ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT

PRACTICE ADVISORY

April 21, 2011

Prolonged Immigration Detention and Bond Eligibility: *Diouf v. Napolitano*

This advisory concerns the Ninth Circuit's recent decision in *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011). *Diouf* is the latest in a series of Ninth Circuit decisions addressing whether the government may subject individuals to immigration detention for a prolonged period of time without a bond hearing where the government must show that continued detention is justified. *Diouf* extends the Ninth Circuit's previous decision in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), which held that individuals initially subject to detention under 8 U.S.C. 1226(c) are entitled to bond hearings if their removal is stayed pending direct judicial review of their removal orders or their removal cases have been remanded for further administrative proceedings.[1] **As a result of *Diouf*, non-citizens who have been detained for six months or longer after entry of a final order of removal under § 1231 are also now entitled to a bond hearing where the government bears the burden of justifying continued detention.** Furthermore, under the reasoning of another Ninth Circuit decision, *Vijendra Singh v. Holder*, --- F.3d ---, 2011 WL 1226379 (9th Cir. 2011), the government should be required to show by **clear and convincing evidence** that detention is necessary to prevent flight and danger. This practice advisory discusses how certain detainees can use *Diouf* to obtain bond hearings before immigration judges ("IJs").[2]

The ACLU will be monitoring the implementation of *Diouf* on an ongoing basis. Should you have questions or require technical assistance regarding a detention challenge under *Diouf*, please contact Michael Kaufman at the ACLU Foundation of Southern California, MKaufman@aclu-sc.org / 213-977-9500 x 232.

Background on *Diouf*

Amadou Lamine Diouf, a citizen of Senegal, lawfully entered the United States as a student in 1996. In 2003, the government initiated removal proceedings against him for overstaying his visa, and the IJ ordered voluntary departure. Before his voluntary

[1] The court held that the detention of such individuals is governed by 8 U.S.C. § 1226(a). Likewise, under the reasoning of *Casas*, an individual initially detained under § 1226(a) whose removal is stayed pending direct review of their removal order is still detained under § 1226(a). For more information on *Casas*, *see* the ACLU Practice Advisory dated Sept. 9, 2008, *available at* http://lawprofessors.typepad.com/immigration/2008/09/aclu-issues-pra.html.

[2] *Diouf* is not binding outside the Ninth Circuit, but may serve as persuasive authority.

departure deadline passed, Mr. Diouf retained an immigration attorney to reopen his removal proceedings and adjust his status based on his planned marriage to his long-time U.S. citizen fiancée. The attorney, however, never filed the motion to reopen. As a result, Mr. Diouf unwittingly violated his voluntary departure order, which automatically converted into an order of removal. In late 2005, Mr. Diouf moved to reopen his removal proceedings, arguing that his former attorney provided ineffective assistance of counsel. The IJ denied the motion to reopen, and the Board of Immigration Appeals ("BIA") affirmed. Diouf petitioned for review in the Ninth Circuit, which granted a stay of removal.

Meanwhile, U.S. Immigration and Customs Enforcement ("ICE") arrested Mr. Diouf in March 2005 (after he was convicted for possession of less than 30 grams of marijuana) and detained him for nearly two years pending completion of his removal case under the post-final order detention statute, 8 U.S.C. § 1231. In the Ninth Circuit, § 1231 governs the detention of individuals with final orders of removal that have not been stayed pending direct judicial review.[3] Section 1231 requires detention during the 90-day removal period after entry of a final order of removal. 8 U.S.C. § 1231(a)(2). If the non-citizen is not removed during the removal period, § 1231(a)(6)—the provision at issue in Mr. Diouf's case—authorizes continued detention at the discretion of the Attorney General. By regulation, individuals detained under § 1231 do not receive a bond hearing before an IJ, but rather only periodic post-order custody reviews ("POCRs") by ICE. *See* 8 C.F.R. § 241.4.[4] Accordingly, the only process Mr. Diouf received during his prolonged imprisonment was two file reviews in which ICE summarily continued his detention.

In November 2006, Diouf filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 arguing that his prolonged detention violated the statute and the Due Process Clause of the Fifth Amendment. The district court granted a preliminary injunction

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[3] In a previous decision, the Ninth Circuit held that, whereas 8 U.S.C. § 1226(a) governs detention of individuals whose removal orders are stayed pending direct review, § 1231 governs the detention of individuals like Mr. Diouf who seek judicial review of a denied motion to reopen, even when a stay has issued. *Diouf v. Mukasey*, 542 F.3d 1222, 1230 (9th Cir. 2008); *see also* 8 C.F.R. § 241.4 (defining final order of removal).

[4] Under the regulations, ICE must conduct an initial custody review before the 90-day removal period expires if the individual's removal cannot be accomplished during the removal period ("the 90-day review"). *See* 8 C.F.R. § 241.4(k)(1)(i). If the non-citizen is not released or removed at the time of the 90-day review, he or she will receive a second review three months later—180 days from the date the removal period began ("the 180-day review"). *See id.* § 241.4(k)(2)(ii). If the non-citizen is not released, a subsequent review will occur within approximately one year after the 180-day review. *See id.* § 241.4(k)(2)(iii).

requiring a bond hearing before an IJ. Upon conducting a hearing, the IJ found that Mr. Diouf did not present a flight risk or danger sufficient to justify detention and ordered his release on bond.

In September 2008, the Ninth Circuit vacated the preliminary injunction. The court clarified that, at the time Mr. Diouf filed his habeas petition, he was detained under the post-final order detention statute, § 1231(a)(6), and not the pre-final order detention statute, § 1226(a), as the district court had erroneously held. *See Diouf v. Mukasey*, 542 F.3d 1222, 1228-32 (9th Cir. 2008). The court remanded for the district court to determine in the first instance "whether aliens such as Diouf, who are detained under § 1231(a)(6), are entitled to receive bond hearings and to obtain release on bond unless the Government proves that they are a danger or a flight risk." *Id.* at 1234. On remand, the district court concluded that individuals facing prolonged detention under § 1231(a)(6) are not entitled to a bond hearing and denied Mr. Diouf's motion for a preliminary injunction.

What did the Ninth Circuit hold?

Relying on its prior decision in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), the Ninth Circuit held that prolonged detention under § 1231(a)(6) is prohibited without an individualized hearing to determine whether the person is a flight risk or a danger to the community. The court reaffirmed that prolonged detention without adequate procedural protections would present serious constitutional concerns. However, as in *Casas*, the court did not reach the constitutional question. **Instead, it construed § 1231(a)(6) to *require* that an immigration detainee be afforded a bond hearing before an IJ once detention becomes prolonged, and that the detainee be released on bond unless the government establishes at that hearing that the person is a flight risk or a danger to the community**. *Diouf*, 634 F.3d at 1086.

Moreover, the court held the POCR process to be inadequate to safeguard the liberty interests threatened by prolonged detention. As the court explained, "[t]he regulations do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge." *Id.* at 1091.

When does detention become "prolonged?"

Significantly, *Diouf* clarified when detention under § 1231(a)(6) becomes prolonged: "[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." However, if, at six

months, the individual's release or removal is "imminent," the government is not required to provide a bond hearing before the IJ. *Diouf*, 634 F.3d at 1092 n.13 (emphasis added).[5]

The court also made clear that the government should not presumptively detain individuals for six months without a hearing. Rather, the government "should be encouraged to afford an alien a hearing before an immigration judge *before* the 180-day threshold has been reached if it is practical to do so and it has already become clear that the alien is facing prolonged detention." *Diouf*, 634 F.3d at 1092 n.13. Moreover, the court specifically indicated that individuals, like Mr. Diouf, who have obtained a stay of removal pending a petition for review of a denied motion to reopen, are generally entitled to such a hearing before the six-month mark. In such cases, "the alien's prolonged detention becomes a near certainty." *Id*.

What types of cases does *Diouf* apply to?

Diouf specifically applies to prolonged detention pursuant to § 1231(a)(6). A detainee held under that statute is clearly entitled to a bond hearing if he or she has been detained for more than six months.

Thus, *Diouf* clearly requires a bond hearing for the following classes of detained immigrants if they have been detained for six months, or if it is otherwise clear that they will face prolonged detention:

1. *Individuals petitioning for review of a denied motion to reopen, regardless of whether they have a stay of removal.*

2. *Individuals who have a final order of removal and remain detained pending administrative adjudication of a motion to reopen, whether before the IJ or BIA, and regardless of whether they have obtained an administrative stay of removal.*

3. *Individuals petitioning for direct review of a removal order and for whom no stay of removal has been issued.*

4. *Other individuals with final orders of removal who have no pending challenges to removal and no stay of removal.*

The reasoning of *Diouf*—including its presumption that detention becomes prolonged at six months—arguably also applies to the following types of cases:

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[5] *See also Diouf*, 634 F.3d, at 1091-92 (explaining that "[w]hen detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound"). The Ninth Circuit previously suggested that immigration detention beyond six months is prolonged in nature. *See Nadarajah v. Gonzales*, 443 F.3d 1069, 1079-80 (9th Cir. 2006).

