



AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY¹

ICE's Detention After Removal Hearing (DARH) Program Practical Suggestions and Legal Analysis for Potential Challenges

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By the Legal Action Center

I. INTRODUCTION

In August 2003, Immigration and Custom Enforcement (ICE) officers began arresting respondents in Hartford, Connecticut who did not win their merits hearings immediately after completion of their hearings instead of allowing them to remain free while they appealed their cases to the Board of Immigration Appeals (BIA). The results from the Hartford Pilot Project were reported to be inconclusive and arrests and detentions in Hartford reportedly have ceased.

ICE very recently began implementing a similar pilot program in Denver and Atlanta.² There are rumors that ICE is considering expanding the program nationwide. For the purposes of this advisory, we are calling the program "Detention After Removal Hearing" or DARH. AILA members in Denver and Atlanta report that the following respondents are subject to detention under the program:

- * Respondents who are issued an order of removal by an Immigration Judge (IJ) regardless of whether they intend to file an appeal with the BIA.
- * Respondents who are granted voluntary departure with a condition of posting a bond.³

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² See "*ICE Announces Expansion of Pilot Detention Project to Atlanta and Denver*," AILA Infonet Dec. No. 04032614 (March 26, 2004).

³ Note, reports to date are that ICE claims that once the voluntary departure bond is posted, the respondent will be released without having to pay an additional bond.

There are reports that ICE also plans to subject to DARH respondents who are granted relief by an IJ but in whose case ICE reserves appeal or appeals on an error of law made by the IJ.⁴

This practice advisory provides some basic nuts and bolts suggestions for lawyers with clients subject to DARH, then outlines the statutes and regulations governing the detention of respondents subject to DARH, and sets out potential legal challenges. We caution that the suggested legal challenges are untested and will be affected by how ICE implements the program in general and in any particular case.

II. NUTS AND BOLTS SUGGESTIONS FOR ATTORNEYS AND CLIENTS IN AFFECTED AREAS

To date, ICE is applying the DARH Program in immigration courts in Denver and Atlanta. These suggestions are for lawyers representing clients in removal proceedings in those areas:

Before the hearing:

If clients are warned ahead of time about the DARH program, they will be able to prepare themselves, their families, and their employers for the possibility they may be arrested.

There are many unknowns and ICE's responses are not predictable.

If clients are taken into custody after the hearing, they have the right to demand an immediate bond redetermination hearing. However, it remains to be seen how "immediate" that bond redetermination hearing will be held or whether it will be held while the client and lawyer are in the same building or via telephone later.

Clients can direct you as to how to proceed after the hearing if ICE moves to take them into custody. Here are some issues you may want to discuss (in addition to the family and employment disruptions):

Are there issues or factors that may come up at the hearing that may affect the detention decision? Obviously these are things the lawyer would want to know about in any event, but ICE may ask especially probing questions or may have done more investigation than normal in preparation for the detention evaluation.

How does the client want you to proceed? Of course, you will object to any change in their release status, but specifics will help. Would they want to pay an additional bond? How soon could they pay an additional bond? Could they pay a voluntary departure

⁴ *But see* February 9, 2004 Memorandum from Michael J. Garcia, ICE Assistant Secretary, regarding Detention Policy Where IJ has Granted Asylum and ICE has Appealed, available on AILA InfoNet Document # 04022462 (web address: <http://www.aila.org/infonet/fileViewer.aspx?docID=12356>).

bond? Are they prepared to depart if granted voluntary departure and if any BIA appeal is unsuccessful?

Did the client already post a pre-hearing bond, and if so, what are the details and the contact information with the bonding company?

Should you demand that ICE obtain an arrest warrant? What are the implications and possible consequences? (see below in this advisory). Should you or your client ask the ICE agent if the client is “under arrest?” “Free to go?”

If there were a legal and factual basis and a need for filing a habeas corpus petition in federal district court, would the client want you to take that step? How soon could you prepare the petition? How much will this legal work cost the client? District court judges may not be able to accommodate requests for immediate hearings, so reducing expectations may prove helpful. Also, exhaustion of administrative remedies (an IJ bond redetermination hearing) may be required and is advisable unless those administrative remedies are unavailable or futile.

