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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

B.I.C.,

Petitioner,

Case No. C16-132-MJP

v.

NATHALIE R. ASHER, et al.,

Respondents.

ORDER ADOPTING REPORT AND
RECOMMENDATION, GRANTING
PETITION FOR WRIT OF HABEAS
CORPUS

THIS MATTER comes before the Court on Respondents’ Objections to the Report and Recommendation of the Honorable James P. Donohue, Chief United States Magistrate Judge. (Dkt. No. 19.) Having considered the Objections, the Report and Recommendation, and the related record, the Court hereby ADOPTS the Report and Recommendation, DENIES Respondents’ Motion to Dismiss, and GRANTS Petitioner’s petition for writ of habeas corpus.¹

Background

Respondents object to five of the Report and Recommendation’s conclusions: (1) that no Respondent should be dismissed at this time; (2) that 8 U.S.C. § 1252(b) does not limit this

¹ This order replaces an earlier preliminary order issued by the Court on the same issues. (See Dkt. No. 20.)

1 Court's jurisdiction; (3) that Petitioner's challenges to Immigration and Customs Enforcement's
2 ("ICE") custody are ripe; (4) that the Office of Refugee Resettlement's ("ORR") age
3 determination is unlawful because it was based solely on radiographic analysis; and (5) that
4 Petitioner's habeas petition should be granted because ICE's continued custody is based on an
5 unlawful age determination. (Dkt. No. 19.)

6 Discussion

7 I. Legal Standard

8 Under Fed. R. Civ. P. 72, the Court must resolve de novo any part of the Magistrate
9 Judge's Report and Recommendation that has been properly objected to and may accept, reject,
10 or modify the recommended disposition. Fed. R. Civ. P. 72(b)(3); see also 28 U.S.C. § 636(b)(1).

11 II. Respondents' Objections

12 A. Dismissal of Certain Respondents

13 Respondents object to Judge Donohue's conclusion that no Respondents should be
14 dismissed at this time. (Dkt. No. 19 at 2-3.) Judge Donohue concluded that while Respondents
15 other than Respondent Asher may not have been properly named as respondents to the habeas
16 petition, all were properly named under Petitioner's APA claim. (Dkt. No. 18 at 12.)
17 Respondents argue that, because Judge Donohue denied Petitioner's requests for relief under the
18 APA after finding that such relief may indirectly intrude on Petitioner's removal proceedings,
19 Judge Donohue's conclusion that no Respondents should be dismissed is incorrect. (Dkt. No. 19
20 at 3.)

21 Respondents' arguments are unavailing. No Respondents are entitled to be dismissed on
22 grounds that they have been improperly named. While Judge Donohue recommended denying

1 the APA claim, he recommended granting the petition for writ of habeas corpus; with the
2 adoption of Judge Donohue's Report and Recommendation, this matter is now concluded against
3 all Respondents.

4 B. 8 U.S.C. § 1252(b)

5 Respondents object to Judge Donohue's conclusion that the Court's jurisdiction in this
6 matter is not limited by 8 U.S.C. § 1252(b). (Dkt. No. 19 at 3-5.) Judge Donohue found that the
7 jurisdiction-stripping provision of § 1252(b) did not apply in this matter because Petitioner has
8 not been ordered removed, and therefore is not subject to a final order of removal. (Dkt. No. 18
9 at 14.) While Respondents object to this conclusion, they provide no argument specifying why it
10 is incorrect. (See Dkt. No. 19 at 2, 3-4.)

11 Respondents' objection is without merit. See Nadarajah v. Gonzales, 443 F.3d 1069,
12 1075-76 (9th Cir. 2006) ("[T]he jurisdiction-stripping provision [of 8 U.S.C. § 1252(b)] does not
13 apply to federal habeas corpus petitions that do not involve final orders of removal.").

