

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

2008 AUG 25 P 4: 32

CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

DR. SAMI AL-ARIAN )

Petitioner, )

v. )

MICHAEL MUKASEY, )  
U.S. Attorney General; )

MICHAEL CHERTOFF, )  
Secretary of the Department of )  
Homeland Security: )

DEBORAH ACHIM, )  
U.S. ICE Field Officer Director )

Respondents. )

1:08CV871-LD/JFA

**PETITION FOR A WRIT OF HABEAS CORPUS AND  
EMERGENCY REQUEST FOR RELEASE FROM DETENTION**

Petitioner, Dr. Sami Amin Al-Arian, hereby petitions the Court for a Writ of Habeas Corpus to remedy Petitioner's unlawful detention by Respondents. In support of this petition and complaint for injunctive relief, Dr. Al-Arian alleges as follows:

**INTRODUCTION**

1. Dr. Al-Arian is currently being held in detention by the Immigration and Customs Enforcement branch ("ICE") of the U.S. Department of Homeland Security without bond. He has been held in detention without bond since April 6, 2008. Dr. Al-Arian is entitled to immediate release from custody and is only detained because of ICE's misapplication of the law and abuse of its discretion.

**CUSTODY**

2. Dr. Al-Arian was taken into custody by ICE on April 6, 2008, upon the completion of

his criminal sentence.

3. Dr. Al-Arian has been held, by ICE, in a variety of facilities since the completion of his criminal sentence. Included among these facilities are the Northern Neck Regional Jail, Hampton Roads Regional Jail, Winchester Regional Jail, and Pamunkey Regional Jail. ICE has contracted with some of the facilities to house immigration detainees such as Dr. Al-Arian. Dr. Al-Arian is currently being held at the Alexandria Detention Center on the order of U.S. District Court Judge Leonie M. Brinkema. (*See* Dkt. No. 46 in criminal case 1:08-cr-131) Dr. Al-Arian is under direct control of Respondents and their agents.

#### **PARTIES**

4. Dr. Al-Arian is a native of Kuwait and is a Palestinian refugee. He is married to a Nahla Al-Arian, who is a U.S. citizen. Dr. Al-Arian and Nahla Al-Arian are the parents of five children, all of which are U.S. citizens. Dr. Al-Arian has been a permanent resident of the United States since 1989.

5. Respondent Michael Mukasey is sued in his official capacity as the Attorney General of the United States. He has authority over the Board of Immigration Appeals and the Immigration Courts nationwide. He has authority to direct the Immigration Court to hold bond hearings and establish bond conditions. 8 C.F.R. §§ 1001.1, 1003.19.

6. Respondent Michael Chertoff is sued in his official capacity as the Secretary of the Department of Homeland Security. He is the executive officer who has authority to manage and control U.S. Immigration and Customs Enforcement. As such, he is the ultimate legal custodian of the Petitioner.

7. Respondent Deborah Achim is sued in her official capacity as the Field Office Director for the District of Columbia and Virginia Office of the U.S. Immigration and Customs

Enforcement, an office within the U.S. Department of Homeland Security. Respondent Achim is charged by law with the implementation and enforcement of the immigration laws and she is the officer with custody over Dr. Al-Arian.

## **JURISDICTION**

8. This action arises under the Constitution of the United States, and the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 1570, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 et seq.

9. This Court has jurisdiction under 28 U.S.C. § 2241; art. I § 9, cl. 2 of the United States Constitution (“Suspension Clause”); and 28 U.S.C. § 1331, as Petitioner is presently in custody under color of the authority of the United States, and such custody is in violation of the Constitution, laws, or treaties of the United States. This Court may grant relief pursuant to 28 U.S.C. § 2241, 5 U.S.C. § 702, and the All Writs Act, 28 U.S.C. § 1651.

10. The Use of the Writ of Habeas Corpus to challenge detention by the Department of Homeland Security, Immigration and Customs Enforcement remains intact after the passage of the REAL ID Act. The REAL ID Act of 2005, Pub. L. 109-13 (May 11, 2005), Title I, Section 1-6(c) amending INA §§242(a)(2)(A), (B), and (C) and § 242(g), while limiting habeas jurisdiction, only applies to those challenges to “final administrative orders of removal.” *See Hernandez v. Gonzalez*, 424 F. 3d 42 (1st Cir. 2005) (holding that the proper venue for a habeas petition challenging detention after REAL ID remains with the district court); *see also INS v. St. Cyr.*, 533 U.S. 289, 364-65 (2001) (stating that “[t]he writ of habeas corpus has always been available to review the legality of executive detention”).

