

1 THE COURT: We're in a chambers conference in
2 the matter of Hiu Lui Ng against Michael Chertoff.
3 This is a motion for temporary restraining order,
4 preliminary injunction and an emergency motion for an
5 expedited hearing. So you're Mr. Basdavid.

6 MR. BASDAVID: Basdavid.

7 THE COURT: Basdavid. Okay. Tell me what
8 you've got here.

9 MR. BASDAVID: Thank you, your Honor. There's
10 two issues that we're presenting to the Court, the
11 first being the Zadvydas detention beyond the removal
12 period issue, the effect being the denial of medical
13 care and the denial of access to counsel.

14 Starting with the Zadvydas position, your Honor,
15 it's an important position. Mr. Ng has been subject to
16 a final order of removal since that would be February
17 2nd, 2001 at the point of which the in absentia order
18 was entered by the Court. Motion to reopen was
19 submitted; however, it was denied by the Board of
20 Immigration Appeals. A petition for review of that
21 denial was to the Second Circuit. The Second Circuit
22 has remanded the matter back to the Board. However, at
23 this point, the case has not yet been reopened
24 notwithstanding the denial of reopening is on review
25 again by the Board. Therefore, a final order of

1 removal has remained in effect pursuant to 8 U.S.C.
2 Section 1231. He has been detained now for over a year
3 by the Government. The fact he has not been removed
4 demonstrates removal is unlikely in the foreseeable
5 future.

6 THE COURT: Can he be removed in the face of an
7 order from the circuit to reopen the proceeding?

8 MR. BASDAVID: It's our position that the
9 circuit has not reopened the matter. They have
10 remanded the matter to the Board to reconsider its
11 denial of the motion to reopen, but, in fact, the case
12 has not been reopened. Whether or not he can be
13 removed under a close reading of the statute is
14 irrelevant as to whether or not defining whether the
15 removal period is in effect. The removal period under
16 1231(a)(1)(B) is very specifically defined as under (i)
17 is defined as the date the order of removal is
18 administratively final. Under (ii) it says if the
19 order of removal -- a stay has been issued and the
20 order of removal is under judicial review the date the
21 judicial review is complete.

22 Because the order of removal itself is not under
23 judicial review, it's denial of the motion to reopen,
24 it still remains the removal period or the removal
25 order is administratively final unless and until the

1 Board reopens the matter. And therefore, since
2 February 2nd, 2001, Mr. Ng has been subject to a final
3 order of removal.

4 Since he has been detained since July 19th,
5 2007, it's our position and pursuant to the Supreme
6 Court's decision in Zadvydas v. Davis detention is
7 unreasonable absent showing Mr. Ng is a flight risk or
8 danger to the community, none of which my understanding
9 is the basis for detention.

10 The second issue we're presenting to the Court
11 is the fact that Mr. Ng has been denied medical care
12 and, relatedly, unable to access counsel. He is
13 physically unable to get out of bed. He has requested
14 repeatedly a wheelchair be made available and the only
15 thing he has been told is he would be given a cane, not
16 a wheelchair. As a result, he remains confined to bed.
17 We're only able to communicate with other Chinese
18 detainees who are calling on his behalf and relaying
19 messages back and forth.

20 When Mr. Wong attempted to visit him, he was
21 told that if he was able to walk to the visitation room
22 with a cane, he could visit with his attorney,
23 otherwise he would be unable to visit with his
24 attorney. His attorney was not permitted to go back
25 into the facility to visit him.

1 Therefore, he's being denied both adequate
2 medical care and access to his attorney. For these
3 reasons, we think immediate release is appropriate.

4 THE COURT: Okay.

5 MR. MYRUS: Well, your Honor, Richard Myrus on
6 behalf of the Government.

7 First of all, my understanding is that today's
8 TRO/preliminary injunction hearing is directed to the
9 issues of the petitioner's access to medical care and
10 access to counsel. The Zadvydas issue isn't teed up in
11 the pleadings. That's the subject of a habeas
12 petition, and I'm certainly prepared to address it.

