UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Maria Helena Pinto de Jesus Paiva,
Catia Melissa de Jesus Paiva,
Pedro Andre de Jesus Paiva,

Petitioners,

v.

Curtis J. Aljets, Bureau of Citizenship and Immigration Services, and Bureau of Immigration and Customs Enforcement,

Respondents.

Civil No. 03-6075 (DWF/AJB)

MEMORANDUM OPINION AND ORDER

Greta M. Smolnisky, Esq., Smolnisky Law Office, P.O. Box 1442, Willmar, MN 56201, counsel for Petitioners.

Friedrich A. P. Siekert, Assistant United States Attorney, 600 United States Courthouse, 300 Fourth Street South, Minneapolis, MN 55415, counsel for Respondents.

Introduction

The above-entitled matter was brought before the undersigned United States District Judge on November 14, 2003, pursuant to Petitioners' Motion for Preliminary Injunction. For the reasons set forth below, the Court grants Petitioners' request to proceed with this matter *in forma pauperis* ("IFP"), but denies Petitioners' request for preliminary injunctive relief.

Background

Petitioner Maria Helena Pinto de Jesus Paiva and her two minor children, Caitia Melissa de Jesus Paiva and Pedro Andre de Jesus Paiva (collectively "Petitioners"), entered the United States in June 2000 to visit Maria's sister, Laura, in Fergus Falls, Minnesota. Maria met

her now ex-husband, Tim Ness, a United States citizen, while visiting her sister and the two fell in love. Maria returned to Portugal with her children and re-entered the United States in December 2000 under the Visa Waiver Program ("VWP"). Maria and Ness were married in December and established their home in Fergus Falls, Minnesota. Maria alleges that after she moved in with Ness, his behavior towards her and her children changed. Specifically, Maria alleges that on at least two occasions Ness pushed her, and on at least one occasion, Ness grabbed her son by the arm. In addition to these physical acts, Maria alleges other incidents of verbal abuse, manipulation, and attempts at isolation by Ness towards her and her children. Maria alleges that Ness eventually abandoned his family. Maria and Ness were divorced in July 2003.

Maria and her children continued to live in Fergus Falls, Minnesota, until agents from the Bureau of Customs and Immigration Enforcement ("ICE") arrested them in Minnesota in October. Petitioners were immediately transferred by ICE to Pennsylvania. On October 30, 2003, the ICE issued Petitioners' final orders of removal. In early November, Petitioners filed an I-360 petition claim for benefits under the Violence Against Women Act ("VAWA"), INA § 204, 8 U.S.C. § 1154, *et seq.* ICE arranged for Petitioners to be deported on November 5, 2003, but this Court stayed the deportation that day so the Court could hear Petitioners' request for a temporary restraining order ("TRO"). The Court granted Petitioners' request for a temporary restraining order and set a hearing for November 14, 2003, to hear Petitioners' request for a preliminary injunction.

At the hearing on November 14, 2003, the Court told counsel for Petitioners and Respondents that it would issue a ruling on the matter within one week. However, on

November 21, 2003, the Court was informed by counsel for Petitioners that the BCIS' Vermont Service Center ("Vermont Service Center") determined that Petitioners had established a *prima facie* claim for VAWA benefits. Based on this new information, the Court held a telephone conference with counsel for both parties and discussed the affect, if any, the new information would have on the position of either party. During the telephone conference, counsel for Respondents requested time to confer with his clients. A second telephone conference was held on November 24, 2003.

Discussion

1. Standing To Proceed IFP

28 U.S.C. § 1915 governs this Court's IFP determination. In order to grant this status, the Court must determine whether Petitioners are indigent and whether their action is brought in good faith. *See* 28 U.S.C. §§ 1915(a)(1) and (a)(3). Petitioners aver that they have no income. The Court finds that Petitioners are indigent within the meaning of § 1915. Moreover, the Court further determines that the action is taken in good faith.

2. Jurisdictional Matters

Respondents assert this Court lacks jurisdiction to hear Petitioners' request for preliminary injunctive relief on a number of grounds; therefore, the Court will begin by considering Respondents' jurisdictional claims.