11. Petitioner has exhausted any and all administrative remedies to the extent required by

law.

12. Venue is proper in the Eastern District of Virginia under 28 U.S.C. § 1391(e)(2) because the Petitioner is being held in detention in the district. Dr. Al-Arian is currently housed at the Alexandria Detention Center.

### **FACTUAL BACKGROUND**

13. On February 20, 2003, Dr. Al-Arian was arrested and imprisoned based on a February 19, 2003 indictment filed in the United States District Court for the Middle District of Florida.

14. In September 2004, Dr. Sami Amin Al-Arian was charged, along with various co-defendants, in a 53-count Superseding Indictment in the Middle District of Florida.

15. Following a highly publicized six-month trial in 2005, Dr. Al-Arian was acquitted on eight counts and the jury was unable to reach a unanimous verdict on the remaining nine counts. There were only two jurors who voted against acquitting Dr. Al-Arian of all of the remaining counts.

16. As the government considered whether to bring charges against Dr. Al-Arian on the remaining counts, the parties began to negotiate a plea agreement. As a result of these negotiations, Dr. Al-Arian executed a written plea agreement on February 28, 2006. (*See* Plea Agreement, attached as Exhibit 1.) Pursuant to this agreement, Dr. Al-Arian committed to pleading guilty to Court 4 of the Superseding Indictment. The narrative of this count largely dealt with a statement that Dr. Al-Arian made to a reporter and his support with an immigration matter for a person “associated” with the Palestinian Islamic Jihad (PIJ). The count notably did not admit to any of the core terrorism charges levied against him regarding alleged leadership in PIJ and the other terrorism acts. The government agreed to recommend that Dr. Al-Arian be

sentenced to the low end of the Guidelines (i.e. 46 months) and be expeditiously deported once his imprisonment ceased. (*See id.*)

17. As a result of this plea agreement, Dr. Al-Arian was to be deported immediately upon the completion of his criminal sentence.

18. Dr. Al-Arian was sentenced to a 57-month term of imprisonment on May 1, 2006. The provisions relating to immediate deportation were entered by the Court. Dr. Al-Arian's original release date under the 2006 plea agreement was April 11, 2007.<sup>1</sup>

19. On May 10, 2006, ten days after being sentenced by the United States District Court for the Middle District of Florida, the United States Attorney's Office for the Eastern District of Virginia secretly obtained an order immunizing Dr. Al-Arian and compelling his testimony before the grand jury investigating the International Institute of Islamic Thought ("IIIT"), an organization based in Herndon, Virginia. Having been transferred to Virginia, Dr. Al-Arian was summoned to testify before the grand jury on October 19, 2006. Upon the commencement of questioning by Assistant United States Attorney Gordon Kromberg, Dr. Al-Arian declined to answer any questions.

20. Later on October 19, 2006, the government sought a civil contempt order against Dr. Al-Arian for his refusal to testify before the grand jury. This Court recessed the October 19, 2006 civil contempt hearing to permit Dr. Al-Arian to file a motion in the United States District Court for the Middle District of Florida regarding whether the plea agreement between Dr. Al-Arian and the government barred the government from forcing Dr. Al-Arian to cooperate in an investigation by testifying before a grand jury.

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<sup>1</sup> This date was calculated by using the following facts. Dr. Al-Arian was initially imprisoned on February 20, 2003. Dr. Al-Arian was sentenced to 57 months which would expire

21. Dr. Al-Arian filed a motion on October 26, 2006 requesting that the United States District Court for the Middle District of Florida to issue an order requiring the enforcement of a portion of the plea agreement that barred the government from forcing Dr. Al-Arian to testify before a grand jury. On November 9, 2006, the Florida court denied Dr. Al-Arian's motion to enforce the plea agreement without holding an evidentiary hearing on the scope of Dr. Al-Arian's non-cooperation agreement.

22. Dr. Al-Arian appealed the November 9, 2006 ruling to the United States Court of Appeals for the Eleventh Circuit. At the oral hearing, the panel specifically raised the fact that the usual cooperation provisions in plea agreements were conspicuously missing. The standard cooperation provision in use in the Middle District of Florida in the spring 2006 time-frame did include an obligation to testify before a grand jury. The Eleventh Circuit ultimately denied the appeal on January 25, 2008. The Eleventh Circuit denied Dr. Al-Arian petition for en banc review of the panel's ruling on April 1, 2008. Dr. Al-Arian, by counsel, filed a petition for writ of certiorari to the United States Supreme Court with regard to the Eleventh Circuit ruling on July 30, 2008. This petition remains pending.