It may be helpful before the hearing to prepare the “bond worksheet” that ICE will use to evaluate the respondent’s custody status. Counsel and the respondent can describe the positive and negative factors and provide supporting documents to the ICE agent either before or after the hearing. The bond worksheet currently used by Denver ICE is attached to this advisory (or in a separate PDF document accompanying the electronic version of this advisory). Presumably the respondent may include additional information and is not limited to the space on the bond worksheet itself.

At the hearing:

If it appears the IJ is going to issue an adverse decision on the merits or relief, particularly if it is late in the afternoon (after ICE officers may be unavailable to take bonds) consider asking the IJ to delay rendering the decision until the following morning. This will give your client time to make arrangements. However, expect ICE to object that the client may not reappear for the decision or to demand assurances that the client will appear.

If ICE agents are in the courtroom or enter the courtroom at or near the end of the hearing, you may want to ask the IJ to continue operating the audiotape so that a record is made of what the Trial Attorney, the ICE agents, and you and your client say.⁵ In some situations, the IJ may be willing to remain to conduct an immediate bond redetermination hearing or return to the courtroom after ICE interviews your client.

⁵ See attached October 10, 2003 Memorandum from The Office of the Chief Immigration Judge regarding “Procedures for Going Off-Record During Proceedings,” available on AILA’s InfoNet as Document # 03121714 (web address: <http://www.aila.org/infonet/fileViewer.aspx?docID=11825>).

III. STATUTORY AND REGULATORY AUTHORITY

Authority to Detain

Respondents who are not subject to mandatory detention under INA § 236(c) based on certain criminal convictions, may be detained pursuant to INA § 236(a) while removal proceedings are pending before the immigration judge or the BIA. That section provides:

(a) Arrest, Detention, and Release.—

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) [relating to mandatory detention] and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but . .

INA § 236(a) (emphasis added). Detention under INA § 236(a) is discretionary. Both DHS and the immigration courts⁶ “may,” in the exercise of discretion, decide to continue a respondent’s detention or “may,” in the exercise of discretion, decide to release the respondent.

The custody procedures are set forth in the regulations. 8 C.F.R. § 236.1; 8 C.F.R. § 1003.19. *See also* 8 C.F.R. § 287. DHS officials are authorized to arrest individuals and make initial custody determinations. These decisions are subject to review by an immigration judge in a bond redetermination hearing. The IJ’s decision is appealable to BIA.

Authority to Rearrest and Revoke Bond

With respect to rearrests and change in custody status, INA § 236(b) states,

Revocation of Bond or Parole. –The Attorney General at any time may revoke bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

⁶ INA § 236(a) was added by IIRIRA § 305. At the time of IIRIRA’s enactment, the Attorney General – as head of the Department of Justice – referenced both the former INS and the immigration courts. The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the INS and transferred the agency’s functions to bureaus within the newly established Department of Homeland Security (DHS). HSA §§ 101, 102, 441, 451, 455, 456, 471. The HSA also provided that where the Act transferred a function to the Secretary of Homeland Security, any reference in the law to another official shall be deemed to refer to the Secretary. HSA § 1517. These changes took effect on March 1, 2003. Congress has not yet amended the INA to reflect the delegation of authority to the DHS.

The regulation regarding revocation, 8 C.F.R. § 236.1(c)(9), states,

When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled.

The BIA has interpreted this regulation, previously codified at 8 C.F.R. § 242.2(b) (1981), to mean that INS could revoke a bond even if there was a redetermination hearing by the IJ. *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981). *See also Matter of Valles*, 21 I&N Dec. 769 (BIA 1997); *Matter of Chew*, 18 I&N Dec. 262 (BIA 1982).

Also regarding bond, detention and release, see also AILF's Practice Advisory at: http://www.aifl.org/lac/lac_pa_011303.asp and resources referenced therein.

Definition of an “Administratively Final” Removal Order

INA § 101(a)(47)(A) defines “order of deportation” [removal] and says that such an order becomes final upon the earlier of a BIA determination affirming the order, or the expiration of the period to appeal an IJ decision (30 days from the date of that decision). Thus, a decision issued by an IJ is not “final” until the time for appeal lapses.

