IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JUYEL AHMED,	)	**Special Proceeding No. 00-0101A**
	)	
Applicant,	)	
	)	
vs.	)	**ORDER GRANTING APPLICATION FOR WRIT OF HABEAS CORPUS WITH CONDITIONS**
	)	
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS and CNMI DEPARTMENT OF LABOR AND IMMIGRATION,	)	
	)	
Respondents.	)	
	)	

I. PROCEDURAL BACKGROUND

This matter came before the court on March 6, 2000, 1999, in Courtroom 217A, on Applicant Juyhel Ahmed's Application for issuance of a writ of habeas corpus pursuant to 6 CMC § 7102. Bruce L. Jorgensen, Esq,. appeared on behalf of the Applicant, and Assistant Attorney General Robert Goldberg, Esq., appeared on behalf of the Commonwealth and the CNMI Department of Labor and Immigration ('the Government"). The court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its findings and conclusions in this written decision. **[p. 2]**

II. FACTUAL BACKGROUND

1. Applicant Juyel Ahmed, a Bangladeshi national, was ordered detained and deported by this court because his tourist permit expired on November 24, 1994. *See CNMI v. Ahmed,* Civil Action No. 98-0704B (N.M.I. Super.Ct. August 6, 1998) (Order of Deportation, attached as Ex. 1 to R. Verified Return). Pursuant to this court's Deportation Order, on August 6, 1998, Applicant was remanded to the custody of the Division of Immigration and ordered to surrender his passport. Applicant did not appeal the court's Deportation Order.

2. Although the court also ordered the Division of Immigration Services to place Applicant on the first available airline flight to the People's Republic of Bangladesh, Applicant has been held at the prison facility operated by the Government's Department of Labor and Immigration ("DOLI") since July 1, 1998. Decl. of Juyel Ahmed (hereinafter "Appl. Decl." at ¶ 1).

2. Following U.S. Senate oversight hearings relating to CNMI immigration policies and coverage by the media of certain court proceedings in which he is involved, Applicant charges that he was subjected to treatment different from other prisoners at the direction of CNMI Assistant Attorney General Robert Goldberg. Applicant maintains that, among other things, Mr. Goldberg has attempted to coerce him into helping the Bangladesh Government issue a passport.[1] Applicant asserts that when he refused to comply with Assistant Attorney General Goldberg's demands, Mr. Goldberg ordered Applicant to be placed on "24-hour lockdown" for 365 days per year. Appl. Supp. Decl. at ¶ 5. Applicant insists that at Goldberg's direction, he was prevented from leaving his cell, denied access to and use of newspapers, cigarettes, and other ordinary items, not permitted to play cards, forbidden access to entertainment of any type, precluded from making telephone calls, and prevented from communicating with others. *Id.* Applicant further **[p. 3]** contends that Mr. Goldberg stopped Applicant's visiting privileges, directed that Applicant be precluded from making telephone calls, and instituted measures that would prevent Applicant from communicating with his attorney (*Id.* At ¶¶ 6-11). In light of Respondents' failure or refusal to provide public records and other materials sought in Applicant's federal court proceeding, Applicant insists that it is appropriate for him to seek habeas corpus relief (Appl. at 2-3).

3. The Government does not dispute these allegations, but simply contends they are irrelevant as to whether Applicant is "unlawfully imprisoned." *See* R. Verified Return at 4, N.3. At the hearing in this matter, the Government argued that the Applicant himself is the reason for the prolonged detention. Because Applicant has refused to provide or surrender his

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[1] See Supplement to Habeas Corpus Application, Supplemental Declaration of Juyel Ahmed (hereinafter, "Appl. Suppl Decl."), filed in this proceeding on February 24, 2000.

passport,[2] the Government maintains that it has been forced to obtain Bangladeshi travel documents, and, notwithstanding three meetings among CNMI representatives, members of the State Department, and Bangladesh Embassy officials in Washington, D.C., the Government has yet to receive them. The Government contends that the only travel document provided by the Bangladesh Embassy was defective and that a proper travel document has been promised "as soon as possible" (Verified Return at 2).

4. To challenge his detention, Applicant brings this Application for a writ of habeas corpus pursuant to 6 CMC § 7103, contending, among other things, that his continued detention violates CNMI and Federal substantive and procedural due process rights.[3] **[p. 4]**

5. On March 1, 2000, the Superior Court issued an Order to Show Cause directing Respondents to certify the true cause of Applicant's detention. In response, Respondents claim that the Application is defective under 6 CMC §§ 7102 and 7104, since Applicant has failed to name the person detaining him as a respondent (Verified Return at 3). Respondents further contend that the detention is lawful pursuant to this court's Deportation Order and is solely the result of Applicant's own misconduct (*Id.* At 2).