A. 8 U.S.C. § 1252(g)

Respondents assert that 8 U.S.C. § 1252(g) divests this Court of jurisdiction[1]; however, in relying on the reasoning of *Jama v. Immigration and Naturalization Service*, 329 F.3d 630 (8th Cir. 2003), the Court finds that 8 U.S.C. § 1252(g) does not divest the Court of its jurisdiction. In *Jama*, the Eighth Circuit Court of Appeals addressed the identical jurisdictional issue as Respondents have raised here–whether 8 U.S.C. § 1252(g) foreclosed any and all judicial review of the Attorney General's decision to execute a removal order. *Id.* at 632-33. Relying upon the United States Supreme Court decision in *I.N.S. v. St. Cyr*, the Eighth Circuit concluded that habeas review was appropriate despite the INS's contention that § 1252(g) eliminated such jurisdiction. *Id. (citing INS v. St. Cyr*, 533 U.S. 289, 305 (2001)).

A brief summary of *St. Cyr* is instructive. In *St. Cyr*, the Supreme Court addressed whether the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") had eliminated habeas review as provided by the general habeas statute, 28 U.S.C. § 2241. *See St. Cyr*, 533 U.S. at 298. Noting that neither the AEDPA nor the IIRIRA specifically mentioned habeas review or foreclosure of review under 28 U.S.C. § 2241, the Supreme Court held that these statutes did not clearly repeal such jurisdiction. *Id.* at 314. The Supreme Court was persuaded by this lack of a

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[1] 8 U.S.C. § 1252(g) reads as follows:

Exclusive Jurisdiction.

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

clear, unambiguous statement of congressional intent to preclude habeas review, coupled with the absence of another judicial forum to answer such habeas questions. *Id.* at 314.

In *Jama*, the court noted that while *St. Cyr* did not directly address the preclusive effect of § 1252(g), the same analytical principles applied. *See Jama*, 329 F.3d at 632-33. The court noted that serious constitutional issues would be presented if § 1252(g) was read to foreclose habeas review, especially when there was no adequate substitute for such review.[2] *Id.*

This Court concurs with the *Jama* court and finds that the analysis of *St. Cyr* is appropriately applied to the jurisdictional matter at issue here. Identical to the petitioner in *Jama*, Petitioners here raise a pure question of law. The Court refuses to read § 1252(g) to preclude habeas jurisdiction without an utterly clear statement to eliminate such jurisdiction. Any other reading of § 1252(g) would raise serious constitutional questions. *See St. Cyr,* 533 U.S. 289 at 314. Thus, the Court concludes that § 1252(g) does not bar this Court from entertaining a habeas petition from Petitioners who raise a pure question of law.

B. Personal Jurisdiction

"Habeas corpus jurisdiction lies only when petitioner's custodian is within the jurisdiction of the district court." *United States v. Monteer*, 556 F.2d 880, 881 (8th Cir. 1977). The rationale for this rule rests on the historic principle that a writ of habeas corpus "is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter." *Ex parte Mitsuye Endo*, 323 U.S. 283, 306 (1944) (quoting *In re Jackson*,

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[2] Article I, § 9, cl. 2, of the United States Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The *St. Cyr* Court noted that "[b]ecause of that Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *St. Cyr*, 533 U.S. at 300 (*quoting Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

15 Mich. 417, 439-440 (1867)). The court, in other words, has personal jurisdiction in a habeas proceeding "so long as the custodian can be reached by service of process." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973).[3] Service of process may be made to the extent allowed by the forum state's long-arm statutes and within the constitutional limits of due process.

In Minnesota, the state long-arm statute extends as far as due process allows. *See* Minn. Stat. § 543.19; *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 29 (Minn. 1995) (describing the reach of Minnesota's long-arm statute); *Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1431 (8th Cir. 1995). The familiar requirements of due process are that the person being haled into court have "certain minimum contacts" with the forum state such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

As the Supreme Court has noted, there are no "talismanic" formulas to personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985). Rather, courts must consider "the relationship among the [person being haled into court], the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). Physical presence of the defendant or respondent in the forum state is unnecessary. *Burger King*, 471 U.S. at 476.

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[3] Respondents suggests that, in the context of habeas petitions, geographic considerations limit the reach of a court's personal jurisdiction. While, of course, the law "is not a brooding omnipresence in the sky but the articulate voice of some sovereign," *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), the notion that the territorial sovereignty of the forum state has some transcendent importance for personal jurisdiction expired with *Pennoyer v. Neff*, 95 U.S. 714 (1877). The Court is confident that the reach of its personal jurisdiction is governed by the familiar minimum contacts analysis of *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945), and its progeny.