13 THE COURT: It's a little confusing, actually,
14 to me. As I looked at the papers, I wasn't exactly
15 sure whether the TRO went to everything or just the
16 limited issues of access to counsel and medical care
17 and so forth. Maybe you can clarify that.

18 MR. BASDAVID: Certainly, your Honor. It's our
19 position that under the habeas statute, 28 U.S.C. 2243,
20 the filing of the habeas, in essence, creates a TRO
21 based upon the definition of -- based upon the
22 requirement that in order to show cause shall be
23 directed requiring an answer within three days, but up
24 to twenty, for good cause showing by the Government.

25 We added, in addition, the medical TRO because

1 that wasn't inherently defined in the statute. So it
2 is our position that this is to address both the
3 substantive relief sought in the habeas as well as the
4 supplemental temporary restraining order that we did
5 seek.

6 THE COURT: Go ahead.

7 MR. MYRUS: I'll just note that it's less than
8 24 hours since these papers were filed, but be that as
9 it may, there's no verified complaint here.

10 THE COURT: It's not less than 24 hours. It's
11 three days. This was filed on July 29. This is July
12 31st.

13 MR. MYRUS: I apologize, your Honor. My
14 understand is this was served on the Government
15 yesterday, but I may be in error.

16 THE COURT: It may be that it wasn't served on
17 you. It was filed in the Court anyway.

18 MR. OLEN: It actually was served at the same
19 time, moments after it was filed.

20 THE COURT: All right.

21 MR. MYRUS: There's no verified complaint here.
22 There's no complaint at all. And there's no affidavit
23 addressing the medical care issue, as far as I can
24 tell.

25 What's going on here is that the medical care

1 and the access to counsel issues are not properly pled.
2 Those are not -- habeas petition is not the proper
3 vehicle to raise medical treatment issues, and the case
4 law is pretty clear on that.

5 Petitioner needs to bring some form of a civil
6 rights claim because medical care goes to conditions of
7 confinement, not to the reasons or duration of
8 confinement.

9 With respect to access to counsel, which is the
10 other relief that is sought in the TRO proceeding, the
11 Aguilar case from the First Circuit makes it quite
12 clear that petitioner needs to exhaust his
13 administrative remedies with respect to that kind of
14 issue before seeking judicial relief.

15 On the Zadvydas issue, I haven't had a chance to
16 obtain the administrative file yet, but my
17 understanding is that with respect to Mr. Ng, this
18 matter was remanded by the Second Circuit to the BIA
19 and, therefore, Zadvydas doesn't apply because there is
20 not a final order of deportation in effect.

21 In fact, just within the last couple of days, I
22 believe, Mr. Ng has filed another petition, a motion
23 for bond. So if there were a final order of
24 deportation in effect, Mr. Ng certainly wouldn't be
25 filing a motion for an additional bond. There's an

1 administrative proceeding ongoing now, and, therefore,
2 to the extent the petitioner is relying on Zadvydas, it
3 doesn't apply.

4 In fact, again, I don't have the A-file, but my
5 understanding is that the petitioner filed another
6 motion to reopen this matter in June. So I may be
7 wrong, but that's my understanding.

8 In any event, given the filings by the
9 petitioner, as well as the Second Circuit's remand to
10 the BIA to review this matter, this is not a case in
11 which the Zadvydas six-month time standard would apply.

12 I'd like to go into these issues in a little
13 more detail with respect to the medical claim, for
14 example, unless the Court thinks it's unnecessary. I'm
15 prepared to address the adequacy of the care that he's
16 received.

17 THE COURT: We're here. Why don't you go ahead
18 and get into it a little bit. You've raised some
19 procedural issues, which are legitimate, so you might
20 as well outline the substance, too.

21 MR. MYRUS: Absolutely. The medical history
22 here is fairly clear, and I have a copy of what's been
23 provided to me as the medical records, which I can
24 provide to counsel as well, but I can summarize that
25 now.

