


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

,
Petitioner/Plaintiff,



vs.

JOHN ASHCROFT, as Attorney General of the
United States; TOM RIDGE, as Secretary of the
United States Department of Homeland Security;
MARION DILLIS, Officer in Charge, Krome
Service Processing Center (SPC), Immigration and
Customs Enforcement (ICE), United States
Department of Homeland Security; MICHAEL
ROZOS, Field Office Director, Miami ICE
Detention and Removal Office, United States
Department of Homeland Security,

Respondents/Defendants.

CIVIL ACTION NO. _____

**PETITIONER/PLAINTIFF’S EMERGENCY MOTION FOR A TEMPORARY
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTIVE RELIEF**

The Petitioner/Plaintiff (hereinafter “Petitioner”),  by and through his undersigned counsel, respectfully requests this Honorable Court to enter an emergency temporary restraining order and/or a preliminary injunction from this Honorable Court enjoining Respondents from preventing Petitioner’s release on bond; releasing Petitioner from physical custody pending the outcome of the instant action on any reasonable conditions on bond that would ensure his appearance at any future immigration hearings; and declaring that the actions and/or decisions of Immigration Judge (IJ)  were (a) in violation of the Equal Protection guarantees of the Due Process Clause of the Fifth Amendment by utilizing the impermissible criteria of national origin as a basis to deny bond; (b) in violation of the Due Process

Clause of the Fifth Amendment by determining that no conditions of bond could be set and therefore no conditions of bond could satisfy release; and (c) in violation of the INA and DOJ regulations because an immigration judge does have the authority to set conditions of bond in a removal proceeding.

In support of this request, the Petitioner states as follows:

1. [REDACTED] is a native and citizen of Mexico, and also a citizen of [REDACTED] and [REDACTED]. *See* Affidavit of Petitioner, attached as Exh. 7 to the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and Complaint for Declaratory and Injunctive Relief (hereinafter “Habeas Petition”). (All documents referenced herein are attached as exhibits to Mr. XXXXX’ Habeas Petition.)

2. Mr. [REDACTED] is a university trained [REDACTED] who has been in the United States since [REDACTED] on a temporary visa for professionals [REDACTED]. During that time period, Mr. [REDACTED] has raised his family in Florida including [REDACTED] children. He has been very active in his church and his community. *See* letters from church members and neighbors attached hereto as Exhibit 1. One of his United States citizen sons, [REDACTED], is [REDACTED] old and was born out-of-wedlock. In state court proceedings, the Honorable Judge [REDACTED], awarded Mr. [REDACTED] extensive visitation rights with his child while only allowing the mother limited supervised visitation. *See* Motion and Order Granting Extensive Supervision to Mr. [REDACTED] marked herein as Exhibit 2. In addition to these extensive ties, Mr. [REDACTED] has all his immediate relatives in the United States. His [REDACTED] is a lawful permanent resident. His other brothers, sister, and parents are [REDACTED].

3. Notwithstanding all of these factors, Mr [REDACTED] was arrested by Immigration and

Customs Enforcement (“ICE) on [REDACTED] charged solely with overstaying the period granted to him in the United States by immigration authorities, and incarcerated at the Krome Detention Facility **without any bond**, where he remains today. *See* ICE Notice to Appear and Warrant of Arrest against Mr. [REDACTED] marked herein as Exhibit 3.

4. On August [REDACTED], [REDACTED] was laid off from his [REDACTED] position. At that time, he was informed by his then immigration attorney that he had six months to depart the United States. After August [REDACTED] Mr. [REDACTED] made plans to depart the United States unaware that he was required to depart immediately. Mr. [REDACTED] had never previously violated the immigration laws of the United States and has never knowingly violated or been *accused* of violating any other laws of the United States, immigration or criminal, before his arrest and incarceration without bond.

5. His incarceration without bond simply because he inadvertently overstayed the time period given to him as a professional in the United States is extraordinary. He has asked the immigration judge to allow him pre-hearing voluntary departure under Immigration and Nationality Act (“INA”) §240B(a) (1), 8 U.S.C. §1229c(a)(1), so that he may simply depart the United States and be with his family abroad. As a Mexican (as well as an [REDACTED]) citizen he has expressed an interest to voluntarily depart to Mexico or another country of his choice. Because ICE is fighting his request for pre-hearing voluntary departure, Mr. [REDACTED] has asked for a temporary bond *under any conditions the government wishes to set*, while he defends his request for voluntary departure from the United States.

6. ICE bases their “no bond” decision on the fact that there are pending criminal charges against Mr. [REDACTED]. These charges were brought to ICE’s attention through the mother of Mr. [REDACTED] who was not awarded custody of her child. She is a close relative of

high government officials in [REDACTED]. She contacted those officials who in turn contacted the United States government. Although there are no extradition proceedings even pending in [REDACTED] [REDACTED] See Notice for the Supreme Court of XXXXX marked herein as Exhibit 4, the decision to call US officials regarding the criminal charges, and the subsequent arrest of Mr. [REDACTED] has had the predictable effect of terminating his extensive visitation rights with his child and giving custody of the child to the mother.