Nevertheless, in the peculiar context of habeas petitions filed in INS removal cases, the question of who constitutes a custodian has divided a number of courts. *See Vasquez v. Reno*, 233 F.3d 688, 692 (1st Cir. 2000) (noting that the decisions of courts that have tackled the question are in "considerable disarray"). Traditionally, the warden of the prison or facility holding the detainee is considered to be the custodian of the detainee for the purposes of a habeas petition. *See Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994). "This is because it is the warden that has day-to-day control over the prisoner and who can produce the actual body." *Id.* This traditional definition of "custodian," however, fails to account for the reality of immigration removal cases. As manifested by the facts of this case, the location of the custody and the identity of the day-to-day custodians of immigration detainees frequently changes as detainees are rapidly transferred from one detention facility to another. *See Lee v. Aschcroft*, 216 F. Supp. 2d 51, 54 (E.D.N.Y. 2002).

Recognizing a pragmatic need for an exception to the traditional rule that petitioners should name their day-to-day custodian as a respondent in habeas proceedings, a number of courts have determined that the Attorney General is a proper respondent in immigration removal cases. *E.g., Pottinger v. Reno*, 51 F. Supp. 2d 349, 357 (E.D.N.Y. 1999); *Nwankwo v. Reno*, 828 F. Supp. 171, 175 (E.D.N.Y. 1993). The Court recognizes that normally the Attorney General should not be considered a custodian in habeas proceedings. However, it is unnecessary to grapple with the legal and practical arguments in favor of and against holding the Attorney General to be a custodian in all INS habeas cases, because here Petitioners have not brought suit against the Attorney General, but instead the Interim BCIS Director for the Central Region - St. Paul, the BCIS, and the ICE. While Petitioners in this case did not bring suit against the

Attorney General, those suits in which the Attorney General has been considered the custodian in a habeas proceeding may be instructive. As the First Circuit conceded in *Vasquez*, at least in extraordinary circumstances, "the Attorney General [may] appropriately . . . be named as the respondent to an alien habeas petition." *Vasquez*, 233 F.3d at 696. One example of such an extraordinary circumstance, according to the First Circuit, is a situation were the INS spirits "an alien from one site to another in an attempt to manipulate jurisdiction." *Id.*

The Court finds that the practical effect of ICE's decision to transport Petitioners from Minnesota to Pennsylvania was to prevent them from filing their Petition while they were present in this state. To now hold that Petitioners may only file their Petition in the state that the ICE determines to send them would be to allow the ICE to forum shop, intentionally or not. *See Alcaide-Zelaya v. McElroy*, No. 99-5102, 2000 WL 1616981, at * 5 (S.D.N.Y. Oct. 27, 2000) (noting that if alien petitioners were not able to sue the Attorney General in some circumstances, there would "be almost no check on the government's ability to forum shop"). Accordingly, for the purposes of this case, the Court finds that Petitioners have named the appropriate Respondents and that, because Respondents regularly transact business in this state, the Court has personal jurisdiction over them.

C. Removal Under Visa Waiver Program (VWP)

Respondents assert that Petitioners waived all rights with regard to proceedings before the judiciary when they executed a Form I-94, Non-Immigrant Visa Waiver Arrival/Departure Form, upon entering the country. *See* 8 C.F.R. § 217.4(b)(1) (VWP entrants are not entitled to proceedings before an immigration judge). Petitioners concede that they overstayed the 90-day period of admission granted to them via the VWP. However, Petitioners assert that even those

aliens present in the United States, who have not been legally admitted or paroled, are eligible to apply for relief under VAWA. Petitioners also point out that while they may have waived the right to appear before an immigration judge, they remain entitled to other forms of judicial relief.

The Court finds that Petitioners have not waived their ability to assert their VAWA claims by entering and remaining in the country beyond the 90 days provided by the VWP. Specifically, the Court agrees with Petitioners that the VWP's waiver of rights cannot be read to require waiver of all of Petitioners' rights to judicial relief. A ruling to the contrary would allow for the waiver of rights to which the Petitioners had not yet become entitled when they entered the country and would place a restriction on those filing for VAWA claims that cannot be found in the statute.