1 This individual has been seen by medical
2 professionals at Wyatt at least a half a dozen times
3 since his arrival in early July. He's been seen by the
4 nursing staff. He's been seen by a physician on
5 several occasions. He's been prescribed analgesics,
6 anti-inflammatories on several occasions. Again, my
7 understanding, without having been able to spend a lot
8 of time investigating this, is that on July 18th he was
9 seen by the doctor. He was prescribed an X-ray. He
10 was given a cane. The X-ray results were read on the
11 20th, and they were determined to be unremarkable.

12 He was seen by the medical staff after that. He
13 was scheduled for a CT scan. On July 26th, which we
14 can talk about in connection with the other issue,
15 Mr. Ng was transported by authorities at the Wyatt to
16 Pawtucket Memorial Hospital's Emergency Room because he
17 was complaining of severe back pain.

18 So to suggest that he hasn't received adequate
19 medical care is really stretching it. When he was seen
20 at Pawtucket Memorial, he wasn't admitted. He was
21 returned to Wyatt with a diagnosis of lower back strain
22 and sciatica.

23 Subsequently, my understanding is that he
24 refused to attend a scheduled CT appointment. Upon his
25 return from Pawtucket Memorial, he was moved from his

1 prison cell to a cell in the Health Services Unit. One
2 of the complaints in the papers is he had to climb up
3 to the second bunk. Early on in this process he was
4 given an order allowing him to have a lower bunk.

5 Subsequently, he was transferred to HSU, the
6 Health Services Unit, where he is in a single cell room
7 where his medications, my understanding is, are brought
8 to him. So to the extent that there's a complaint that
9 he was required to wait on a line to receive his meds,
10 that's inaccurate.

11 The facts as reflected in the medical record
12 make it very clear that he has received more than
13 adequate medical care. And so, on the merits, there's
14 a very low likelihood of success, even if procedurally
15 habeas were the proper vehicle, which it's not, to
16 challenge conditions of confinement.

17 So with respect to access to counsel, the facts
18 are somewhat unclear. But this individual was not --
19 was never told that he couldn't meet with his attorney
20 or denied the opportunity to meet with his attorney.
21 He refused, as I understand it, to leave his cell to go
22 and meet with his attorney. The officials at Wyatt
23 were prepared to make a meeting room available for the
24 attorney who was there to visit with Mr. Ng, and so to
25 suggest that in some way the Government or Wyatt

1 officials actively thwarted that is inaccurate.

2 Again, I just want to point out that under First
3 Circuit case law it seems clear that the proper
4 mechanism here is to exhaust administrative remedies
5 before bringing a claim like that.

6 And in addition, counsel mentioned a moment ago
7 that Mr. Ng has been denied the opportunity to speak on
8 the phone with his attorneys, which is just flatly
9 incorrect since in the most recent declaration that an
10 attorney on Mr. Ng's behalf filed I guess last night or
11 first thing this morning there's discussion about how
12 he spoke on the phone with Mr. Ng at length when Mr. Ng
13 was transported to Hartford. So that claim is
14 unfounded.

15 THE COURT: Okay. Well, you've heard a number
16 of things here. First, I'd like to hear you respond to
17 the procedural issue that's raised. I have the same
18 question myself about how it was that you were making
19 claims regarding medical treatment and access to
20 counsel in the habeas petition. I've never seen
21 anybody do that before. Typically, those claims are
22 made in a prisoner's civil rights action. That's the
23 standard vehicle. So why wouldn't that be the case
24 here?

25 MR. BASDAVID: We would respectfully assert that

1 while that's the traditional vehicle, it's not
2 necessarily the sole and exclusive vehicle and given a
3 joint detention and treatment issue that this Court
4 would maintain jurisdiction, at the very least, under
5 the Constitution to review the treatment to the extent
6 that it rises to the level of a due process violation
7 in a habeas proceeding, given that there is a joint
8 issue and rather than necessitating essentially
9 splitting the issues into two separate actions.