III. QUESTIONS PRESENTED

1. Whether Applicant's failure to name his present custodian as a respondent requires the court to deny the Application.

2. Whether an alien subject to a non-appealable, final order of deportation can be detained indefinitely without violating due process of law.

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[2] Applicant, a practicing Muslim, contends that before his entry to the CNMI, he was the victim of torture by Bangladeshi authorities, and that if repatriated to return to Bangladesh, he would be persecuted and subjected to severe pain or suffering (Appl. Decl. at ¶ 4). Applicant's papers further reflect that he has applied for Federal and CNMI asylum and protection. Applicant has completed and submitted an I-590 form to the U.S. Immigration and Naturalization Service ("INS") and is one of several plaintiffs seeking injunctive, declaratory, and other relief in *Liang v. United States, et al.*,, Civil Action No. 99-046 (U.S. Dist. Court).

[3] Appl. Decl. at ¶ 13(a)(4). Applicant also relies upon a panoply of materials and citations, virtually all of which have been "incorporated by reference" into his Application. These include, but are not limited to, all CNMI statutory law, Federal statutory law, Federal/CNMI treaty obligations, international law and Federal/CNMI constitutional law, various court rulings, and all "related facts, legal standards, and equitable considerations, including but not limited to those described in the record of *Liang v. CNMI, et al.*, Special Proceeding No. 00-00050E (CNMI Super. Ct. Jan. 24, 2000). The court notes that with regard to Special Proceeding No. 00-0050E referenced above, there were no facts that the court determined, as the Petition for habeas relief was withdrawn.

3. Whether a writ of habeas corpus should issue as a remedy for Applicant's challenge to the duration and conditions of his confinement.

IV. ANALYSIS

1. Traditionally, habeas corpus provides a remedy for a prisoner challenging the fact or duration of his confinement and seeking immediate or speedier release. *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994*); Preiser v. Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Habeas corpus is also an available remedy to aliens challenging executive detention. *E.g., Chowdhury v. Celis,* Civil Action No. 97-1261, Original Action No. 98-001 (N.M.I. Sup.Ct. March 1, 1998) (Order re: Petitioner's Writ of Habeas Corpus). *See also Nyguen v. Fasano,* __F.Supp.2d __, 2000 WL 144216 (S.D.Cal., Feb 01, 2000). As all parties concede, the law of the Commonwealth provides that "[e]very person unlawfully imprisoned or restrained of his or her liberty under any pretense whatsoever, or any person on behalf of an unlawfully imprisoned individual, may apply for a writ of habeas corpus to inquire into the cause of **[p. 5]** the imprisonment or restraint." 6 CMC § 7101. Pursuant to 6 CMC § 7105, the judge hearing the application for a writ of habeas corpus and authorized to issue the writ shall, "without delay or formality, determine the facts, grant the writ unconditionally, deny the writ, or grant the writ on terms fixed by the court and discharge the person for whose relief the application has been brought or make any order as to disposition that law and justice may require.

2. However, prior to reaching the merits of Applicant's claims, this court must first assess whether, as Respondents contend, Applicant's failure to name the warden or superintendent of the institution where he is now incarcerated bars his claim for relief. The court finds that the failure to name the person detaining Applicant as a respondent in this proceeding does not bar Applicant's claims.

3. A mistake of form, as in naming the state rather than the warden in a habeas proceeding, is a procedural rather than a jurisdictional defect. 17A C. Wright, A. Miller, E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4268.1 at 490 (West 1999). The defect is easily cured by amendment. *West v. Louisiana*, 478 F.2d 1026, 1029 (5th Cir. 1973). Since 6 CMC

§ 7102 only requires the Application to set forth "*if known*, the name of the person who has custody over the person seeking relief," (emphasis added), and 6 CMC § 7105 permits this court to, among other things, "make any order as to disposition that law and justice require," the court finds it appropriate in this instance to amend the petition on its own initiative to add the Supervisor of the Department of Labor and Immigration Detention Center as a respondent. *See Ashley v. Washington*, 394 F.2d 125, 126 at Note 1 (9th Cir. 1968). The Application will not, therefore, be denied on these grounds.

