U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Eloy Detention Ctr,1705 E. Hanna Rd
Eloy, AZ 85131

Name: [redacted] U[redacted] A[redacted] **A [redacted]212**

Date of this notice: 5/26/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

Userteam: Docket

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Eloy, AZ 85131

Name: [redacted] U[redacted] A[redacted]

A [redacted]212

Date of this notice: 5/26/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

Userteam:

File: [redacted] 212 – Eloy, AZ Date: MAY 26 2017

In re: [redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brent H. Johnson, Esquire

APPLICATION: Redetermination of custody status

The respondent is a native and citizen of Honduras. The respondent appeals the December 15, 2016, denial of her request for a redetermination of her custody status under the Order, Judgment and Permanent Injunction issued in *Rodriguez v. Holder*, No. 2:07-CV-03239, 2013 WL 5229795 (C.D. Cal. Aug. 6, 2013), *aff'd in part and rev'd in part by Rodriguez v. Robbins*, 804 F.3d 1060, 1085-86 & 1086 n.14 (9th Cir. 2015) (*Rodriguez III*), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). The Immigration Judge held that the Department of Homeland Security ("DHS") had established, by clear and convincing evidence, that the respondent is a flight risk.[1] The record will be remanded.

The Board reviews an Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review issues of law, discretion, or judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS has not challenged the Immigration Judge's holding that she had jurisdiction to grant bond. We affirm this ruling and conclude that the respondent is entitled to the bond redetermination hearing mandated by *Rodriguez III*.

As relevant to the issue of flight, the Immigration Judge acknowledged that the respondent's equities include two United States citizen children and multiple supporting letters (I.J. at 4; Exhs. 3 and 5). *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). Yet, the Immigration Judge found it significant that the respondent was ordered removed *in absentia* in 2005 and thereafter illegally reentered the United States (I.J. at 4). *See id.* The Immigration Judge further factored in an asylum officer's finding that the respondent did not have a reasonable fear of persecution in her native country and the Immigration Judge's affirmance of this negative fear

[1] This matter was last before the Board on September 11, 2015, when we concluded that the Immigration Judge had jurisdiction to hold a bond hearing pursuant to *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), and *Rodriguez v. Robbins*, No. 2:07-CV-03239 (C.D. Cal. Sep. 13, 2012), *aff'd*, 715 F.3d 1127 (9th Cir. 2013) (*Rodriguez II*). We further affirmed the Immigration Judge's ruling that the DHS had established, by clear and convincing evidence, that the respondent is a flight risk that could not be mitigated by setting a bond.

determination in the respondent's separate withholding-only proceedings on December 10, 2014 (I.J. at 1, 4). *See id.*; 8 C.F.R. § 208.31(g). Further, while the respondent has an application for a U nonimmigrant visa pending before United States Citizenship and Immigration Services, the Immigration Judge concluded that this did not negate the potential flight risk (I.J. at 4). *See Matter of Guerra*, *supra*, at 40. Therefore, the Immigration Judge held that the DHS had established, by clear and convincing evidence, that the respondent is a serious flight risk that would not be mitigated by setting a bond (I.J. at 4). *See id.*; *Rodriguez v. Robbins*, *supra*, at 1069, 1087.

On appeal, the respondent correctly observes that *Rodriguez* requires an Immigration Judge to consider the length of time during which an alien has been detained. *Rodriguez v. Robbins*, *supra*, at 1089. In this regard, a Notice of Referral to Immigration Judge (Form I-863) in the record shows that the respondent has been detained since July 26, 2014. In addition, the respondent notes that under *Rodriguez*, an Immigration Judge is required to "'consider' restrictions short of detention," such as electronic monitoring, and determine whether such conditions would be sufficient to fulfill the government's interest in continued detention. *Id.* at 1088. Because the Immigration Judge did not evaluate these factors, we agree with the respondent that it is necessary to remand for further proceedings and the entry of a new decision.

On remand, the parties may submit additional evidence and argument.

Accordingly, the following order is entered.

ORDER: The record is remanded for further proceedings and the entry of a new decision consistent with this opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
1705 EAST HANNA ROAD, SUITE 366
ELOY, ARIZONA 85131

IN THE MATTER OF:	)	**IN BOND PROCEEDINGS**
	)	
A[redacted] I[redacted] U[redacted]	)	**FILE NO.** [redacted] 212
	)	
	)	
RESPONDENT	)	**DATE:** December 15, 2016

ON BEHALF OF THE RESPONDENT:

Brent Johnson, Esq.