10 THE COURT: Do you have any authority for that?

11 MR. BASDAVID: No, I do not, your Honor, but we
12 would be happy to brief it further. I recognize that
13 without authority, you know, this Court would certainly
14 need authority and we would be happy to provide it in
15 further briefing, but we would definitely maintain that
16 this Court would -- there would be nothing that would
17 inherently deny this Court jurisdiction.

18 Under the Constitution where there's a due
19 process violation, in the interest of judicial economy
20 this Court could hear it.

21 With respect to the final order, the Government
22 notes that we have filed motions to reopen, but does
23 not and there has not been an order, in fact, granting
24 reopening. So so long as there's not been an order
25 from the Board granting reopening, it's our position

1 that the order of removal remains final.

2 And on the continued detention issue, this Court
3 would have authority to order his release as he has
4 been detained now for over one year since the order of
5 removal became final.

6 With respect to counsel's statement as to
7 underlying care that's been provided, while certainly
8 we do not dispute that Mr. Ng has seen doctors, maybe
9 it would be misconstrued to some degree. We're not
10 stating that they are -- he was told he's not allowed
11 to see his attorney. He's told he's welcome to see his
12 attorney if he walks with a cane. He's unable to walk
13 with a cane and he's deteriorating.

14 While there's a point we were able to speak to
15 him on the phone and he was able to describe what was
16 going on, at this point his condition is deteriorating
17 to such a degree he's unable to get out of bed. The
18 fact that a room was made available does him no good
19 without a wheelchair to get there. It's our position
20 that since this point that he has deteriorated, he has
21 not received adequate follow-up.

22 With respect to counsel's statement, the
23 Government's statement that he was returned from the
24 hospital with a diagnosis that he had lower back pain
25 and it was relatively unremarkable, it's my

1 understanding that, in fact, he was diagnosed with
2 scoliosis. Again, I realize on such short notice we're
3 kind of in a he-said-she-said information and certainly
4 understand, and it may be a matter of miscommunication,
5 it may be this Court needs the opportunity to review
6 the record. And we certainly don't want to prejudice
7 the Government, but we do want to highlight the fact
8 that there is an urgency to this, and it's our position
9 he's deteriorating and continuing to deteriorate. He's
10 now bedridden without being given opportunity to get
11 out of bed and use the phone and contact his attorneys
12 through the use of a wheelchair or get out of bed and
13 being given a room through the use of a wheelchair to
14 meet with his attorneys.

15 THE COURT: The Government has the medical
16 records here. Certainly they can show you those
17 medical records. I don't have any reason to doubt at
18 all what's being represented here, that what the
19 medical records say is, in fact, what the diagnosis is.
20 I'm also concerned why he wouldn't attend a CAT scan.
21 Do you have any explanation for that?

22 MR. BASDAVID: This is the first time I've heard
23 that he refused to attend. I don't know -- on a
24 factual issue, if Mr. Wong would be permitted to
25 address that because he's more familiar with the

1 factual issues.

2 THE COURT: Do you have any information on that?

3 MR. WONG: I think on Tuesday of this week he
4 was scheduled for a CAT scan. He was not able to get
5 up, and he was denied a wheelchair. That's why he
6 could not go to the hospital.

7 THE COURT: So do you have any idea why he would
8 be denied a wheelchair if, you know -- I mean, it seems
9 to me if somebody can't walk with a cane, they'd give
10 him a wheelchair. What's the big deal?

11 MR. MYRUS: No, I don't have any information.
12 My understanding was he had a wheelchair. Based on
13 your declaration that was submitted last night, he was
14 in a wheelchair in Hartford so I'm not in a position to
15 make any representations to the Court about exactly
16 what's going on there.

17 I am able to say my understanding is that he's
18 scheduled for another CT scan. I don't know exactly
19 when, but in the immediate future.

20 THE COURT: Okay.

21 MR. WONG: My understanding is that the only
22 time that Mr. Ng was given a wheelchair was on Saturday
23 after my visit to him. He was given a wheelchair and
24 that's why he was able to go to an outside hospital to
25 see a doctor. But on Tuesday, for some reason Wyatt

1 didn't give him a wheelchair and that's why he couldn't
2 go there. Not that he refused to. When I talked to
3 him on the phone, he wanted to get medical treatment.
4 Just that he couldn't move. And with respect to his
5 communication to me yesterday, he was in Hartford. The
6 ICE gave him a wheelchair but the thing is he's being
7 detained.

8 THE COURT: Why was he in Hartford?

9 MR. MYRUS: My understanding is he was
10 transported to Hartford so that he could have extensive
11 access to speak with his counsel by telephone, but I
12 don't know the answer to that.

13 MR. OLEN: Your Honor, I received a telephone
14 call after, shortly after I filed the habeas. And I
15 don't know if the action of moving him to Hartford had
16 anything to do with the filing of the habeas, but it
17 appears that Mr. Wong was denied access to him because
18 he wasn't provided a wheelchair the day before, I
19 guess, in Wyatt. And up to this point, Wyatt has
20 never, to my knowledge, provided him with a wheelchair.
21 Then they took him to Hartford for whatever reason. It
22 doesn't make sense to take him to Hartford to
23 communicate with his attorney when his attorney had
24 gone from Wyatt to Hartford.

25 THE COURT: Where is he now?

1 MR. MYRUS: He's back at Wyatt.

2 MR. OLEN: He's back at Wyatt.

3 THE COURT: I don't get it. Nobody knows why he
4 was in Hartford, why he was taken to Hartford?

5 MR. MYRUS: He was taken to Hartford so that --
6 my understanding is he was taken to Hartford so they
7 could afford him a better opportunity to speak by
8 telephone with his counsel in private, which is what I
9 understand, in fact, happened, and that he was in
10 Hartford on the phone for many hours with both his --
11 perhaps his family members as well as his attorney.

12 THE COURT: Why would they take him from Wyatt
13 to Hartford to talk to attorneys and talk to family
14 members? That doesn't make any sense. All the
15 facilities are available at Wyatt.

16 MR. MYRUS: I'm not sure, your Honor. I don't
17 know exactly why that transpired that way.

18 THE COURT: Okay. Well, that's curious. Well,
19 anybody else want to add anything here?

20 MR. MYRUS: To the extent the Court still has
21 questions about the Zadvydas issue, I just want to make
22 clear the Government's position is that given the
23 actions that this petitioner has taken to reopen the
24 case, his request for bond at this point, the argument
25 that there's a final order of deportation in effect

1 doesn't hold water and, therefore, the Zadvydas
2 six-month analysis can't apply.

3 THE COURT: I'm not going to release him on the
4 basis of this petition and the TRO filing. There's
5 just too many questions in place. What I am going to
6 do is I want to give you an opportunity to answer the
7 petition and to file a responsive brief that lays out
8 your position with more authority with respect to the
9 application of Zadvydas, and whether there is, in fact,
10 a final order or not. If there is a final order in
11 place, if this is just procedurally, you know, one of
12 those situations where there's a final order in place
13 and in spite of the proceedings that are going on, then
14 I think, you know, we have to deal with the Zadvydas
15 issue, and, you know, the cases say what they say. We
16 have to deal with them.

17 If there's not a final order in place, then
18 Zadvydas would not be applicable and the matter would
19 be one that's reopened and so the request for relief,
20 at least on a temporary basis, would be to deny it.

21 But this needs to be briefed is the bottom line.
22 So how long do you want? I need you to get something
23 in on an expedited basis. How quickly can you do that?

24 MR. MYRUS: Would ten days be reasonable from
25 the Court's perspective?

1 THE COURT: Yes. I think it's reasonable.

2 MR. MYRUS: Thank you, your Honor.

3 THE COURT: This is going to be a little bit
4 difficult to schedule, but I'll deal with that. Do you
5 want an opportunity to reply to what they file?

