No. 00-668

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

YOUR KHORN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are the Immigration and Naturalization Service (INS), the Attorney General of the United States, and the INS District Director in Seattle, Washington. The INS was named by respondent as a defendant in his habeas corpus petition and the district court ordered that the petition be served on the Attorney General and the INS District Director as well. The three petitioners were appellants in the court of appeals. Respondent is Your Khorn, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a) is unreported. The opinion of the district court (App., *infra*, 3a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2000. On September 20, 2000, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including October 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **Detention and removal of aliens ordered removed**
>
> **(a) Detention, release, and removal of aliens ordered removed**
>
> **(1) Removal period**
>
> **(A) In general**
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> **(2) Detention**
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or

1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

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. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained

> beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Cambodia. He entered the United States as a refugee on October 31, 1985, and adjusted his status to lawful permanent resident on October 8, 1987, effective as of his entry date. App., *infra*, 4a.

On September 5, 1997, respondent was convicted in Washington state court on two counts of rape in the third degree. App., *infra*, 4a. The convictions arose out of a course of conduct over a period of several months in which respondent, then a 31-year-old man, engaged in sexual intercourse with two girls. *Ibid.*; see also Administrative Record (A.R.) L087, L080-L081 (certification for determination of probable cause, upon which the state trial court relied in finding that there was a factual basis to support respondent's guilty plea). The two girls are sisters. Respondent met them in the fall of 1996 and began a sexual relationship with the older sister, who was then eleven years old. A.R. L080. In March 1997, respondent obtained the permission of the girls' parents to live with the family and to have sexual relations with the older sister after the parents agreed that he would marry her.[1] App., *infra*, 4a. Respondent lived in the older sister's room and engaged in repeated sexual intercourse with her, using force on occasion to make her engage in the sexual intercourse. A.R. L080. Respondent continued to have sexual intercourse with

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[1] Respondent elsewhere claims to have a common-law wife with whom he has lived for eleven years and with whom he has a child. A.R. L044-L046.

the girl throughout March and part of April 1997. In April 1997, respondent began to spend part of the night in the bedroom of the other sister, who was by then eleven years old, and to engage in repeated sexual intercourse with her, using force on occasion to make her engage in the sexual intercourse. *Ibid.*

On April 24, 1997, the younger sister did not attend school. When the school nurse asked the older sister about her whereabouts, the older sister explained that her sister was with respondent because "he loves her now," and she ultimately revealed to the school nurse the sexual abuse by respondent. A.R. L081. On April 25, 1997, when neither sister came to school, the school nurse contacted the child welfare authorities and the police, which led to the removal of the girls from the home and respondent's prosecution. *Ibid.* Respondent was sentenced to 30 months' imprisonment. App., *infra*, 4a.

b. On March 5, 1998, the INS served respondent with a notice to appear for removal proceedings, charging respondent with being subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) because he had been convicted of an "aggravated felony," which includes a crime of violence for which a term of imprisonment of one year or more was imposed, see 8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998). A.R. L058.[2] On August 26, 1998, an immigration judge ordered respondent removed to Cambodia. A.R. L049. On December 30, 1998, upon completion of his state term of imprisonment, respondent was transferred to the custody of the INS. App., *infra*, 5a.

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[2] Rape and sexual abuse of a minor are also included as aggravated felonies. 8 U.S.C. 1101(a)(43)(A) (Supp. IV 1998).

On March 22, 1999, the Board of Immigration Appeals dismissed respondent's appeal, rendering the removal order final. App., *infra*, 4a-5a. The Board found that respondent was removable as charged and was statutorily ineligible for relief from removal. A.R. L022. The Board also ruled that respondent was statutorily ineligible for withholding of removal because his offense of conviction constitutes a "particularly serious crime." A.R. L023 (citing 8 U.S.C. 1231(b)(3)(B) (Supp. IV 1998) and 8 C.F.R. 208.16(c)(2)).

