UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 13-222 (MJD)

UNITED STATES OF AMERICA, Plaintiff, v. SAYNAB ABDIRASHID HUSSEIN, Defendant.	)))))))))	GOVERNMENT'S SUPPLEMENTAL POSITION REGARDING SENTENCING

The United States of America, by and through its attorneys John R. Marti, Acting United States Attorney for the District of Minnesota, Assistant United States Attorneys LeeAnn K. Bell and Charles J. Kovats, Jr., and Department of Justice Trial Attorney William M. Narus, hereby submits this Supplemental Position in response to the defendant's Position Regarding Sentencing (hereinafter, the defendant's "Sentencing Position").

In her Sentencing Position, the defendant, a lawful permanent resident of the United States, makes several legal and factual assertions about the potential consequences the sentence to be imposed by the Court may have on her immigration status. *See* Sentencing Position at pages 10-13. On January 21, 2014, the Court asked the government to provide briefing on the subject of the defendant's possible removal.

I. THE DEFENDANT'S LEGAL ASSERTIONS ARE FACIALLY CORRECT

The defendant correctly notes that the "offense of perjury is defined as an 'aggravated felony' under the Immigration and Nationality Act ("INA") if the term of imprisonment imposed is at least one year." *Id.* at page 11. The defendant is also correct

in her assertion that if the Court imposes a sentence of more than one year, she will "stand convicted of an aggravated felony" and Immigration and Customs Enforcement ("ICE") would be able to initiate deportation proceedings against her on that ground. *Id*. Pursuant to 8 U.S.C. § 1226(c), the defendant also could be expected to be placed in mandatory immigration custody upon her completion of her criminal sentence.[1] Finally, the defendant is correct that if the Court sentences her to a period of custody less than a year, "such a *conviction* would not make her deportable because she has lived in the United States for more than five years." *Id.* (Emphasis added).

However, the defendant's papers did not include the fact that her *conduct* alone may result in her removal. Nor did her papers discuss any legal relief or protections from removal the law may provide her. Each issue is described below.

[1] Pursuant to 8 U.S.C. § 1226(c) an alien who is deportable by reason of having committed an aggravated felony, or for having engaged in acts of terrorism as defined by 8 U.S.C. §§ 1182(a)(3)(B) and 1227(a)(4)(B), is subject to mandatory detention during removal proceedings. If the alien is subsequently ordered removed, 8 U.S.C. § 1231(a)(1)(A) provides that he or she shall be removed within 90 days. During this 90-day removal period, ICE is required to detain the alien. Upon the conclusion of the 90-day removal period the statute allows for either continued detention or release under supervision. *See* 8 U.S.C. § 1231(a). Although the statute gives the Attorney General the discretion to continue detaining an alien in this situation, this detention is subject to the limits of the Fifth Amendment's Due Process clause. *See Zadvydas v. Davis*, 533 U.S. 678, 690-92 (2001). In *Zadvydas* the Supreme Court interpreted 8 U.S.C. § 1231(a)(6), the provision that allows for detention beyond the 90-day removal period, to limit post-removal-period detention to a period "reasonably necessary to bring about the alien's removal from the United States." *Id.* at 689. The Court held that post-removal detention for six months is "presumptively reasonable." *Id.* at 701. Beyond six months, if removal is no longer reasonably foreseeable, continued detention is not authorized by the statute. *Id.* at 699. Under *Zadvydas*, if an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future in a habeas corpus petition, the Government must respond with evidence sufficient to rebut that showing. *Id.* at 701. If the Government rebuts the showing, it may continue to detain the alien.

II. REMOVAL AND RELIEF FROM REMOVAL, BRIEFLY

There are two phases to an immigration case. The first phase is meant to resolve the question of removability. This question asks whether there is a legal charge to remove an alien from the United States. Where, as here, the defendant was lawfully admitted to the United States, the burden is on the government to prove removability by clear and convincing evidence. *See* 8 U.S.C. § 1229a(c)(3)(A). If the immigration judge determines that the government carried its burden of proof, the alien would then be "removable."

Should the alien be found "removable" the immigration judge would next determine whether there is a legal basis that would allow the alien to remain in the United States – notwithstanding the judge's threshold finding that the alien is "removable." As outlined below, there are numerous provisions of the INA and the Convention Against Torture that provide aliens with relief from removal. Aliens applying for relief or protection from removal bear the burden of proof. *See* 8 U.S.C. § 1229a(c)(4)(A).