23. On November 16, 2006, District Court Judge Gerald Bruce Lee held Dr. Al-Arian in civil contempt under 28 U.S.C. § 1826 because of his refusal to testify before the grand jury based on the November 9, 2006 order and denied Dr. Al-Arian's motion to stay the contempt proceeding pending his appeal of the November 9, 2006 order to the Eleventh Circuit. The Court ordered that Dr. Al-Arian's contempt would end on December 21, 2006 because of the expiration of the grand jury before whom Dr. Al-Arian had been ordered to appear.

24. Dr. Al-Arian was released from civil contempt on December 21, 2006. He had

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on November 20, 2003. Dr. Al-Arian earned "good conduct credit" which reduced his sentence

served 35 days under this first civil contempt order.

25. Dr. Al-Arian's confinement for civil contempt tolled the running of his criminal sentence under the 2006 plea agreement.

26. The Court issued an order on January 10, 2007 again immunizing Dr. Al-Arian and compelling his testimony before a newly empanelled grand jury. The parties stipulated that Dr. Al-Arian, despite already having been imprisoned for civil contempt for over a month, refused to testify before the newly empanelled grand jury. Judge Lee held Dr. Al-Arian again in civil contempt under 28 U.S.C. § 1826 on January 22, 2007.

27. Dr. Al-Arian was again held in civil contempt until December 13, 2007.<sup>2</sup> This period covered 326 days, during which Dr. Al-Arian's criminal sentence was tolled.

28. As a result of these periods of civil confinement, during which his criminal sentence was not running, the release date for Dr. Al-Arian under his criminal sentence moved to April 6, 2008.<sup>3</sup>

29. Immediately after April 6, 2008, the defense notified the government that it was obligated to deport Dr. Al-Arian, pursuant to his plea agreement. (See filing of April 7, 2008, currently under seal.)

30. On April 7, 2008, Dr. Al-Arian submitted a motion to Judge Lee seeking transfer to the custody of ICE.

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by 223 days. His sentence therefore would conclude on April 11, 2007.

<sup>2</sup> The parties dispute the precise date on which Dr. Al-Arian was released civil contempt confinement. Dr. Al-Arian claims he was released on December 13, 2007. The government alleges he was not released until December 18, 2007. The defense has set forth its arguments in Dkt. Nos. 71, 19 and 58 in the criminal case currently pending in this Court, United States v. Al-Arian, 1:08-cr-131.

<sup>3</sup> The original release date was April 11, 2007 + 361 days = April 6, 2008.

31. Dr. Al-Arian was physically taken into ICE custody on April 11, 2008.

32. Over the next several months, Dr. Al-Arian, through his attorneys, negotiated with the government over possible compromises to Dr. Al-Arian being forced to testify before the grand jury. During this time, Dr. Al-Arian was held in ICE custody at various facilities.

33. On June 26, 2008, Dr. Al-Arian was indicted in the Eastern District of Virginia on two counts of criminal contempt for refusing to testify the grand juries.

34. On June 30, 2008, Dr. Al-Arian was arraigned on those same charges before U.S. District Court Judge Leonie M. Brinkema. From June 26, 2008 until June 30, 2008, Dr. Al-Arian remained in ICE Custody. In fact, the arraignment on June 30, 2008 was postponed several hours as ICE officials took too long to transport Dr. Al-Arian from the Hampton Roads Regional Jail to the Court for time of the scheduled arraignment.

35. On June 30, 2008, Dr. Al-Arian was taken out of ICE custody and placed in U.S. Marshall custody, pending his trial. Up to this point, Dr. Al-Arian has already spent 84 days in ICE custody.<sup>4</sup>

36. On July 10, 2008, Judge Brinkema ordered that Dr. Al-Arian be released on bond under certain conditions, pending his trial. (*See* Dkt. No. 9 in criminal case, 1:08-cr-131) These conditions included constant GPS monitoring, home confinement, and a third-party custodian. (*Id.*) In reaching this decision, Judge Brinkema considered whether Dr. Al-Arian was a flight risk or a danger to the community and concluded that given the conditions she had set, those

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<sup>4</sup> Dr. Al-Arian began serving time in ICE custody on April 6, 2008 as that is the date on which his criminal sentence lapsed. The government will undoubtedly argue that he did not begin serving time in ICE custody until April 11, 2008, the date that Dr. Al-Arian was physically taken into custody by ICE. This delay, however, was a result of the government's mistaken calculation of the end of Dr. Al-Arian's criminal sentence that is described in more detail above.



concerns were ameliorated.