3. Standard of Review

Under Eighth Circuit precedent, a preliminary injunction may be granted only if the moving party can demonstrate: (1) a likelihood of success on the merits; (2) that the balance of harms favors the movant; (3) that the public interest favors the movant; and (4) that the movant will suffer irreparable harm absent the restraining order. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). "None of these factors by itself is determinative; rather, in each case the four factors must be balanced to determine whether they tilt toward or away from granting a preliminary injunction." *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). The party requesting the injunctive relief bears the "complete burden" of proving all the factors listed above. *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

A. Likelihood of Success on the Merits

Petitioners assert the Vermont Service Center has already determined that Petitioners have presented *prima facie* evidence of eligibility for VAWA benefits. In order to be eligible for benefits under VAWA, a petitioner must show: (1) that petitioner was battered or subject to extreme cruelty during her marriage to a citizen or lawful permanent resident spouse; (2) that petitioner is a person of good moral character; and (3) that the marriage was entered into in good faith. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, tit. V, 114 Stat. 1464 (2000) (codified at 22 U.S.C. §§ 7101-7110).

Respondents do not directly counter Petitioners' argument that they have presented *prima facie* evidence of eligibility for VAWA benefits, but instead contend that Petitioners have no likelihood of success on their VAWA claim before this Court, because this Court does not have the jurisdiction to hear the VAWA claim. Respondents point out that the Vermont Service Center has sole jurisdiction over the adjudication of the VAWA claim and that Petitioners would further have to exhaust their administrative remedies before this, or any other, court would have jurisdiction to hear the claim.

Respondents also contend that Petitioners have no likelihood of success on their illegal detention claims. Respondents point out that Petitioners have been issued final orders for deportation. According to Respondents, the ICE has a 90-day removal period during which to arrange for an alien's removal. *See* 8 U.S.C. § 1231(a)(1)(A). During the 90-day period, detention of the alien is mandatory. *See* 8 U.S.C. § 1231(a)(2). However, the period for removal

may be extended beyond the 90-day removal period at the ICE's discretion. 8 U.S.C. § 1231(a)(1)(C). The continued detention of an alien for a period of time up to six months has been found to be presumptively reasonable. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

While the Court acknowledges that it plays no role in adjudicating the merits of the VAWA claim, it notes that the BCIS has already made a preliminary determination that Petitioners have presented prima facie evidence of their eligibility for VAWA benefits. The Court then must consider the likelihood of success of the Petitioners' claim that their deportation prior to the final adjudication of their VAWA claim will violate the procedural and substantive due process protections provided for in the United States Constitution. The Court is not overly optimistic as to the validity of Petitioners' due process claims, but it does not find that Petitioners' claims are wholly without merit. However, the Court finds that Petitioners' claims of illegal detention are without merit at this time, because Petitioners admittedly were in this country illegally, and the period of time that Petitioners have been held is reasonable given the circumstances. Because the Court finds that Petitioners' due process claim has only a very limited likelihood of success, the Court finds that this factor of the preliminary injunction standard weighs in favor of Respondents.

B. Irreparable Harm

Petitioners assert that they will suffer irreparable harm if they are deported from the United States. First, Petitioners assert that their VAWA claim will be considered abandoned by the BCIS upon their removal. Second, Petitioners assert that they will be ineligible for readmission to this country for 10 years from the date of their departure if they are deported as the result of an "unlawful presence" bar, 8 U.S.C. § 1182(a)(9)(B)(i), and a "removal" bar,

8 U.S.C. § 1182(a)(9)(A). Petitioners assert that the harm to Respondents will be limited if the Court grants Petitioners' request for release from custody.

Respondents, on the other hand, assert that Petitioners will suffer no harm if they are deported. Respondents contend that the deportation of Petitioners would not result in the abandonment of Petitioners' VAWA claim because the Vermont Service Center will continue to process Petitioners' claims even after Petitioners have left this country. Respondents assert that the deportation of Petitioners would not result in an unlawful presence bar, because of an exception found within the unlawful presence bar statute. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(IV). Respondents acknowledge that Petitioners will be required to apply for a waiver of the removal bar which is applicable to all those people ordered removed who seek admission to the United States within 10 years of that removal. *See* 8 U.S.C. § 1182(a)(9)(A)(iii). However, Respondents contend that whether or not Petitioners are deported, Petitioners will still be required to apply for a waiver of the removal bar as part of their request for an adjustment of status if they are found eligible for VAWA benefits.

The Court begins its analysis of the irreparable harm issue by examining the effect, if any, that deportation would have on Petitioners' VAWA claim. Petitioners assert the VAWA claim will not be processed if they are deported from this country, but they do not cite any legal authority in support of this assertion. Respondents contend that the Vermont Service Center will continue to process Petitioners' VAWA claim if Petitioners are deported. In support of their assertion, Respondents direct the Court's attention to a provision of VAWA that allows for claims for relief to be filed by those both in and outside of the country. *See* 8 U.S.C. § 1154 (a)(1)(A)(v). The Court accepts Respondents' representations that Petitioners' VAWA

claim will continue to be processed even if Petitioners are deported. The Court is also willing to accept Respondents' representations that Petitioners will not be forced to file for a waiver of the unlawful presence bar, because language found in the unlawful presence provisions provides an exception to the bar for "battered women and children." *See* 8 U.S.C. § 1182 (a)(9)(B)(iii)(IV).