III. THE DEFENDANT IS SUBJECT TO REMOVAL PROCEEDINGS NO MATTER THE LENGTH OF THE SENTENCE IMPOSED

As described below, the defendant is likely to be subjected to removal proceedings no matter the length of sentence the Court imposes in the present case.

A. Removal and Relief From Removal

According to the INA, the defendant could be removed from the United States on two grounds: (1) following a conviction for an "aggravated felony" should the Court sentence her to more than one year of imprisonment (*see* 8 U.S.C. § 1227(a)(2)(A)(iii))

(hereinafter, "Ground 1"); or (2) for "security and other related grounds" (*see* 8 U.S.C. § 1227(a)(4)(B)) (hereinafter, "Ground 2"). The security and other related grounds do not have a minimal sentencing requirement and they do not require a criminal conviction. As a result, the defendant may be subject to removal regardless of the sentence imposed by this court.

1. Ground 1: The Aggravated Felony

In the defendant's Sentencing Papers, the defendant accurately characterized the legal framework that undergirds Ground 1. Put simply, the defendant's perjury conviction qualifies as an aggravated felony if the Court imposes a sentence of a term of imprisonment of at least one year. *See* 8 U.S.C. § 1101(a)(43)(S). Should the defendant suffer a conviction for an aggravated felony, the defendant would be removable.

It is harder to predict if an immigration judge would grant the defendant relief from removal under Ground 1. It can be said that if convicted of an aggravated felony, the defendant may not qualify for many of the grounds for relief provided by law. Each of the five types of relief provided under the law is discussed in Section III(A)(3) below.

2. Ground 2: Security and Other Related Grounds

According to 8 U.S.C. § 1227(a)(4)(B), "any alien who is described in subparagraph (B) or (F) of 8 U.S.C. § 1182(a)(3) is deportable. Subparagraph (F) of 8 U.S.C. § 1182(a)(3) makes deportable any alien "who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the

United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States."

Subparagraph (B) of section 1182(a)(3) makes deportable any alien involved in "terrorist activities" and further states:

> (i) In general any alien who—
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> (I) has engaged in a terrorist activity[2];
>
> (II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));
>
> (III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
>
> (IV) is a representative (as defined in clause (v)) of—
>
> (aa) a terrorist organization (as defined in clause (vi)); or
> (bb) a political, social, or other group that endorses or espouses terrorist activity;
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> (V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);
>
> (VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;
>
> (VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

[2] The term "engage in terrorist activity" is defined by 8 U.S.C. § 1182(a)(3)(B)(iv) to include, *inter alia*, soliciting funds or other things of value for either terrorist activity or for a terrorist organization; soliciting any individual to engage in terrorist activity or for membership in a terrorist organization; or to commit an act the actor knows or reasonably should know affords material support to a terrorist organization.

> (VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or
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> (IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years.

8 U.S.C. § 1182(a)(3)(B)(i).

Significantly, the alien need not have been convicted of a terrorism charge to be removable under Ground 2. Rather, the immigration judge is obliged to consider the conduct engaged in by the alien before determining whether the alien is removable. If the alien is found to be removable under Ground 2, the alien is ineligible for all forms of protection and relief from removal other than deferral of removal under the CAT. *See* 8 C.F.R. § 1208.17.

3. The Five Grounds of Relief from Removal

a. Asylum

i. Ground 1

Under 8 U.S.C. § 1158(b)(2)(A)(ii), an alien convicted of a "particularly serious crime" is not eligible for asylum. An aggravated felony conviction is *per se* a particularly serious crime for purposes of determining an alien's eligibility for asylum. *See* 8 U.S.C. § 1158(b)(2)(B)(i).

ii. Ground 2

Additionally, an alien who has engaged in terrorist activity is also ineligible for asylum. *See* 8 U.S.C. § 1158(b)(2)(A)(v) (providing that an alien described in 8 U.S.C. § 1227(a)(4)(B) is ineligible for asylum); 8 U.S.C. § 1227(a)(4)(B) (any alien who is described in 8 U.S.C. § 1182(a)(3) is deportable); and 8 U.S.C. § 1182(a)(3)(B)(iv) (defining the term "engage in terrorist activity" to include, *inter alia*, soliciting funds or other things of value for a terrorist activity or organization; soliciting individuals for membership in a terrorist organization; and providing material support to a terrorist organization).

b. Withholding of removal under the INA[3]

i. Ground 1

Under 8 U.S.C. §§ 1231(b)(3)(B)(ii) and (iv), an alien convicted of a "particularly serious crime" is ineligible for withholding from removal. For withholding purposes, a "particularly serious crime" is an aggravated felony in which the sentence imposed is at least five years' imprisonment. However, an immigration judge is not precluded from finding that an alien has been convicted of a "particularly serious crime" even if the sentence imposed for the offense was less than five years' imprisonment.