4. The Due Process Clause of the Fifth Amendment to the United States Constitution and Article I, section 5 of the Commonwealth Constitution protect the most basic and fundamental of human rights, ensuring that no person will be deprived of life, liberty, or property without due process of law. U.S. CONST. Amend. V; N.M.I. CONST. Art. I § **[p. 6]** 5.[4] Above and beyond the procedural guarantee explicit in the Due Process clause itself, courts have recognized a limited "substantive" component that forbids the government to infringe certain fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). These constitutional protections extend to all "persons" within the borders of the CNMI, including deportable aliens.[5]

5. There is, however, one exception to this rule. Based upon what has become known as the "entry fiction," a number of courts have ruled that aliens who are placed in exclusion proceedings before entering the United States are legally considered to be detained at the border and thus are not entitled to due process protection. *Id. See also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir.), *cert. denied*, 516 U.S. 976, 116 S.Ct. 479, 133 L.Ed.2d 407 (1995). As a result, the Due Process Clause affords an excludable alien no

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[4] The Fifth Amendment to the Constitution expressly applies within the Northen Mariana Islands as it does within each of the states. COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA (hereinafter, the" COVENANT") § 501. 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 *et seq.*

[5] Constitutional Convention of the Northern Mariana Islands, ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) (hereinafter "Constitutional Analysis") at 24; *Landon v. Plasencia*, 459 U.S. 21, 32-33, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982).

procedural protections beyond those procedures explicitly authorized by Congress. *Landon*, 459 U.S. at 32, 103 S.Ct. at 321. Excludable aliens, therefore, may be denied due process rights, including the right to be free of detention. Vo v.*Greene*, 63 F.Supp.2d 1278, 1282 (D.Colo. 1999)

6. The entry fiction doctrine, however, is not applicable here. Applicant is a deportable, not an excludable alien. This distinction is critical. An excludable alien is one seeking admission to this country as a privilege. *Id.* Whereas courts generally do not recognize any constitutional rights regarding these applications, for the power to admit or exclude aliens is a sovereign prerogative, immigration laws distinguish between "those aliens who **[p. 7]** come to our shores seeking admission...and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry." *Leng May Ma v. Barber*, 357 U.S. 185, 78 S.Ct. 1072, 1073, 2 L.Ed.2d 1246 (1958); *see also Landon*, 459 U.S. at 32, 103 S.Ct. at 321.[6]

7. Once aliens are admitted to this country, their constitutional status changes so that they enjoy a right to due process. *Landon*, 459 U.S. at 32, 103 S.Ct. at 321.[7] These constitutional rights include a fundamental liberty interest in being free from incarceration under the Fifth Amendment. A deportable alien who is indefinitely continued in the custody of immigration suffers a deprivation of liberty. *Nyguen v. Fasano*, 2000 WL 144216 at 10.

8. The parties do not dispute that applicant is "within" the CNMI after lawful entry. Although Applicant has committed no crime save that of staying beyond the expiration of his tourist permit, he has been subjected to, at best indeterminate, and at worst, life detention. To

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[6] *Accord Chi Thon Ngo v. Immigration and Naturalization Service*, 192 F.3d 390 (3d Cir. 1999) (alien who is on the threshold of initial entry stands on a footing different from those who have "passed through the gates"; excludable aliens could be detained for lengthy periods when removal is beyond the control of the INS, provided that appropriate parole provisions were in place)

[7] *Accord Nyguen v. Fasano*, __F.Supp.2d __, 2000 WL 144216 (S.D.Cal. Feb.1, 2000); *Sok v. Immigration and Naturalization Services*, 67 F.Supp.2d 1166, 1169 (E.D.Cal. 1999); *Phan v. Reno* 56 F.Supp.2d 1149 (W.D.Wash. 1999); *Hermanowski v. Farquharson*, 39 F.Supp.2d 148, 157 (D.R.I. 1999). *But see Zadvydas v. Underdown*, 185 F.3d 279, *reh'g denied*, 199 F.3d 441 (5th Cir. 1999), *petition for cert. granted*, Case No. 99–7791 (Jan. 11, 2000) (when alien residents are subject to final deportation order, there is virtually no basis for distinguishing them from excludable aliens).

determine whether this deprivation of liberty is impermissible punishment or permissible regulation, the court examines whether the deprivation of liberty is imposed for the purpose of punishment or in furtherance of regulatory goals. *Id.*

9. Plainly the CNMI has a legitimate sovereign interest in ensuring the removal of aliens ordered deported and preventing flight prior to deportation. *See, e.g. Phan v. Reno* 56 **[p. 8]** F.Supp.2d 1149, 1154-1156 (W.D.Wash. 1999). *See also United States v. Valenzuela-Bernal*, 458 U.S. 862, 863-66, 102 S.Ct. 3440, 3444-46 (1982) (prompt deportation of aliens is justifiable on the basis of legislative and executive policy, and on the practical and financial difficulties associated with their continued detention). In light of the fundamental liberty interest at stake, the court believes that heightened scrutiny, and not deferential review, is appropriate to determine whether the restriction on Applicant's liberty is excessive in relation to these purposes.[8]