1. *Individuals detained pursuant to 8 U.S.C. § 1225(b) who have been detained for six months or longer while litigating their cases before the IJ or the BIA.*

Section 1225 applies to individuals, including some lawful permanent residents ("LPRs"), who are detained while seeking admission to the United States.[6] The Ninth Circuit has previously held that § 1225 must be construed to authorize only "brief and reasonable" detention.[7]

Notably, the only process the government presently makes available to § 1225 detainees is a form of discretionary parole, which, like the POCR procedures, lack an in-person hearing and neutral arbiter such as an IJ, and place the burden of proof on the non-citizen rather than the government.[8] Under *Diouf*, such procedures are inadequate to safeguard the liberty interests threatened by prolonged detention.

2. *Individuals subject to mandatory detention under 8 U.S.C. § 1226(c) who have been detained six months or longer but whose immigration proceedings before the IJ or BIA have not been completed.*

Section 1226(c) requires the detention of individuals with a qualifying criminal conviction, such as an alleged aggravated felony or two crimes involving moral turpitude, pending administrative removal proceedings. In *Casas-Castrillon*, the Court made clear that individuals who would otherwise be subject to § 1226(c), but who have a stay of removal pending a petition for review of their removal order, or whose cases have been remanded from the Court of Appeals for further administrative proceedings, are entitled to an individualized bond hearing after their detention has become prolonged, in part on the theory that § 1226(c) does not govern in cases of prolonged detention. *Casas-Castrillon* followed the Ninth Circuit's earlier holding in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), that 1226(c) only authorizes mandatory detention where removal proceedings are "expeditious."[9]

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[6] *See Nadarajah*, 443 F.3d at 1077 n.3 (noting that some individuals who are ultimately found admissible may be detained pursuant to § 1225(b) because of the statutory requirement that persons be detained unless admissibility is "clear[] and beyond [] doubt" to the inspecting officer).

[7] *Nadarajah*, 443 F.3d at 1076-79.

[8] *See* 8 U.S.C. § 1182(d)(5).

[9] *Casas-Castrillon*, 535 F.3d at 948 (holding that "alien whose case is being adjudicated before the agency for a second time—after having fought his case in this court and won . . . has not received expeditious process"). The court also held that § 1226(c) did not govern Casas-Castrillon's detention because § 1226(c) governs detention only "pending .

The reasoning of *Casas,* coupled with the holding of *Diouf* establishing the six month benchmark, likely requires that mandatory detainees whose cases have been pending before the IJ or BIA for more than six months are entitled to an individualized bond hearing, even if their criminal history would otherwise subject them to mandatory detention under § 1226(c). Significantly, in *Casas*, as in *Tijani,* the court construed § 1226(c) to apply "only to the 'expedited removal of criminal aliens.'"[10] Moreover, detainees held for prolonged time periods under § 1226(c) receive *no* procedure—not even an administrative custody review—to determine if their continued detention is justified. Thus, the reasoning of *Diouf* should apply equally, if not more, to prolonged mandatory detention under § 1226(c).

3. *Individuals detained pursuant to reinstated removal orders for six months or longer while seeking relief either before the immigration courts or review before the Courts of Appeal.*

Individuals detained pursuant to reinstated removal orders are likely held pursuant to § 1231 and thus entitled to a hearing under *Diouf* after six months of detention. However, because such detainees do not consistently receive POCRs, it is unclear whether the government views them as detained under § 1231.

What should I do to obtain a bond hearing for my client under *Diouf*?

If *Diouf* applies, your client is entitled to receive a determination by an IJ on whether he or she should be released. If your client has been detained for six months or longer, or is clearly facing such prolonged detention under § 1231(a)(6), *Diouf* allows your client to seek a bond hearing before an IJ directly.[11]

DHS should have an affirmative responsibility to notify individuals of their right to a bond hearing. To request a hearing under *Diouf*, your client should file an administrative request for a bond hearing in immigration court and attach the *Diouf* decision to the request. The request for a bond hearing should be made in writing, but may also be made orally or, at the IJ's discretion, via telephone.[12] A sample motion requesting a bond

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. . removal proceedings," and not after entry of a final order of removal. *Id*. (internal quotation marks and emphasis omitted)

[10] *Casas-Castrillon*, 535 F.3d at 947-48 (quoting *Tijani*, 430 F.3d at 1242). The court specifically held that where detention is prolonged, the government's authority to detain "shifts" from § 1226(c) to § 1226(a), which authorizes discretionary detention "pending a decision on whether the alien is to be removed from the United States." *Id.*

[11] *See Diouf*, 634 F.3d at 1086.