[3] Withholding of removal under the INA generally prevents an alien's removal to a particular country indefinitely if an alien can establish a "clear probability" that his or her life or freedom would be threatened in a particular country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion (actual or imputed). 8 U.S.C. § 1231(b)(3). If an alien qualifies for withholding of removal, the grant is mandatory and cannot be denied in the exercise of discretion.

ii. Ground 2

In addition, an alien who is found to have engaged in "terrorist activity" is statutorily barred from being granted withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(B)(iv).

c. Withholding of removal under the Convention Against Torture ("CAT")[4]

i. Ground 1

An alien with an aggravated felony is not eligible for withholding of removal under the CAT.

ii. Ground 2

Additionally, an alien who has been ordered removed for having engaged in "terrorist activity" is barred from being granted withholding of removal under the CAT. *See* 8 U.S.C. § 1231(b)(3)(B) and 8 C.F.R. § 1208.16(d)(2).

d. Deferral of Removal under the CAT[5]

Under either Ground 1 or Ground 2, the defendant is eligible for deferral of removal under the CAT. *See* 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a). There is no bar for deferral

[4] Withholding of removal under the CAT generally prevents an alien's removal to a particular country indefinitely unless the case is reopened and DHS establishes that the alien is not more likely than not to be tortured in that country. *See Khouzam v. Attorney Gen.*, 549F.3d 235, 240 n.3 (3d Cir. 2008); 8 C.F.R. §§ 1003.2, 1003.23. The motion to reopen will not be granted unless it is supported by evidence that was unavailable and could not have been presented at the earlier hearing. Withholding is granted to aliens meeting the "more likely than not" standard who are not subject to "mandatory denial" of withholding on national security, criminal, or related grounds. An alien granted withholding of removal may be removed to another country where he or she is not "more likely than not" to experience torture.

for aliens who are barred from receiving withholding of removal on national security, criminal, or related grounds. To obtain deferral of removal, an alien must prove that it is more likely than not that he or she will be tortured by or with the acquiescence of the government to which the alien would be removed. *See* 8 C.F.R. § 1208.18(a) and *Gallimore v. Holder*, 715 F.3d 687, 689 (8th Cir. 2013).

e. Cancellation of Removal[6]

i. Ground 1

Pursuant to 8 U.S.C. § 1229b, the Attorney General (acting through immigration judges and the Board of Immigration Appeals), has the discretion to "cancel" the removal of aliens who meet certain specified conditions. Under 8 U.S.C. § 1229b(a)(3), aliens who are legal permanent residents who have been convicted of an aggravated felony are ineligible for cancellation of removal.

ii. Ground 2

Under 8 U.S.C. § 1229b(c)(4), an alien who is deportable under 8 U.S.C. § 1227(a)(4) (which pertains to terrorist activities) is ineligible for cancellation of removal.

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[5] Deferral of removal is granted to those eligible for CAT protection who are barred from receiving withholding of removal on national security, criminal, or related grounds. *See* 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a). Deferral of removal is a more temporary protection. It may be terminated at any time the alien is no longer "more likely than not" to face torture. *See* 8 C.F.R. § 1208.17(d). Like withholding, an alien granted deferral of removal may be removed to another country "where he or she is "not more likely than not" to experience torture.

[6] Cancellation of removal is a one-time forgiveness of grounds of deportability or inadmissibility for certain LPR aliens. 8 U.S.C. § 1229b(a). An alien who is a LPR must show at least seven continuous years of residence in the United States following an admission in any status, plus five years of lawful permanent resident status.

B. The Defendant's Status

It is the view of the government that if the court sentences the defendant to a term of imprisonment exceeding one year, she is in jeopardy of removal under both Ground 1 and Ground 2. Should the Court sentence the defendant to a term of imprisonment less than one year, she is in jeopardy of removal under Ground 2, only.

However, regardless of whether the defendant should face removal under Ground 1, Ground 2, or both, the question central to the defendant's status is *whether the defendant engaged in "terrorist activity"* as defined under the INA. If an immigration judge resolves this question in the affirmative, she will be removable, regardless of the sentence she receives for her perjury conviction. If, on the other hand, an immigration judge resolves this question in the negative, she will not likely be removable unless she is sentenced to a year or more of confinement for her perjury conviction, in which case the conviction will qualify as an aggravated felony.