IV. POTENTIAL LEGAL CHALLENGES

Individual legal challenges will depend upon the facts and circumstances of individual cases. General challenges to the DARH program will depend upon how DHS implements it.

No Changed Circumstances

* *Qualifying ICE's Authority to Revoke Bond – Changed Circumstances*

Arguably, an IJ's finding of removability is not a changed circumstance warranting the arrest and detention of a respondent who (1) was not previously detained; or (2) was previously detained but eligible for release on bond.

The BIA's decision in *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981) could be interpreted to mean that INS may revoke an IJ's bond determination *only* where there are changed circumstances relating to the bond decision. In that case, the IJ had redetermined the respondent's bond amount. At a subsequent merits hearing, the IJ ordered respondent deported; the district director immediately revoked the bond decision and set bond at a higher amount. The BIA found that the fact that the IJ ordered respondent deported and denied relief contributed to a finding of changed circumstances. The BIA noted that INS' actions did not undermine an impartial and independent determination by an IJ because respondent had the right to appeal the

bond amount to the Immigration Judge. Importantly, however, there were other factors (including new evidence about criminal activity) that contributed to the finding of changed circumstances.⁷ Arguably, in the absence of other factors that would support a finding of changed circumstances, *Matter of Sugay* should not justify the revocation of bond or setting a higher bond.

Notably, some number of respondents who are found removable by the IJ will win their appeals to the BIA and, those who lose before the BIA, may win their appeals in federal court. In these cases, the IJ's finding of removability is neither definitive nor final. Moreover, respondents granted relief by the IJ (where DHS appeals a legal error) have already won their case before an IJ and therefore, DHS should be hard pressed to demonstrate changed circumstances.

Where DHS cannot prove changed circumstances in an individual case, the respondent could argue that the arrest and detention is unlawful. Even if the person is later released, this theory may support a false imprisonment or other type of tort claim under the Federal Tort Claims Act (to recover damages for time in detention). This theory is untested.

Where An IJ Had Set Bond Prior to the Merits Hearing

The following arguments may be applicable in individual cases where the IJ previously had set a bond prior to the merits hearing. Some of these arguments are similar to those used to challenge the automatic stay regulation at 8 C.F.R. § 1003.19(i)(2). In automatic stay cases, the IJ's bond decision is rendered meaningless by the mere act of the DHS attorney filing a notice staying that ruling pending the government's BIA appeal. Arguably, in DARH cases, the IJ's custody decision issued before the individual's removal hearing is rendered meaningless by a subsequent DHS decision to detain the individual after the removal hearing. The following cases address this issue in the context of the automatic stay regulation and may support the arguments set forth in this section of the practice advisory. *Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446, 448 (D. Conn. 2003); *Uritsky v. Ridge*, 286 F. Supp. 2d 842 (E.D. Mich. 2003); *Zavala v. Ridge*, 2004 U.S. Dist. LEXIS 3620 (N.D.Cal. 2004); *Almonte-Vargas v. Elwood*, 2002 U.S. Dist. Lexis 12387 (E.D. Pa. 2002).

NOTE: If an individual is afforded a second bond redetermination hearing, it may weaken or moot these legal challenges because the person may have obtained the very relief he or she was seeking in the habeas corpus petition.

*** Statutory/Regulatory Argument Regarding ICE's Authority to Revoke Bond**

The INA is silent about the procedures for making custody determinations. However, the regulations (as interpreted by the BIA) permit ICE to revoke the bond. Potentially, there is an

⁷ In addition, the respondent in *Matter of Sugay* was ordered released on bond, and therefore, the case does *not* support the proposition that an adverse decision by the IJ justifies continued detention without bond. See *Noorani v. Smith*, 810 F. Supp. 280, 284 (W.D. Wash. 1993).

argument challenging ICE's authority based on 8 C.F.R. § 1003.19(e). This regulation says that a respondent can only request subsequent bond redetermination hearings when there are changed circumstances. Arguably, it follows that ICE also should have to go to the IJ to request a change in custody status. However, this argument is weakened by the fact that the regulations do not seem to prevent the respondent from seeking a change in custody status by going directly to the district director. See *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997); *Matter of Chew*, 18 I&N Dec. 262 (BIA 1982).