10. The Ninth Circuit recognizes that immigration detention is not punishment. *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991). Since detention is lawful only in aid of deportation, if deportation never occurs, then indefinite detention of a deportable alien is excessive. *Vo*, 63 F.Supp.2d at 1285 (concurring with the panel in *Phan*, that the court must balance the likelihood of deportation against the potential danger of the applicant and the risk that he will abscond). If it appears to the court that the government is unlikely to deport the alien, then the Government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty becomes more severe. Since detention is only lawful in aid of deportation, it is "excessive" to detain an alien indefinitely if deportation will never occur. When removal is not foreseeable, likely, or realistic, detention becomes impermissible punishment. Under these circumstances, the alien should presumptively be released unless

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[8] While courts defer to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention. *Phan*, 56 F.Supp. 2d at 1155. By observing the excludable/deportable alien distinction, the *Phan* panel accorded far less weight to the plenary power doctrine, which counsels judicial deference to the executive and legislative branches on substantive immigration matters. *Id.* Since the court found petitioners' liberty interest to be fundamental, it applied heightened scrutiny, not deferential review, to petitioners' detention.

the Government is able to demonstrate that the detention is temporary and that it will be able to deport the alien in short order.

11. In this case, the Government maintains that detention is foreseeable, likely and realistic. It has represented to this court that proper travel documents will arrive shortly. At the same time, Applicant has been detained nearly two years. The Government has not presented any evidence of Applicant's criminal history, and thus this court makes no **[p. 9]** finding that Applicant is any danger to the community. Similarly, the Government has not presented any evidence that Applicant poses a flight risk, and thus the court makes no finding that Applicant will abscond. The court is troubled, moreover, by the absence of procedures or safeguards in place to ensure that DOLI will ever comply with the Court's Deportation Order directing DOLI to place Applicant on the first available airline flight to the People's Republic of Bangladesh.

12. The court therefore concludes that after some time in custody, when deportation is not reasonably foreseeable, an Applicant's liberty interest will surpass DOLI's interest in effecting the safe removal of aliens ordered to be deported. At this point, detention becomes impermissible incarceration. In this case, however, the court need not decide how long an Applicant must remain in custody before his rights outweigh the Government's interest in effecting deportation because Applicant has been in custody for nearly two years. The court finds that Applicant's detention has extended well beyond that necessary to effect removal and has become punitive imprisonment without due process in contravention of Applicant's fundamental rights under the Fifth Amendment and Article I, § 5.

13. In light of its Order below and because Applicant's papers suggest that his treatment at the hands or direction of CNMI officials may have ceased, the court need not determine whether the unrefuted allegations of differential treatment constitute unlawful imprisonment for purposes of habeas relief under 6 CMC § 7101.

V. CONCLUSION

The court makes the following Orders:

1. The Application is hereby amended to add Major Ignacio Celis, Supervisor, Department of Labor and Immigration Detention Center, as a Respondent. The amended caption shall read as set forth on Exhibit "A" hereto.**[p. 10]**
2. The Government is directed to file a status report within ten (10) days of entry of this order advising the court whether travel documents have been obtained.
3. During such time as Applicant remains in DOLI custody, Applicant's visiting, telephone and newspaper privileges shall be fully restored. Applicant shall be permitted to communicate with counsel. Unless the Government makes a showing that restrictions on these privileges are in fact necessary to serve some governmental interest, these privileges shall remain in effect.
4. Should the Government be unable to effect deportation within ten (10) days, then Applicant shall be released. The release, however, need not be unconditional. To keep the Attorney General apprized of Applicant's availability for departure, Applicant may be required to appear periodically before an immigration officer for identification, give such information as the Attorney General may deem proper, and conform to restrictions on conduct or activities as prescribed, including the posting of a cash or property bond.
5. Since this monitoring may become permanent, the conditions imposed by the Government, if any, must be the minimum needed to assure availability for deportation. Further, the conditions must be reasonable and capable of being modified for Applicant to satisfy them.
6. If Applicant violates any conditions of his release, then DOLI may request the Attorney General to prosecute the violations as violations of Applicant's conditions of release. CNMI law provides for a method of punishing violations of conditions of release. Accordingly, further indefinite detention by the Government is unwarranted.

So ORDERED this 09 day of March, 2000.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge