



Practice Advisory
Prolonged Detention Bond Hearings in the Ninth Circuit under *Aleman Gonzalez v. Sessions*
June 7, 2018

On June 5, 2018, the Northern District of California certified a Ninth Circuit-wide class and issued a preliminary injunction requiring bond hearings for individuals who are detained in immigration custody for more than 180 days, and who are detained pursuant to the authority of 8 U.S.C. § 1231(a)(6), INA § 241(a)(6). See [Aleman Gonzalez v. Sessions, No. 18-CV-01869-JSC, 2018 WL 2688569 \(N.D. Cal. June 5, 2018\)](#). The decision holds that these bond hearings must be provided to class members pursuant to the Ninth Circuit’s decision in *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (“*Diouf II*”).¹ The court reasoned that the Supreme Court’s decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (“*Rodriguez IV*”) did not abrogate *Diouf II*’s holding that prolonged detention bond hearings are required for those detained under § 1231(a)(6).²

As a result of the decision, many detainees in the Ninth Circuit may now be eligible for a bond hearing before an Immigration Judge (“IJ”) after 180 days of detention. This practice advisory provides a description of the individuals who qualify for a bond hearing as a result of the decision.

Who is covered by the order?

The *Aleman Gonzalez* preliminary injunction requires bond hearings for individuals who are detained in the Ninth Circuit (with some geographic exceptions discussed below) under 8 U.S.C. § 1231(a)(6) and who have been detained for more than 180 days.

Geographic Scope. The injunction applies to individuals detained throughout the Ninth Circuit Court of Appeals. The order excludes any individual who is already being provided a bond hearing in the Central District of California or the Western District of Washington, where district courts have each certified classes of individuals detained under § 1231(a)(6) in their respective districts.³ Note that the class certified in the Western District of Washington is limited to individuals who are placed in “withholding-only” proceedings under 8 C.F.R. § 1208.31(e), and thus this injunction is broader.

¹ For more information on *Diouf II*, please see this [ACLU practice advisory](#).

² *Rodriguez IV* held that periodic bond hearings are not required as a statutory matter for individuals detained under 8 U.S.C. § 1225(b), INA § 235(b), and 8 U.S.C. § 1226(a), (c), INA § 236(a), (c), and remanded the case for the Ninth Circuit to decide in the first instance whether prolonged detention bond hearings are required as a constitutional matter. For more information on the effect of the Supreme Court’s decision in *Rodriguez IV*, please see this [ACLU practice advisory](#).

³ See *Rodriguez v. Holder*, No. CV 07-3239 TJH RNBX, 2013 WL 5229795, at *1 (C.D. Cal. Aug. 6, 2013); *Baños v. Asher*, No. 2:16-CV-01454, Dkt. #77, Magistrate Judge’s Report and Recommendation Granting Summary Judgment as to the 1231(a)(6) Class Members (W.D. Wash. Jan. 23, 2018), *report and recommendation adopted*, No. 2:16-CV-01454-JLR, Dkt. #83 (W.D. Wash Apr. 4, 2018).

Detention Authority. The following individuals are detained under 8 U.S.C. § 1231(a)(6) and so fall within the scope of the preliminary injunction if their immigration detention reaches 180 days:

Reasonable Fear and Withholding-Only Proceedings, Including Judicial Review

- Those in pending “withholding-only” proceedings before the IJ or the Board of Immigration Appeals (“BIA”) following the issuance of a reinstated removal order or an administrative removal under 8 U.S.C. § 1228(b), INA § 238(b)
 - Those with a pending petition for review seeking judicial review of the BIA’s denial of withholding of removal or protection under the Convention Against Torture following the “withholding-only” proceedings
- Those in pending reasonable fear proceedings before the Asylum Office or the IJ
 - Those with a pending petition for review seeking judicial review of an IJ’s negative reasonable fear determination

Motions to Reopen, Including Judicial Review

- Those with a final order of removal pending administrative adjudication of a motion to reopen, whether before the IJ or the BIA, and those petitioning for review of a denied motion to reopen

Other Cases on Judicial Review

- Those with a pending petition for review seeking judicial review of a reinstated removal order
- Those petitioning for direct review of a removal order for whom no stay of removal has been issued

Indefinite Detention (Zadvydas)

- Other individuals with final removal orders who have no pending challenges to removal

Note: Individuals who cannot be removed—for example, because their home country does not accept deportees or will not issue a travel document—are eligible for outright release from detention pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001) after six months of post-final order detention because their removal is not “reasonably foreseeable.” If ICE will not release such individuals, they may need to file a habeas petition to obtain release under *Zadvydas*.

Separate and apart from the outright release remedy provided by *Zadvydas*, *Aleman Gonzalez* provides that such individuals must be provided a bond hearing before an IJ after six months in detention.

The order only applies to those detained under § 1231(a)(6). It does not apply to other prolonged detainees, including arriving aliens held under 8 U.S.C. § 1225(b) or mandatory detainees held under 8 U.S.C. § 1226(c).

What procedural requirements apply at bond hearings held pursuant to the *Aleman Gonzalez* injunction?

At the bond hearing, the burden falls on the government to justify continued detention. Thus, the individual is entitled to release on bond unless the government establishes that the individual is a flight risk or will be a danger to the community by “clear and convincing” evidence. See *Diouf II*, 634 F.3d at 1086; *Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011); *Aleman Gonzalez*, 2018 WL 2688569 at *1,

*9, *11. These are the same procedural requirements that previously applied to prolonged detention bond hearing conducted pursuant to *Diouf II* and *Rodriguez*.

How and when will bond hearings be scheduled?

The government is required to automatically provide hearings pursuant to the *Aleman Gonzalez* preliminary injunction. No motion for a bond hearing should be required. Nevertheless, to ensure that a hearing is promptly provided, detainees or their counsel may wish to file a *notice* with the Immigration Court of the District Court's decision and a request for the court to *schedule* an immediate bond hearing pursuant to the *Aleman Gonzalez* preliminary injunction. Individuals should not fashion those requests as motions for a bond hearing, as there should be no question that the individual is entitled to a bond hearing. A notice of court decision accompanied by a request to schedule an immediate (if that is desired) bond hearing will make clear that it is being filed to simply expedite the process.

How do I make sure that a class member's right to a bond hearing is being protected?

If you have a client who is a class member, or who is approaching 180 days in immigration detention in the next 60 days, and you encounter problems with obtaining a bond hearing under the *Aleman Gonzalez* preliminary injunction, please contact class counsel (see below for contact information).

For those who encounter unrepresented individuals who are class members through detention center visits, to the extent possible, please also contact class counsel if you are concerned about the individual not getting a bond hearing. We are particularly concerned with unrepresented individuals as they are especially reliant on the government to provide the hearing.

Class Counsel Contacts and Questions

The *Aleman Gonzalez* class is represented by Van Der Hout, Brigagliano & Nightingale LLP, Centro Legal de la Raza, the Law Offices of Matthew H. Green, the ACLU Foundation of Southern California, the ACLU Foundation of Northern California, and the ACLU Foundation of San Diego and Imperial Counties. For questions about the *Aleman Gonzalez* injunction or this practice advisory please contact Amalia Wille (awil@vblaw.com) or Judah Lakin (jlak@vblaw.com).