* *Claims Regarding INA § 236(a)*

Especially where the respondent is not afforded a bond redetermination hearing, it could be argued that DHS' implementation of the DARH program violates INA § 236(a). DARH vests in DHS the unfettered authority to nullify the ordered release of the respondent and, therefore, eliminate the effect of any individualized determination by an impartial adjudicator.

At least absent a change in circumstances, INA § 236(a) does not contemplate the detention of respondents after an IJ has already conducted an individualized determination and ordered release. The IJ made the initial custody evaluation anticipating not just IJ proceedings but also potential appeals.

At least where the respondent is detained, not released on bond, and not afforded a bond redetermination hearing, it can be argued that Congress did not intend for low-level DHS officers to override an IJ's discretionary determination under § 236(a). In that situation, DARH contravenes § 236(a)'s mandate that detention and release determinations are discretionary by making detention mandatory – albeit temporarily. If Congress wanted to make detention mandatory for these individuals, it would have done so as it did in INA § 236(c). Congress' decision not to do so must be given effect.

* *Claims Regarding Substantive Due Process*

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that government detention violates due process *unless* there are “certain special and ‘narrow’ non-punitive ‘circumstances,’ [citation omitted], where a special justification, such as harm-threatening mental illness, outweighs the ‘respondent's constitutionally protected interest in avoiding physical restraint.’” *Id.* (citations omitted).⁸ The *Zadvydas* Court further stated that civil confinement of noncitizens must be limited with respect to both the length of detention and the underlying purpose justifying the detention. 533 U.S. at 671.

Thus, government detention is not permissible if the respondent's liberty interest outweighs the government's justification for the detention. It is well established that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Zadvydas*, 533 U.S. at 690 (citation omitted).

⁸ However, in *Demore v. Kim* the Supreme Court distinguished post-order detention, which was at issue in *Zadvydas*, from pre-order detention, and upheld mandatory pre-order detention. 538 U.S. 510 (2003).

Where there are no changed circumstances and the respondent is not afforded a second bond redetermination hearing, it can be argued that an arrest under the DARH program eviscerates the IJ's prior decision to release an individual from detention while their removal hearing is pending. In rendering the prior decision, the IJ necessarily determined the respondent is neither a flight risk nor a danger to the community. Thus, DHS – which is both the initial adjudicator and the prosecutor (in the bond hearing) and the prosecutor (in the removal hearing) – is unilaterally overriding and nullifying the determination of an IJ.

Depending upon how the DARH program is implemented, there may be an argument that it does not achieve its stated purpose in the least restrictive way. Rather, it may have the effect of classifying certain respondents or types of respondents as *per se* absconders even though an impartial IJ has already found that the respondent is not a flight risk or a public danger. The Supreme Court has “explicitly stated that a ‘purpose to injure [society] could not be imputed generally to all aliens subject to deportation,’” *Leader v. Blackman*, 744 F. Supp. 500, 508 (S.D.N.Y. 1990) (quoting *Carlson v. Landon*, 342 U.S. at 538). Similarly, detention based on imputed rather than actual characteristics (of being a flight-risk) is not justifiable.

Finally, it could be argued that the DARH program is not narrowly tailored to further the government's interest in protecting pre-removal flight. Many respondents subject to DARH will win their BIA or federal court appeals. Detaining a broad scope of respondents based on imputed characteristics cannot be characterized as narrow or applying only to special circumstances. The government likely will respond to this argument by citing unfavorable statistics of the number of non-detained respondents who fail to depart after a removal order. *See, e.g., Demore v. Kim*, 538 U.S. 510 (2003) (citing statistics about the risk of flight of non-detained individuals with criminal convictions).

* *Claims Regarding Procedural Due Process*

Depending upon how the program is implemented and particularly where the respondent is not afforded a second bond redetermination hearing, it could be argued that DARH violates procedural due process. The determination of whether government conduct violates procedural due process requires consideration of three factors: (1) the nature of the private interest affected; (2) the risk of an erroneous deprivation of the interest as a result of the procedures used and the probable value of additional or substitute safeguards; and (3) the government's interest in using its own procedures and the fiscal and administrative burdens entailed by additional or substitute safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976).