6 MR. BASDAVID: Yes, your Honor. Three days.

7 THE COURT: That, of course, will delay any
8 hearing, but I think it might be in your interest to
9 respond.

10 MR. BASDAVID: Certainly. We would need three
11 days to respond from the Government's filing.

12 THE COURT: Three days after that you get a
13 response in, then we'll set a hearing up on the habeas
14 petition after that as soon as we can fit it in.

15 MR. BASDAVID: Thank you, your Honor.

16 THE COURT: Now, there's a secondary, this
17 secondary issue that the Government's raised about the
18 appropriateness of the other relief that you've
19 requested. That needs to be dealt with as well.

20 Now, it would seem to me that you could deal
21 with that in your responsive briefing in the form of
22 whether it's essentially a motion to dismiss or a
23 motion to strike or how you characterize it as a
24 response to that aspect or that portion of the
25 petition. I'm not really sure what you would call it,

1 but I think you need to join that issue and give me the
2 authority on that. Again, you need to respond to that.

3 MR. BASDAVID: Absolutely.

4 THE COURT: Unless you decide that, you know,
5 maybe you've reached too far here and you want to just
6 refile this as a prisoner civil rights case and you're
7 going to have to deal with those administrative --
8 exhaustion of administrative remedies issue one way or
9 the other. I don't want to tell you what to do with
10 it, but you're going to have to think that through.

11 MR. BASDAVID: Absolutely.

12 THE COURT: Because I think that is the more
13 typical vehicle. Maybe you've got the authority to
14 raise it in this context, but I'm a little skeptical
15 about that.

16 All right. Now, as a practical matter, just to
17 try to just be sensible here, in the period until we
18 can get a chance to get this briefed and have a
19 hearing, can you just call these folks, call the folks
20 at Wyatt. I mean, they're pretty reasonable people. I
21 know a lot of them. Call them up and, you know, find
22 out what's going on with this fellow. Why is he going
23 to Hartford to talk to counsel? Is there an issue with
24 this wheelchair? Let's get the CAT scan done. He's
25 got a CAT scan scheduled in the next couple of days you

1 said.

2 MR. MYRUS: I think I'm the one that said that.

3 THE COURT: Let's make sure he gets to that CAT
4 scan and gets it done. It's in everybody's interest.
5 It's also in the Government's interest so you don't
6 have to be sitting here defending why he didn't get a
7 wheelchair to get him to the CAT scan. You don't want
8 to be dealing with that. Let's get that done.

9 MR. MYRUS: I understand what you're saying,
10 your Honor. I'm internalizing it.

11 THE COURT: These guys need to visit with their
12 client. Get it to him. Maybe they don't have enough
13 wheelchairs out there. This isn't rocket science.
14 Let's try to smooth things over for a few days so we
15 can get to the meaty issue. All right?

16 MR. MYRUS: Yes.

17 THE COURT: So talk to those folks. Who's in
18 charge out there now?

19 MR. MYRUS: I talked with Assistant Warden
20 Tapley.

21 THE COURT: You tell Tapley, I know Tapley, just
22 tell him get this guy a wheelchair so we can get this
23 thing worked on. He's a reasonable guy.

24 Okay. Anything else that we need to do here?

25 MR. BASDAVID: Nothing further, your Honor.

1 Thank you.

2 THE COURT: Okay. Hopefully, you'll be able
3 to -- are you going to attempt to see him in the next
4 day or so?

5 MR. BASDAVID: Absolutely, yes.

6 THE COURT: Let's see if you can't help
7 facilitate that visit since these guys are from New
8 York.

9 MR. MYRUS: Yes.

10 THE COURT: Good. We'll get you a date. I
11 can't give it to you right now, but we'll get you a
12 date as soon as it's available.

13 MR. BASDAVID: Thank you, your Honor.

14 (Hearing concluded at 3:10 p.m.)
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C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, do hereby certify
that the foregoing pages are a true and accurate
transcription of my stenographic notes in the
above-entitled case.

/s/ Anne M. Clayton

Anne M. Clayton, RPR

AUGUST 14, 2008

Date