Petitioners and Respondents also present differing opinions as to whether Petitioners will need to apply for waiver of the removal bar if Petitioners have not been deported from this country. Petitioners claim that they will not need to apply for such a waiver if they are granted relief under their VAWA claim, because they will not have been deported from, or need to seek re-admission to, the United States. On the other hand, Respondents assert that Petitioners will need to apply for a waiver of the removal bar whether or not they have been deported from this country.

While the Court finds some common sense logic in Petitioners' position, the Court finds that Respondents are correct in their contention that Petitioners will need to apply for a waiver of the removal bar whether or not they are deported from this country. If the Vermont Service Center finds Petitioners are eligible for relief under VAWA, Petitioners will be eligible to apply to have their statuses adjusted to that of legal permanent residents. In order to attain legal permanent resident status, Petitioners will have to prove to the BCIS that they are not otherwise "inadmissible." To meet the BCIS's requirements for admissibility, Petitioners will be required to apply for a waiver of the removal bar.

Because the Court finds that Petitioners' VAWA claims will not be abandoned and that Petitioners will not be forced to obtain any waiver other than that which they would need to obtain if they remained in this country, the Court finds that Petitioners will not suffer irreparable

harm if the preliminary injunctive relief they sought is not granted. While the Court thoroughly reviewed the applicable statutes and case law in coming to this determination, it notes that it also relied on representations made by Respondents and their counsel in making these findings. As the parties are well aware, the Court expects that all representations made before it were truthful and will be carried out accordingly. Based on the reasons stated above, the Court finds that Petitioners will not suffer irreparable harm if the preliminary injunction is not granted.

C. Balance of Harms

Petitioners assert that Respondents will suffer no harm by the granting of Petitioners' request for injunctive relief. Respondents do not counter this argument in their brief; however, during oral arguments on this motion, counsel for Respondents did mention the limited resources of the federal agencies responsible for administering the immigration laws as a factor weighing against granting Petitioners' motion. While the Court is mindful of the need of federal agencies to be careful with citizens' tax dollars, the Court finds that the relatively limited costs of supervising Petitioners if they are released or in keeping Petitioners detained until such time as the Vermont Service Center has had an opportunity to make a final adjudication of Petitioners' VAWA claim weighs in favor of Petitioners on this factor.

D. Public Interest

Petitioners assert that the public interest weighs in their favor, and in favor of all abused spouses and children in a similar situation, having the opportunity to resolve their VAWA claims. Petitioners also contend that members of the public, specifically those in Fergus Falls, Minnesota, have supported the efforts of Petitioners to remain in this country. Respondents assert that the public interest lies in fostering respect and compliance with the laws of this

country. The Court agrees with Respondent that the public has a strong interest in maintaining compliance with the laws, including those laws that were established to protect abused spouses and children. Relying on Congress's passage of VAWA legislation as a strong indication of the public's interest in protecting battered women and children and the BCIS's own determination that Petitioners have presented a *prima facie* case of eligibility for VAWA benefits, the Court finds that this factor weighs strongly in favor of Petitioners.

Conclusion

While the Court does not find that Petitioners are legally entitled to the injunctive relief they sought before this Court, the Court does not believe it is in the best interests of anyone to deport Petitioners to Portugal when a final adjudication of Petitioners' VAWA claim could be made in a relatively short period of time. The idea that government agencies, those same government agencies that have come before this Court on this very matter to complain of a lack of resources, would be detaining and attempting to remove Petitioners at the expense of citizen tax dollars when a resolution of this matter could be obtained by a brief examination of Petitioners' file by someone in the Vermont Service Center is astounding. Nonetheless, the Court finds that Respondents are acting within their discretion in detaining, and if their better judgment determines it is necessary, in deporting Petitioners.

For the reasons stated, **LET IT BE ORDERED THAT:**

1. Petitioners' application to proceed *in forma pauperis* (Doc. No.3) is **GRANTED**; and

2. Petitioners' request for a preliminary injunction (Doc. No. 6) is **DENIED.**

Dated: December 1, 2003

DONOVAN W. FRANK
United States District Court Judge