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel

MEMORANDUM ORDER OF THE IMMIGRATION COURT
***RODRIGUEZ* CUSTODY HEARING**

I. PROCEDURAL HISTORY

The respondent is a native and citizen of Honduras. An Asylum Officer had found she did not have a reasonable fear of persecution in her home country and subsequent to this Court's determination of that finding, the Court affirmed the asylum officer's findings. (Previous *Bond Exh. 7)* Respondent filed an appeal of that decision and on January 14, 2015, the Board of Immigration Appeals ("Board") dismissed the appeal for lack of jurisdiction. (Previous *Bond Exh. 8)* Subsequently, the respondent requested a custody redetermination hearing pursuant to *Rodriguez/Casas*. (Previous *Bond Exh. 1)*, which was opposed by the Department. *(*Previous *Bond Exh. 3)* The Court conducted a bond hearing for the respondent on June 25, 2015. On June 29, 2015, this Court found it lacked jurisdiction to consider the respondent for bond and in the alternative, found her to be a significant flight risk and denied her request. She appealed the decision to the Board and on September 11, 2015, the Board found that the Court had jurisdiction to consider the bond request and also affirmed the Court's decision regarding flight risk. (Bond Exh. 8). Most recently, respondent renewed her request for bond. (Bond Exh. 1). On December 12, 2016, the Court conducted the bond hearing.

II. STATEMENT OF LAW

In *Casas-Castrillon v. DHS*, the Ninth Circuit addressed the issue of what rights an alien, originally subject to mandatory detention under INA § 236(c), has to contest his continued detention while he pursues *direct* judicial review of an administratively final removal order. 535

F.3d 942 (9th Cir. 2008); *see also Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (extending the holding in *Casas-Castrillon* to aliens who have exhausted all *direct* review of their removal orders and have entered the ninety (90) day "removal period" but, for one reason or another, were not removed during that period, and are still being detained at the discretion of DHS pursuant to section 241(a)(6)).

Moreover, in *Casas-Castrillon,* the Ninth Circuit held that because "prolonged detention without adequate procedural protections would raise serious constitutional concerns," an alien who is being detained pending direct judicial review of his removal order is entitled to a hearing even if he was originally subject to mandatory detention under section 236(c) of the Act. *Casas-Castrillon*, 535 F.3d at 950. During such hearing, the DHS bears the burden of establishing by "clear and convincing evidence" that the alien should not be released pending judicial review of his removal order because he is a danger to the community or a flight risk. *Id.* at 951 (quoting *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011).

To determine whether an alien, who is detained pending judicial review of his removal order presents a "flight risk or danger to the community," Immigration Judges "should . . . look[] to the factors set forth in *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006)." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008). In *Matter of Guerra*, the Board instructed Immigration Judges to first look at the alien's "criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses" to determine whether the alien would be a danger to the community if released. *Matter of Guerra*, 24 I&N Dec. at 40. An alien who presents a danger to persons or property should not be released from custody. *Id.* at 38 (citing *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994)). The Board then explained that if an Immigration Judge concludes that an alien is not dangerous, the Immigration Judge should go on to determine if the alien is a flight risk. The Board then listed nine factors for an Immigration Judge to consider in making this determination. *Id.* These factors include:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record . . . (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.

Id. at 40. In making this determination, an Immigration Judge may rely "upon any information that is available to [the Immigration Judge] or that is presented to him or her by the alien or the Service." 8 C.F.R. § 1003.19 (2013).

Generally, an alien is subject to mandatory detention pursuant to sections 235(b) or 236(c) of the Act if he or she is subject to certain grounds of removability. *See* INA §§ 235(b)(1)(B)(iii)(IV); 236(c)(1)(A)–(D). However, on September 13, 2012, the United States District Court for the Central District of California entered a preliminary injunction requiring the

Federal Government to identify aliens who have been detained for longer than 180 days pursuant to the general immigration detention statutes, and to "provide each of them with a bond hearing before an Immigration Judge with power to grant their release." *Rodriguez v. Robbins*, Nos. CV 07-03239-TJH(RNBx), SA CV 11-01287-TJH(RNBx), 2012 WL 7653016, at *1 (C.D. Cal. June 13, 2012). At the conclusion of each bond hearing, the Immigration Judge "shall release [members of the class] unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight." *Id.*

On April 16, 2013, the Ninth Circuit affirmed the district court's preliminary injunction. *Rodriguez II*, 715 F.3d at 1131. In doing so, the Ninth Circuit held that "to avoid constitutional concerns" sections 235 and 236(c)'s "mandatory language must be construed to contain an implicit reasonable time limitation, the application of which is subject to federal court review." *Id.* at 1138 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001)) (internal quotation marks omitted). The circuit court went on to observe that "under a fair reading of our precedent, when detention becomes prolonged, [sections 235 and 236(c)] becomes inapplicable." *Id.* The Ninth Circuit noted that "[a]s a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." *Id.* (quoting *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011)). The Ninth Circuit concluded, therefore, that aliens detained under sections 235 and 236(c) of the Act "for six months are entitled to a bond hearing because the applicable statutory law, not constitutional law, requires one." *Id.*

