
U.S. Dept. of Justice
Office of the United States Attorney, EDVa.
Civil Division
2100 Jamieson Avenue
Alexandria, VA 22314
Counsel for Defendant John Ashcroft

Mark Nagle
U.S. Attorney's Office
Civil Division
10th Floor
555 4th St NW
Room 10-435
Washington, DC 20001
Counsel for Defendant Robert Mueller

William McDaniel
McDaniel, Bennett & Griffin
118 West Mulberry Street
Baltimore, Md., 21201-3606
Counsel for Defendant James Ziglar

Michael L. Martinez, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
Counsel for Defendant Dennis Hasty

Allan N. Taffet, Esq.
Duval & Stachenfeld LLP
300 East 42nd Street
New York, NY 10017
Counsel for Defendant Michael Zenk

ERNESTO H. MOLINA, JR.