[12] 8 C.F.R. § 1003.19(b).

hearing is attached to this practice advisory. As they become available, your client should also attach copies of filings by the government in similar cases where the government has agreed that an individual subject to prolonged detention under § 1231(a)(6) must receive a bond hearing because of *Diouf*.

What should I do if my client is denied a bond hearing?

It is possible that the IJ will deny your client's request for a bond hearing, either because the IJ is not familiar with *Diouf* or for some other reason. If that occurs, your client should appeal to the BIA within 30 days of the denial. If your client is in the Ninth Circuit, you should also file a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in federal district court to enforce *Diouf*. Section 2241(c)(3) provides district courts the power to grant the writ of habeas corpus where a person is "in custody in violation of the Constitution or laws or treaties of the United States." Failure to provide a bond hearing contravenes binding Ninth Circuit law and can be remedied through a habeas petition.

If my client obtains a bond hearing, what will the bond hearing entail?

If your client obtains a bond hearing, the hearing should largely resemble a bond redetermination hearing under § 1226(a), except that the government bears the burden of proof and must establish flight risk or danger by clear and convincing evidence.

At the bond hearing, the IJ should determine whether your client should be released based on at least two factors: (1) whether your client is a flight risk, and (2) whether your client is a danger to the community.[13] The IJ also has discretion to consider any information that your client or the government presents.[14] If the court finds that your client is neither a flight risk nor a danger to the community, the court should set bond.

There are two main differences between an ordinary bond hearing and a bond hearing for a client subject to prolonged detention. First, at this bond hearing, the government, and not your client, must bear the burden of proof. [15] Second, the government must likely prove by *clear and convincing evidence* that the detainee is a flight risk or danger to the community to justify continued detention. Recently, in *Vijendra Singh v. Holder*, --- F.3d ---, 2011 WL 1226379, at *4 (9th Cir. 2011), the Ninth Circuit clarified that the clear and convincing evidence standard governs *Casas* hearings. Because the court has recognized that detainees subject to prolonged detention under § 1231 have the same

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[13] *See Diouf*, 634 F.3d at 1086; *see also Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

[14] 8 C.F.R. § 1003.19(d).

[15] *Diouf*, 634 F.3d at 1086.

interest in freedom from detention as detainees entitled to *Casas* hearings, the same framework likely applies to hearings under *Diouf* as well.[16]

Although the government bears the burden of proof, the IJ will likely expect your client to present evidence showing that he or she is not a flight risk or danger to the community, regardless of whether the government presents any evidence. Your client should be prepared to present testimonial and documentary evidence about the following:

1. *Criminal history*: details regarding arrests and convictions; rehabilitation, including programs during detention; reasons why your client will not engage in criminal activity if released. [17]

2. *Likelihood of success in removal case*: the merits of your client's removal case and why he or she is likely eventually to succeed on his or her claim to relief or defense against removal.

3. *Activities in detention*: organized activities and positive activities that your client participated in while detained (reading, exercise, attending church, participating in skills programs, etc.); any disciplinary infractions.

4. *Other information*: family and community ties, education, work history, etc.

Your client should also make sure to put the *length* of his or her detention into the record and explain that prolonged detention requires a heightened showing of dangerousness and flight risk. Because individuals who obtain such hearings have already been detained for a prolonged period of time, you should argue that the justification for detention must be stronger than in typical bond cases. *See Diouf*, 634 F.3d at 1091 (holding that "[w]hen the period of detention becomes prolonged, the private interest that will be affected by the official action is more substantial; greater procedural safeguards are therefore required" (internal quotation marks and citation omitted)).[18]

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[16] *See Diouf*, 634 F.3d at 1086 (finding "no basis for withholding from aliens detained under § 1231(a)(6) the same procedural safeguards accorded to aliens detained under § 1226(a)").

[17] Significantly, *Vijendra Singh* held in the context of *Casas* hearings that "criminal history alone will not always be sufficient to justify denial of bond on the basis of dangerousness. Rather, the recency and severity of the offenses must be considered." *Vijendra Singh*, 2011 WL 1226379, at *6; *see also id.* (explaining that *Casas* requires "individualized bond hearings to ensure that the government's purported interest in securing the alien's presence at removal and protecting the community from danger is *actually* served by detention *in this case*" (internal quotation marks, citation, and alteration omitted)).