Insofar as the Ninth Circuit's decision in *Rodriguez II* interprets the mandatory detention provision under sections 235 and 236(c) of the Act as requiring a bond hearing after 180 days of detention, it constitutes binding precedent for the entire Ninth Circuit. *See M.R. v. Dreyfus*, 697 F.3d 706, 709 n.1 (9th Cir. 2012). In *M.R. v. Dreyfus*, the Ninth Circuit held that all published circuit court opinions interpreting statutory law—"even at the preliminary injunction stage," as occurred in *Rodriguez II*—"constitute [the] 'law of the circuit,' such that they 'constitute[] binding authority which must be followed unless and until overruled by a body competent to do so.'" *Id.* (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)).

In light of the Ninth Circuit's interpretation of sections 235 and 236(c) in *Rodriguez II*, this Court must conduct a bond hearing for aliens who have been detained pursuant to sections 235 and 236(c) of the Act for longer than 180 days. *Rodriguez II*, 715 F.3d at 1131–32. For this reason, it does not matter whether the respondent is subject to mandatory detention pursuant to these sections. Any alien who has been subject to DHS detention pursuant to sections 235 and 236(c) of the Act for more than 180 days is eligible for a bond hearing pursuant to *Rodriguez II*, 715 F.3d at 1138.

III. DISCUSSION

A. Eligibility Under *Casas-Castrillon* and *Rodriguez*

The respondent has identified herself as eligible for a custody redetermination hearing pursuant to *Casas-Castrillon* and *Rodriguez*. (Bond Exh. 1, Resp't Request for Bond Hearing.) The Department argued that respondent is not eligible for the type of bond she seeks as she is in reinstatement proceedings. Based upon the Board's September 11, 2015 decision which found

that respondent, albeit in such proceedings, is still eligible for *Casas* and *Rodriguez* bond hearings, this Court finds it has jurisdiction and will entertain the arguments raised by the parties regarding danger and flight risk.

DHS, in its alternate argument, asserted that respondent is a flight risk, with a limited case based upon her re-instatement, and thus bond should be denied. They pointed out that respondent was removed in 2005. She subsequently returned to the United States and expressed a fear of return to Honduras. An Asylum officer reviewed her case but found no reasonable fear of persecution or torture present. This Court affirmed the asylum officer's decision. She has filed an appeal of that decision to the Board, which was dismissed on January 14, 2015. DHS argued that as there is no form of relief that respondent is eligible to seek, that she is an extreme fight risk.

Respondent argued that respondent is not a flight risk. She stated that her 2005 removal was an *in absentia* order. She stated that she experienced prior abuse in her home country and her main goal was to survive and to take care of her newborn child. In 2016, when she entered the United States, she had no intent on evading immigration officials. She experienced prior death threats in her home country. She twice reported the incidents to law enforcement and never tried to hide from law enforcement. Respondent is currently seeking a U-visa, awaiting adjudication. She has two children in the United States and a member of a strong church community in Houston. As her case is pending before the 9th Circuit, she is not in imminent danger of removal. She has not had any contact with her children while she has been detained in Eloy. If the U-visa is denied, she will voluntarily return to Honduras.

The Court has considered all documentary evidence submitted by both parties in these new bond proceedings, including the last document submitted by respondent's counsel to the Court on December 13, 2016. After reviewing the totality of the documents, the Court finds the respondent to be a significant flight risk for which no amount of bond can ensure her appearance at future proceedings. As the record reflects, this Court has affirmed the asylum officer's finding of a negative reasonable fear determination. Pursuant to the regulations, there are no means by which an alien can appeal this Court's negative fear determination. *See* 8 C.F.R. sec. 208.31(g); *Ortiz-Alfaro v. Holder*, (citation omitted). The Board has denied the respondent's appeal finding as such. As such, this Court does not believe her petition to the Ninth Circuit is viable, or that she will appear at any future proceedings if granted bond. Despite the respondent's familial ties in this country which include her children, and documentary evidence which she submitted to that effect, all taken into consideration by the Court, the Court finds the respondent to be a significant flight risk. The Court is mindful of respondent's pending U-visa. However, based upon respondent's prior immigration history, which includes a 2005 *in absentia* order, the Court does not find the consideration of her U-visa to negate the potential flight risk in this case. The Court therefore finds that DHS has met its burden of establishing that respondent is a flight risk and no bond is set.

IV. CONCLUSION

Accordingly, the Court will enter the following orders:

ORDERS: Request for change in custody Status is **DENIED**.

LINDA SPENCER-WALTERS
IMMIGRATION J DGE

CERTIFICATE OF SERVICE

THIS DOC MENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (M) ALIEN'S ATT/REP (P) DHS

DATE: 12/15/16 BY COURT STAFF:
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other

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