7. Although ICE claims that Mr. [REDACTED] is a “fugitive from justice” in [REDACTED] the charges arose *two years after* Mr. [REDACTED] left [REDACTED]. See Official Departure and Arrival Records from Immigration in [REDACTED] marked herein as Exhibit 5. As soon as Mr. [REDACTED] learned of the pending criminal charges, he hired counsel in [REDACTED] who is vigorously challenging the basis of those charge which are for improper bookkeeping and embezzlement. [REDACTED] law presumes innocence, there is no final decision on the criminal charges in [REDACTED], there is no reason to believe Mr. [REDACTED] will be convicted in [REDACTED], and as stated previously there are no extradition proceedings pending against him.

8. During the course of Mr. [REDACTED]’ detention, the government of [REDACTED] taken [REDACTED] action to undermine the rule of law in the country by removing [REDACTED] [REDACTED] [REDACTED]. The actions were illegal and unconstitutional under [REDACTED] Expert Affidavit of [REDACTED] attached herein and marked as Exhibit 6.

9. On [REDACTED] a hearing on Mr. [REDACTED] request to leave the United States voluntarily and at no cost to the government was held before Immigration Judge X [REDACTED] [REDACTED] at the [REDACTED]. This hearing followed the immigration judge’s first continuance for two weeks to give the government an opportunity to present their case. At the hearing on [REDACTED] the immigration judge further continued the hearing until [REDACTED]

██████████ with the understanding that the continued hearing may be further postponed after ██████████. Even if the immigration judge renders a decision in favor of Mr. ██████████ in ██████████, ICE counsel has the right to appeal that decision to the Board of Immigration Appeals thereby ensuring Mr. ██████████ detentions for months if not years.

10. As a result of the prospect of long term detention, notwithstanding Mr. ██████████ simple request to voluntarily leave the country, he asked for a bond re-determination hearing from Judge Hurewitz pursuant to INA §236(a)(2), 8 U.S.C. §1226(a)(2) so that he may be reunited with his family while his case proceeds.

11. The immigration judge then proceeded to hold a perfunctory bond hearing. Mr. ██████████ stated that he would accept *any conditions for bond*, including electronic monitoring, daily reporting, the government holding all his passports and a financial bond, to ensure his appearance at his next hearing.

12. The immigration judge ruled that “no bond” should be given to Mr. ██████████ decision rested on two impermissible legal grounds---one constitutional and one statutory. His constitutional ruling rested on the theory that Mr. ██████████ was a flight risk because he was a Mexican citizen. As a Mexican citizen, even with all the above mentioned conditions, the immigration judge reasoned that “he could get a Mexican birth certificate and cross the border.” Although no transcript or recording is maintained of an immigration bond hearing, this reasoning is reflected in the immigration judge’s written bond decision which *in toto* states: “Respondent held w/o bond. Flight risk. It appears can leave at anytime to Mexico.” *See* Immigration Judge’s Decision on Bond incorporated herein as Exhibit 7. Under this theory, no Mexican citizen would be eligible for a bond because he or she could “get a birth certificate” and “cross the border.”

13. The immigration judge also impermissibly concluded that he had no statutory authority to impose any conditions of bond, other than financial conditions, that would ensure Mr. [REDACTED] appearance. Ignoring all the other conditions suggested by Mr. [REDACTED], the immigration judge reasoned that financial conditions would not ensure Mr. [REDACTED]' appearance, because as a Mexican citizen he could obtain a birth certificate and cross the border. The immigration judge's claim that he could not impose any other conditions, such as electronic monitoring, extensive reporting, or ordering Mr. [REDACTED] to provide his passports to ICE, and therefore could not guarantee his appearance, is in clear contravention of INA §236(a)((2)(A), 8 U.S.C. §1226(a)(2)(A). Under that section, the Attorney General (and his designate the immigration judge) "may release the alien on—(A) bond of at least \$1,500, with security approved by, and *containing conditions prescribed by, the Attorney General....* (emphasis added). The statutory scheme only prohibits the immigration judge from granting work authorization to Mr. XXXXX as a condition of release. INA §236(a)(3). Nor do the regulations of the Department of Justice prohibit the immigration judge from setting other conditions of bond. 8 C.F.R. §1003.19 (XXXXX).

A. There Is A Substantial Likelihood That the Petitioner will Prevail on the Merits

14. As discussed in the accompanying memorandum of law, based on an erroneous interpretation and construction of federal statutes and regulations, and in violation of the equal protection and procedural and substantive due process guarantees of the Fifth Amendment, the IJ found that Petitioner was found ineligible for release on bond. This ruling was based impermissibly on protected suspect classification, namely, Mr. [REDACTED] Mexican citizenship. The IJ further erred in his finding that his authority as a judge did not allow him to place any conditions on bond, thus premitting any discussion by Petitioner of the appropriateness of such conditions. Because such rulings were violative of Petitioner's Constitutional rights under the Fifth Amendment and based on

a fundamental error in statutory construction, there exists a substantial likelihood Petitioner will prevail on the merits.