c. The INS was unable to effectuate respondent's removal within the 90-day period following entry of his final removal order. The Cambodian government did not respond to the INS's request for travel documents for respondent. App., *infra*, 5a. On June 24, 1999, the INS informed respondent that, because of the delays encountered by the INS in making arrangements for his removal, the INS would consider releasing him from custody and would afford him an interview and opportunity to submit written evidence that he would not pose a danger to the community or a flight risk if released. A.R. L019. The INS district director considered the factors set forth in 8 C.F.R. 241.4, including the nature and seriousness of respondent's criminal convictions and "[e]vidence of rehabilitative effort or recidivism," and concluded that respondent should be continued in detention. A.R. L001. Respondent was informed that his custody status would be reviewed again in March, 2000. *Ibid.*

2. a. Meanwhile, respondent had filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington on September 9, 1999, challenging his continued confinement as a violation of due process. On February 10, 2000, the district court entered judgment for respon-

dent. App., *infra*, 3a-7a. The court applied the standards set forth in the joint order of five judges of the district court in *Phan* v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999), for evaluating such constitutional challenges to continued detention beyond the 90-day removal period. See App., *infra*, 4a, 5a. The court first concluded, following the conclusion of the district court judge in *Ma* v. *Reno*, No. C99-151L (W.D. Wash. July 9, 1999), and similar conclusions by other judges in the district in two other cases, that there is no realistic chance of Cambodian nationals being deported to Cambodia. App., *infra*, 6a. The court also found that the evidence of dangerousness and flight risk did not outweigh respondent's liberty interest. *Id.* at 5a-7a. The court concluded that, therefore, respondent's continued detention by the INS violated substantive due process. *Id.* at 7a. The INS appealed.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the 90-day removal period, notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit did not reach the constitutional grounds on which the district court had relied.

c. On June 28, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), that the INS lacks such authority. On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, No. 00-38, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, No. 99-7791, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6) without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

OCTOBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35345
DC# CV-99-1455-JCC
Washington (Seattle)

YOUR KHORN, PETITIONER-APPELLEE

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT-APPELLANT

[Filed: June 28, 2000]

ORDER

Before: FERGUSON, RYMER and HAWKINS, Circuit Judges

Appellants' May 31, 2000 motion to file late their response to the court's May 15, 2000 order to show cause is granted.

The Clerk is directed to file appellee's response received June 9, 2000.

The court has reviewed the parties' responses to the May 15, 2000 order to show cause. The judgment of the district court is summarily affirmed. *See Ma v. Reno*,

208 F.3d 815 (9th Cir. 2000), *pet. for reh'g and for reh'g en banc denied* (9th Cir. June 3, 2000).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE No. C99-1455C

YOUR KHORN, PETITIONER

v.

JANET RENO, ET AL., RESPONDENTS

[Filed: Feb. 10, 2000]

ORDER

This matter comes before the Court on Your Khorn's petition for a writ of habeas corpus, in which he challenges his detention by the Immigration and Naturalization Service (INS) as unconstitutional under the Due Process Clause of the Fifth Amendment. The petition is one of more than one hundred such petitions filed by persons who have been detained indefinitely by the INS while awaiting deportation to countries that have refused to receive them. Due to the great number of cases currently pending in this district that raise the same issue and in recognition of the need to adopt a consistent legal framework to guide individual consideration of these petitions, the judges of the Western District of Washington in Seattle issued a Joint Order.

See Phan v. Reno, 56 F. Supp.2d 1149 (W.D. Wash. 1999). The Joint Order describes the appropriate legal framework under which the petitioners' substantive and procedural due process claims must be individually evaluated. *Id.* at 1156. The Court, having reviewed the entire record, GRANTS petitioner's writ of habeas corpus.

BACKGROUND

Petitioner, a native and citizen of Cambodia, was granted lawful permanent resident status on October 8, 1987, effective as of October 31, 1985, the date he entered the country. He lived in Seattle, Washington, where he graduated from high school and then worked. His parents still reside in Seattle. When Petitioner was 31, his parents obtained permission from the parents of a 13-year-old girl for them to marry. Petitioner then lived with the family of the girl, including her 12-year-old sister. Petitioner had sexual intercourse with each of the two sisters. Petitioner's relationship with the children was reported to the police by a nurse at the school that the children attended. On September 5, 1997, petitioner was convicted of two counts of child rape in the third degree. He entered *Alford* pleas, *North Carolina v. Alford*, 400 U.S. 25 (1970), to those counts, and was sentenced to thirty months of imprisonment. He was also ordered not to have contact with the child victims for five years. He served most of his term of imprisonment at a minimum custody work camp.