[18] *Cf. Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding that post-final order detention ceases to be authorized by statute where removal is not reasonably foreseeable

Finally, under the reasoning of *Vijendra Singh*, your client should be entitled to an audio recording of the hearing in order to preserve the record for appeal. *See Vijendra Singh*, 2011 WL 1226379, at *8 (holding that "due process requires a contemporaneous record of *Casas* hearings"). A sample request for such recording is attached to this practice advisory.

My client is held in one state, but his or her immigration case is in another. Where should my client apply for bond?

8 C.F.R. § 1003.19(c) states that applications for bond determinations should be made in the following order:

> (1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention;
> (2) To the Immigration Court having administrative control over the case; or
> (3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.

Thus, the regulations establish a preference for filing a bond determination request where you client is detained. However, because the regulations do not foreclose jurisdiction in the court having administrative control, your client may arguably choose to file where his or her removal case is taking place. Since IJs outside the Ninth Circuit are not bound by *Diouf*, your client should file in an immigration court located in the Ninth Circuit where appropriate.

What if my client is detained outside the Ninth Circuit?

Diouf is not binding outside the Ninth Circuit but may serve as persuasive authority. For more information on filing a habeas petition and assistance in evaluating the merits of a case outside the Ninth Circuit, please contact Michael Tan at the ACLU Immigrants' Rights Project, mtan@aclu.org / 212-283-7303.

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and holding that as the length of detention grows, what is "reasonably foreseeable . . . conversely . . . shrink[s]").

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
[CITY, STATE]

In the Matter of:	)	
,	)	In Bond Proceedings
A#	)	
	)	
Respondent	)	

REQUEST FOR BOND HEARING PURSUANT TO *DIOUF V. NAPOLITANO*

I respectfully request that the Immigration Court schedule a bond redetermination hearing for me. I have been detained for [**INSERT PERIOD OF TIME**] after entry of a final order of removal. Because my detention under INA 241(a) has become prolonged [**OR:** is clearly likely to become prolonged], I am entitled to a bond hearing under the Ninth Circuit's decision in *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (attached), where the government must show that my continued detention is justified.

Pursuant to *Diouf*, the Immigration Judge may release me on bond or grant conditional parole. At the solicited hearing, I am "entitled to be released from detention unless the *government* establishes that [I] pose[] a risk of flight or a danger to the community." *Id*. at 1092 (emphasis added). In order to justify my continued detention, the government must show by clear and convincing evidence that my detention is necessary to prevent flight and danger. *See Vijendra Singh v. Holder*, --- F.3d ---, 2011 WL 1226379, at *4 (9th Cir. 2011) (imposing clear and convincing standard for hearings conducted pursuant to *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008)) *see also Diouf*, 634 F.3d at 1086 (finding "no basis for withholding from aliens detained under § 1231(a)(6) the same procedural safeguards accorded to aliens [in *Casas* hearings]"). At the hearing, I urge the Immigration Court to

look to the *In re Guerra*, 24 I&N Dec. 37 (BIA 2006), factors to determine whether the government meets its burden of overcoming my presumed "entitle[ment]" to release on bond. *Diouf*, 634 F.3d at 1092.

Finally, I ask that the court grant conditional parole or set a bond amount that is reasonable and proportional to my means and the cost of living because the Ninth Circuit has correctly suggested that "serious questions may arise concerning the reasonableness of the amount of the bond if it has the effect of preventing an alien's release." *Doan v. INS*, 311 F.3d 1160, 1162 (9th Cir. 2002).

Respectfully submitted this _____ day of _____, 20___,

_____
Respondent, *pro se*

ATTACHMENTS:

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
[CITY, STATE]

In the Matter of:	)	
,	)	In Bond Proceedings
A#	)	
	)	
Respondent	)	

REQUEST FOR AUDIO RECORDING OF HEARING

I respectfully request that the Immigration Court audio record my bond redetermination hearing. As recognized by the Ninth Circuit, due process requires a "contemporaneous record" of my bond redetermination hearing to facilitate review by the Board of Immigration Appeals should such review be necessary. *Vijendra Singh v. Holder*, --- F.3d ---, 2011 WL 1226379, at *8 (9th Cir. 2011) (requiring audio recordings for hearings conducted pursuant to *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008)); *see also Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011) (finding "no basis for withholding from aliens detained under INA § 241(a)(6) the same procedural safeguards accorded to aliens [in *Casas* hearings]").

Respectfully submitted this _____ day of _____, 20___,

_____
Respondent, *pro se*