B. The Petitioner Will Suffer Irreparable And Immediate Injury Unless The Injunction Is Issued.

15. If Petitioner is denied release on bond with reasonable conditions, he will suffer irreparable injury in that he will be separated from his two U.S. citizen children who are extremely close to him. *See United States v. Wharton*, 514 F.2d 406, 408, 412 (9th Cir. 1975) (“Governmental conduct would work a serious injustice if this family were divested of the home in which they have invested so much of themselves”); *Tefel v. Reno*, 972 F. Supp. 608, 619-620 (S.D. Fla 1997) (failure to issue temporary restraining order would result in irreparable injury including family separation), *rev’d on other grounds* 180 F.3d 1286 (11th Cir. XXXXX).

16. Based on the letters submitted by Petitioner and his immediate family members, it is evident that his continued detention will cause them extreme emotional harm and break up their tight-knit and loving family. *See* Habeas Petition Exh. 1 (indicating that he will suffer extreme emotional harm by being separated from his family). In a physician’s letter dated December 20, [REDACTED] the doctor reports that Mr. [REDACTED] children “suffer severe cases of [REDACTED] *Id.*

17. Lastly, the fact that Mr. X [REDACTED] will remain incarcerated unlawfully itself represents a continuing irreparable injury to Petitioner. *Dash v. Mitchell*, 356 F. Supp. 1292, 1309 (D.C.D.C. 1972); *Grodzki v. Reno*, 950 F. Supp. 339, 342 (N.D.Ga. 1996); *U.S. v. Montalvo-Murillo*, 495 U.S. 711 (1990).

C. The Petitioner’s Injuries Overwhelmingly Outweigh Any Potential Harm To The Respondents

18. The injury to the Petitioner far outweighs the potential harm to the Respondents by permitting him to be released on conditions of bond while awaiting conclusion of his removal

proceedings. As discussed *supra*, Petitioner will suffer various forms of irreparable harm if he remains in detention. On the other hand, the Respondents will suffer no harm if the Petitioner is permitted to be released on bond and remains in the United States pending his removal proceedings. He poses no risk to United States security or to his community nor is he a flight risk. To the contrary, as indicated in numerous support letters, he is man of great character and who has generously helped and positively influenced numerous individuals. *See* Exh. 1. Although the IJ found that Petitioner is a flight risk, as discussed *supra*, that finding has no support in law or in fact. Petitioner has no history of immigration law violations, prior to the NTA issued in November, nor has he ever failed to appear before the IJ when he was required to do so. The IJ failed to consider these factors that clearly establish that Petitioner does not pose any flight risk. Instead, the IJ found Petitioner to be a flight risk solely based on the judge's conjecture that "[Petitioner] could get a Mexican birth certificate and cross the border." Such a finding is based on mere speculation, and if upheld, will render bond hearings meaningless for all Mexican citizens because no Mexican citizen would ever be eligible for a bond because he or she could "get a birth certificate" and "cross the border." Because Petitioner does not pose any danger to the community or flight risk, there would be no harm to the Respondent by releasing the Petitioner.

D. The Issuance of the Injunction Is Not Adverse To The Public Interest

19. The issuance of the injunction in this case is not adverse to the public interest. In fact, the issuance of an injunction strongly favors the public interest here. It is clearly against public policy and the public's interest to separate members of an immediate family. Indeed, one of the purposes behind our immigration law is to preserve family unity. *See, e.g., INS v. Errico*, 385 U.S. 214 (1966). Furthermore, the invidious racial and national origin classification at the base of the Immigration Judge's ruling, if allowed to stand, would represent a judicial imprimatur of

impermissible race and national origin discrimination. Such a ruling is not only unfounded legally, but adverse to the public interest in protecting minorities from arbitrary, capricious and unconstitutional governmental action.

IV. Conclusion

WHEREFORE, the Petitioner respectfully requests that this Honorable Court enter a Temporary Restraining Order and/or preliminary injunction enjoining Respondents from preventing Petitioner's release on bond; releasing Petitioner from physical custody pending the outcome of the instant action on any reasonable conditions on bond that would ensure his appearance at any future immigration hearings; and declaring that the actions and/or decisions of Immigration Judge [REDACTED] were (a) in violation of the Equal Protection guarantees of the Due Process Clause of the Fifth Amendment by utilizing the impermissible criteria of national origin as a basis to deny bond; (b) in violation of the Due Process Clause of the Fifth Amendment by determining that no conditions of bond could be set and therefore no conditions of bond could satisfy release; and (c) in violation of the INA and DOJ regulations because an immigration judge does have the authority to set conditions of bond in a removal proceeding.

Dated: [REDACTED]

[REDACTED]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Motion for a Temporary Restraining Order and/or Preliminary Injunctive Relief, and Memorandum of Law were served via hand delivery on this ___ day of December, XXXXX, on XXXXXXXXX, Esq., Assistant United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132.

Respectfully submitted,