Review of these factors supports finding DARH violates procedural due process. First, the private liberty interest affected by detention is among the most fundamental and valued in our society.

Second, the DARH program would subject respondents to an extremely high risk of erroneous deprivation of their liberty interest because both Congress, in enacting the statutory detention provisions, and an IJ, in ordering bond following a hearing, have already determined that such respondents are eligible for release during removal proceedings (including appeal to the BIA).

Due process cannot be satisfied when the individualized determination initially provided by the IJ was merely a charade. Respondents subject to DARH who previously had a bond hearing before an IJ, were afforded an opportunity to present witnesses and documentary evidence and cross-examine DHS' evidence. Based on all the evidence presented at the hearing, the IJ ordered these respondents released on bond. Yet this order has been rendered completely meaningless by the DARH program. By rearresting, detaining and setting a higher bond, DHS has rendered the IJ's decision a nullity. The DARH program vests more control over custody status in low-level DHS officers than in an IJ.

Third, the cost to the government of respecting the IJ's initial bond determination – in which the IJ arguably already considered whether the person should be detained if found removable – is low compared to the consequences of subjecting respondents (some of whom will ultimately win their cases) to arrest and detention.

Where Respondent is Denied a Timely Bond Hearing

** Challenge to Timely Bond Redetermination Hearing*

If, after revoking their bond, respondents are not afforded bond redetermination hearings, they may be able to challenge the immigration court's failure to provide a timely bond hearing. This challenge may be aided by the fact that the Office of the Chief Immigration Judge has said that 100% of all custody hearings shall be completed within three days. *See* Memo, OCIJ, *Case Completion Goals* (April 26, 2002) (Posted on AILA InfoNet at Doc. No. 03070847 (July 8, 2001)).

Matter of Sugay lends additional support to this challenge. In that case, it appears that the IJ conducted the bond redetermination hearing at the same hearing where he made a decision on the merits of respondent's case. EOIR, however, has announced that IJs will not conduct bond hearings at the conclusion of merits hearings:

Any request for custody redetermination must first be addressed to the DHS. Once the DHS has made an initial custody determination – which, by regulation, they have generally 48 hours to make [8 C.F.R. § 287.3(d)] – only then can an immigration judge review the determination. However, EOIR has and will continue to adjust bond hearing schedules as necessary.⁹

Conflict With the Statutory Right to Voluntary Departure

If respondents are granted voluntary departure, but ICE arrests or rearrests them, and detains them without bond or on a high bond, so that the respondents cannot depart within the voluntary

⁹ This was EOIR's response to a question posed at the September 25, 2003 AILA/EOIR Liaison Meeting. Specifically, AILA asked EOIR about the Hartford Pilot Project and whether an IJ could conduct a custody hearing immediately at the close of the merits hearing to avoid automatic detention.

departure period, the respondents may be able to argue this action violates their statutory right to voluntary departure under INA § 240B. This argument is untested.

Challenge to Arrest Under DARH As Executed Without a Warrant

INA § 236(a) authorizes arrest and detention only “[o]n a warrant issued by the Attorney General.” INA § 236(b) authorizes “rearrest . . . under the original warrant.” Where no arrest warrant has been issued, DARH arguably violates the statute. Presumably, DHS would attempt to remedy this alleged violation by issuing the warrant, which could moot the claim. However, attorneys might consider requesting proof of the warrant during the arrest/rearrest. In some cases, where DHS is unable to produce the warrant, it *might* delay or deter arrest.

However, INA § 287(a)(2) authorizes warrantless arrests if the arresting officer has reason to believe that the respondent is in the US in violation of law and is likely to escape before a warrant can be obtained for his or her arrest. *See also* 8 C.F.R. § 287.7(c)(2)(ii) (stating that a warrant should be obtained whenever possible prior to an arrest). Where the respondent is arrested after the IJ has granted relief (even if DHS appeals), arguably DHS has no basis to contend that the person is in the US in violation of law. Where the IJ has issued a removal order, the respondent may argue that he or she is not likely to escape before a warrant can be issued and, thus, should not be detained without a warrant.