Because of petitioner's aggravated felony conviction, the INS initiated deportation proceedings against him. In 1998, an immigration judge ordered him deported to Cambodia, and the Board of Immigration Appeals affirmed that decision. He was taken into INS custody on

December 30, 1998, and a final order of deportation was entered on March 22, 1999. The INS sent a travel documents request to Cambodia on June 28, 1999, but has heard nothing in response because of the lack of a repatriation agreement between the United States and Cambodia.

Having applied the standards set forth in *Phan v. Reno*, U.S. Magistrate Judge John L. Weinberg issued a report in which he concluded the petitioner had no reasonable likelihood of deportation and the dangerousness and risk of flight posed by petitioner's release were not significant enough to outweigh petitioner's liberty interest. The Report recommends petitioner's immediate release from INS custody.

ANALYSIS

As set forth in the Joint Order, the Court must determine whether petitioner's detention is excessive in relation to the government's primary objective of ensuring the removal of aliens ordered deported, as well as its ancillary goals of preventing flight prior to deportation and protecting the public from dangerous felons. *Phan* at 1155-56. If evidence does not support "a realistic chance that an alien will be deported" within a time certain, *Phan* at 1156, the Court will consider dangerousness and flight risk.[1] Only if petitioner's

[1] The Joint Order describes a balancing of the likelihood of deportation against dangerousness and risk of flight. This formulation simply indicates that, as the likelihood of deportation decreases, the government must make a greater showing of dangerousness and flight risk to outweigh petitioner's liberty interest.

liberty interest outweighs the sum total of the government's concerns will the petition be granted.

A. Realistic Chance of Deportation

The Honorable Robert S. Lasnick, in *Ma v. Reno*, No. C99-151L (W.D. Wash. 1999), the Honorable Marsha J. Pechman, in *Tep v. INS*, No. C99-1161P (W.D. Wash. 1999), and the Honorable Barbara J. Rothstein, in *Vath v. Smith*, C98-1363R (W.D. Wash. 1999), have concluded that there is no realistic chance of Cambodian nationals being deported to Cambodia. This Court concurs in that finding.

B. Dangerousness and Flight Risk

Since the Court finds no likelihood of deportation, the government must make a significant showing of dangerousness and flight risk to outweigh petitioner's liberty interest. Petitioner's criminal history is not lengthy, although the circumstances surrounding his 1997 conviction are deeply troubling. This Court takes very seriously Petitioner's offenses, and their lasting impact on the victims and their family. However, the facts do not indicate that Petitioner is a sexual predator. In addition, if petitioner were released, he would be required to register as a sexual offender, be placed on probation by the state, and be subject to a no contact order. Furthermore, the government presents little evidence of flight risk. Petitioner grew up in Seattle, completed high school here, and held steady jobs prior to his conviction. He has had no failures to appear, and served his time in a prison work camp without incident.

Therefore the Court finds that the evidence of dangerousness and flight risk does not outweigh

Petitioner's liberty interest. The proper inquiry is whether a petitioner's detention is excessive in relation to the government's interests in ensuring the removal of aliens ordered deported, preventing flight prior to departure, and protecting the public from dangerous felons. *Phan* at 1156. The evidence does not support a realistic chance of deportation, nor is the risk of flight and dangerousness substantial enough to warrant what potentially could be a life sentence. In weighing the sum total of the government's interests in detaining petitioner against petitioner's liberty interest, the Court concludes that Petitioner's continued detention violates his substantive due process rights.[2]

CONCLUSION

The Court GRANTS the habeas petition and orders petitioner's release within two business days of the entry of this Order.

SO ORDERED this 10 day of February, 2000.

/s/ JOHN C. COUGHENOUR
Chief United States District Judge

[2] Based on this conclusion, the court does not address the issue of procedural due process.