37. Judge Brinkema explicitly stated that Dr. Al-Arian would “no longer be in marshal custody after” the hearing on July 10, 2008, and that Dr. Al-Arian was “in ICE custody” which “this Court deems that time to count toward” the 90 day period. (*See* Transcript from July 10, 2008 hearing at pp. 31-32, attached as Exhibit 2.)

38. Dr. Al-Arian was not released on July 10, 2008. Instead he was then held on an ICE detainer.

39. Over the next month, Dr. Al-Arian was subsequently moved, within Virginia, to various ICE facilities, or facilities that contract with ICE.

40. As of July 16, 2008, Dr. Al-Arian had been in the custody of ICE for ninety days, the maximum allowed under the statute when removal is not reasonably foreseeable.

41. ICE officials implicitly agreed with this calculation, orally noting to defense counsel that they believed Dr. Al-Arian had been in ICE custody for ninety days on July 17, 2008.<sup>5</sup>

42. Petitioner has cooperated fully with all efforts by ICE to remove him from the United States. On July 14, 2008, ICE officials requested Dr. Al-Arian’s original passport and travel document to Egypt, even though Dr. Al-Arian had previously provided ICE Officials with color copies of the passport, out of fear that original documents would be lost by officials. (*See* letter, attached as Exhibit 3.) ICE officials explained that these documents were needed as they believed Dr. Al-Arian would be deported in the very near future – indicating that deportation would take place in the following three weeks. Dr. Al-Arian provided the original passport and travel document to ICE officials on the same day - July 14, 2008. (*See id.*)

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discrepancy over the date on which confinement for civil contempt ended – an issue previously addressed by the parties and pending before this Court.

<sup>5</sup> The specifics of their calculation were not provided to defense counsel.

43. The passport and travel document conclusively show that Egypt is willing to accept Dr. Al-Arian were he to be deported by the United States.

44. On August 8, 2008, Judge Brinkema held a pre-trial motions hearing in Dr. Al-Arian's criminal case and ordered that the trial be delayed indefinitely, pending a decision of the U.S. Supreme Court on Dr. Al-Arian's petition for writ of certiorari. (*See* Dkt. No. 66 in criminal case 1:08-cr-131.) There is no specific date on which the Supreme Court will rule on the petition for certiorari but history suggests it can take several months.

45. Dr. Al-Arian, through his attorneys, has submitted seven different letters or emails to ICE officials requesting that they review his case, provide him an update on his status, or initiate a hearing – called a “Continued Detention Hearing” – regarding his case. These communications were sent on July 11, 2008, July 17, 2008, July 21, 2008, July 23, 2008, August 5, 2008, August 8, 2008, and August 15, 2008. (*See* letters and emails, attached as Exhibit 4.) To date, Dr. Al-Arian has received no response from ICE regarding this correspondence.

#### **LEGAL FRAMEWORK FOR RELIEF SOUGHT**

46. 8 U.S.C. § 1231 provides that “when an alien is ordered to be removed, the Attorney General shall remove the alien from the United States within a period of ninety days.” (referred to as the “removal period”). 8 U.S.C § 1231 (a)(1)(A).

47. This period commences upon one of several options, including, “[i]f the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.” 8 U.S.C § 1231 (a)(1)(B)(iii).

48. Under § 1231, if the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. 8 U.S.C §1231(a)(3). These regulations do not include continued

confinement.

49. In *Zavydas v. Davis*, the government argued that the purpose of 8 U.S.C. §1231 was twofold: to ensure the appearance of aliens at future immigration proceedings and to prevent danger to the community. 533 U.S. 688, 690 (2001).

50. As the Court stated in *Zadvydas*, the decision before this Court is not between imprisonment and “living at large.” It is between imprisonment and supervision under release conditions that may be violated. *Id.* at 696 citing 8 U.S.C. §§1231(a)(3), 1253.

51. Once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute. *Zadvydas*, 533 U.S. at 699. The alien release should then be made and conditioned on any of the various forms of supervised release that are appropriate in the circumstances. *Id.* at 699-700.

### **IRREPARABLE INJURY**

52. Dr. Al-Arian is suffering and will continue to suffer irreparable injury because of the government’s actions. Every day that he is held in custody he suffers further injury, which is irreparable.