Finally, should the immigration judge determine that the defendant did engage in "terrorist activity" as defined under the INA, the defendant may seek relief from removal by applying for deferral under the CAT (*see* Part III(A)(3)(d) above). No other forms of relief from removal will likely be available. Whether an immigration judge would grant the defendant deferral from removal under the CAT cannot reasonably be predicted with any certainty.

IV. THE DEFENDANT'S FACTUAL ASSERTION THAT REMOVALS TO SOMALIA ARE ONGOING IS INCORRECT

In her papers, the defendant alleges that the federal government is engaging in an "aggressive effort" to remove Somali immigrants who have been convicted of offenses in the United States. *See* Defendant's Position at page 10. Although this may have been true at one time, it is no longer true. Beginning in mid-October 2013, local DHS has not attempted to effectuate a removal to Somalia. Furthermore, DHS has released from "mandatory immigration custody" the aliens who were to be removed to Somalia because DHS determined that "there is no significant likelihood of removal in the reasonably foreseeable future". *See Zadvydas*, 533 U.S. at 701 (2001).

V. THE DEFENDANT FAILS TO PRESENT ATYPICAL COLLATERIAL CONSEQUENCES OF HER ALIENAGE SUCH THAT THE COURT SHOULD DEPART ON THAT BASIS.

As a preliminary matter, the United States agrees with the defendant that the Eighth Circuit has not forbidden the consideration of alienage and the resulting collateral consequences in crafting the appropriate sentence. *See United States v. Lopez-Salas*, 266 F.3d 842, 847 (8th Cir. 2001). "However, just because an unmentioned factor may be considered for departure, 'does not mean that courts have unfettered authority to depart whenever that factor is invoked.'" *Id. quoting United States v. Bautista*, 258 F.3d 602, 606 (7th Cir. 2001). In fact, the effect of deportation must be ***atypical*** in order to justify a departure. *Id.* However unfortunate, the defendant's circumstances are in fact typical, and thus, they do not present a proper basis for departure.

In *Lopez-Salas*, the Court found collateral consequences which could affect the ***actual*** conditions of a deportable alien serving a sentence, including the denial of time-off for completion of the drug treatment program and the inability to serve the final portion of an alien's sentence in community confinement, to be "typical." *Id.* The Court held that these were not atypical circumstances because defendants could not (1) differentiate their own case from that of any other deportable alien and (2) could not distinguish the plight of aliens from any other class of inmates who would not qualify for those benefits. *Id.*

In making that finding, the Court adopted the rationale of the Seventh Circuit in *Bautista*, 258 F.3d 602. The Seventh Circuit held that although the district court is not prohibited from considering the ***post-sentence*** collateral consequence of deportation, consideration is only justified if the circumstances of the case are extraordinary. The Seventh Circuit reversed the district court which had considered a number of facts claimed by Bautista to merit a departure, including that Bautista had lived half is life in the United States, that deportation would cut him off from his family and home, and that he had no friends or family in Peru other than an abusive father.

The Court found that Bautista's circumstances were not extraordinary. *Id.* In doing so, it cited *United States v. Wright*, 218 F.3d 812 (7th Cir. 2000), in which the Court reversed a departure based on the ordinary effect of a mother's long incarceration on her young child. It also cited *United States v. Carter*, 122 F.3d 469 (7th. Cir. 1997), which held that disruption of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration.

Read together, it is clear that a departure based on the collateral consequences of being a deportable alien – either the actual conditions of the sentence or post-sentence deportation – are only appropriate in atypical or extraordinary circumstances. To put it bluntly, the defendant faces no consequence more extraordinary than a cooperating Mexican-citizen drug trafficker with a family in the United States returning to a cartel-controlled Mexico. The fact that she has a family in the United States and is unfamiliar with her home country makes her no different from hundreds of defendants, men and women, who are separated from their children and families as a result of their own criminal activities.

Finally, to the extent the defendant urges the court to fashion its sentence so as to ***circumvent*** the collateral consequences, it would not be appropriate under the statutory sentencing framework. This Court's obligation is to determine the appropriate sentence. To give a departure in order to circumvent the laws of a separate entity would not be appropriate.

VI. CONCLUSION

Based on the foregoing, the government respectfully submits that this Court should impose a sentence on the defendant that considers the factors outlined in 18 U.S.C. § 3553 and the United States Sentencing Guidelines. The Court should not attempt to fashion a

sentence to avoid collateral consequences that the defendant may suffer as a result of her conduct and that she was aware of at the time of her guilty plea.

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