### **CLAIMS FOR RELIEF**

#### **COUNT I**

#### **STATUTORY VIOLATION**

53. Petitioner re-alleges and incorporates by reference paragraph 1 through 52 above.

54. Petitioner’s continued detention by Respondents is unlawful and contravenes 8 U.S.C. § 1231, as interpreted by the Supreme Court in *Zadvydas*. Dr. Al-Arian has been held well past the ninety day period allowed under the statute. In fact, as of the date of this filing, Dr.

Al-Arian has been held by ICE for 130 days.<sup>6</sup> Dr. Al-Arian has not been removed, and continues to languish in detention. Dr. Al-Arian's removal to Egypt is not significantly likely to occur in the reasonably foreseeable future, given the pending criminal charges against him and the pattern of behavior already demonstrated by ICE officials. The Supreme Court held in *Zadvydas* and *Clark v. Martinez*, 543 U.S. 371 (2005) that ICE's continued detention of someone like Dr. Al-Arian is unlawful. ICE must release Dr. Al-Arian on conditions similar to those imposed by Judge Brinkema until his deportation is reasonably foreseeable.

## COUNT II

### SUBSTANTIVE DUE PROCESS VIOLATION

55. Petitioner re-alleges and incorporates by reference paragraph 1 through 54 above.

56. Dr. Al-Arian's continued detention violates his right to substantive due process through a deprivation of the core liberty interest in freedom from bodily restraint.

57. The Due Process Clause of the Fifth Amendment requires that the deprivation of Dr. Al-Arian's liberty be narrowly tailored to serve a compelling government interest. The Respondents have no interest that justify an indefinite detention of Dr. Al-Arian. *Zadvydas* recognized that that ICE may continue to detain aliens only for a period reasonably necessary to secure the alien's removal. The purpose of 8 U.S.C. § 1231, as outlined by the Supreme Court in *Zadvydas* - to ensure the appearance of aliens at future immigration proceedings and to prevent danger to the community – is not being met by Dr. Al-Arians continued detention. Dr. Al-Arian is not significantly likely to occur in the reasonably foreseeable future and any concerns regarding the danger Dr. Al-Arian might pose to the community, however, unfounded, have been ameliorated by the conditions set forth by Judge Brinkema. Continued detention serves no

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<sup>6</sup> This calculation relies on an end date of August 25, 2008.

governmental purpose other than those of a punitive nature.

### **COUNT III**

#### **PROCEDURAL DUE PROCESS VIOLATION**

58. Petitioner re-alleges and incorporates by reference paragraph 1 through 57 above.

59. Under the Due Process Clause of the Fifth Amendment, an alien is entitled to a timely and meaningful opportunity to demonstrate that he should not be detained. Dr. Al-Arian has been denied this opportunity. Respondents have failed to acknowledge or act upon Dr. Al-Arian's administrative requests for release in a timely manner. Several different letters, detailing the history of Dr. Al-Arian's case and requesting specific relief have gone unanswered. (*See* Exhibit 4.) There is no administrative mechanism in place for Dr. Al-Arian to demand a decision, ensure that decision will ever be made, or appeal a custody decision that violates *Zadvydas*. Dr. Al-Arian is entitled to a bond hearing before a neutral decision-maker other than a DHS official. DHS's refusal to set a bond or allow a hearing before a neutral judge is arbitrary and capricious and constitutes an abuse of discretion.

#### **PRAYER FOR RELIEF**

WHEREFORE, Dr. Al-Arian prays that this Court grant the following relief:

60. Assume jurisdiction over this matter;

61. that this Court issue a Writ of Habeas Corpus directing the respondents to bring Dr. Al-Arian to this Court at a time to be specified and explain why Dr. Al-Arian should not be released from custody immediately;

62. that this Court issue a declaratory judgment that Dr. Al-Arian is eligible to be released from ICE custody and that DHS's interpretation and application of the law is arbitrary and capricious, and is in violation of the Due Process and Equal Protection Clauses of the United

States Constitution;

63. that this Court order that Dr. Al-Arian be released immediately from ICE custody and that Dr. Al-Arian then be released from U.S. Marshal custody under the conditions set forth by the Court's July 10, 2008 order;

64. enter a preliminary and permanent injunctive relief enjoining Respondents from further unlawful detention of Dr. Al-Arian;

65. award Dr. Al-Arian attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and

66. grant any other and further relief that this Court deems just and proper.

Dated this 25<sup>th</sup> day of August, 2007

Respectfully submitted,

Dr. Sami Amin Al-Arian  
By Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify, that on August 25, 2008, I have also sent, via first class mail, a true and correct copy of the foregoing Petition for Writ of Habeas Corpus and Emergency Request for Release and Detention upon:

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