14 C. Ripeness

15 Respondents object to Judge Donohue's conclusion that Petitioner's claims regarding the
16 age determination and radiographic analysis are ripe. (Dkt. No. 19 at 3-5.) Judge Donohue
17 concluded that Petitioner's claims were ripe because the age determination, which was made
18 based solely on the radiographic analysis, directly harmed Petitioner. (Dkt. No. 18 at 16.)
19 Specifically, Judge Donohue found that Petitioner was harmed by his temporary placement in the
20 Northwest Detention Center, his continued subjection to ICE's conditions of release, and the loss
21 of the ORR stipend paid to his foster mother for his care. (Id.) Respondents argue Petitioner's
22 claims are not ripe because (1) Petitioner has already been released from the Northwest

1 Detention Center, the only habeas relief available to him, and (2) the collateral harms are not
2 redressable. (Dkt. No. 19 at 4-5.)

3 Respondents' arguments are unavailing. As discussed below, the Court does not agree
4 with Respondents' contention that Petitioner has already received the only habeas relief available
5 to him. The Court agrees with Judge Donohue's conclusion that Petitioner's claims are ripe, and
6 adopts the Report and Recommendation as to this issue.

7 D. Merits of Habeas Petition

8 Respondents' fourth and fifth objections challenge Judge Donohue's conclusions that
9 ORR's age determination is unlawful because it was based solely on a radiographic analysis and
10 that Petitioner's petition for writ of habeas corpus should be granted because ICE's continued
11 custody of Petitioner is unlawful. (Dkt. No. 19 at 6-10.)

12 ORR's age determination is unlawful. The William Wilberforce Trafficking Victims
13 Protection Reauthorization Act ("TVPRA") explicitly required HHS and DHS to develop
14 procedures that "[a]t a minimum . . . take into account multiple forms of evidence, including the
15 non-exclusive use of radiographs, to determine the age of the unaccompanied alien." 8 U.S.C.
16 § 1232(b)(4) (emphasis added). The procedures developed and properly deployed here resulted
17 in the exclusive use of dental radiographs to make an age determination.

18 Respondents argue that "neither the ORR Policy Guide nor the PTU allows, or even
19 suggests allowance of, 'exclusive use of radiographs' when making an age determination"
20 because the policies indicate the use of radiographs only "as a last resort" when other
21 information is inconclusive. (Dkt. No. 19 at 9.) Respondents argue that because Petitioner did
22 not have any documentation addressing his age, and because he did not have anyone to attest to

1 his age, the only evidence available were Petitioner’s own statements regarding his age. (Id.)
2 Respondents argue that because the ORR Policy Guide forbids reliance on Petitioner’s own
3 statements as the sole basis for an age determination, the Court should find that Respondents’
4 policies and actions comport with the TVPRA. (Id.)

5 Respondents’ arguments are meritless. Respondents do not even attempt to reconcile
6 their policy with the statute’s express prohibition on the exclusive use of radiographs. While
7 Respondents explain at length why they believe their actions were “reasonable” and ask the
8 Court to “reject the Magistrate Judge’s recommended finding that Respondents used only the
9 radiograph to assess his age,” Respondents fail to identify any other evidence they considered.
10 Instead, Respondents claim that using radiographs “as a last resort” when no other evidence is
11 available—aside from the unaccompanied alien’s own statements, which Respondents will not
12 rely on—somehow means that the radiographs were not used exclusively. (Dkt. No. 19 at 9-10.)
13 This assertion is facially frivolous.


14 The Court agrees with Judge Donohue and concludes that ORR’s determination that
15 Petitioner was over the age of 18 at the time he was placed into ICE custody must be vacated
16 because the policy on which it was based violates the plain language of the TVPRA.
17 Accordingly, in the absence of a valid age determination, Respondents must necessarily
18 recognize the May 1998 birth date Petitioner reported to DHS officials at the time he applied for
19 admission into the United States in August 2015. Thus, Petitioner is deemed to be under the age
20 of 18, and his care and custody must be transferred from ICE back to ORR until he reaches the
21 age of 18 based on his reported birth date.

Conclusion

The Court ADOPTS the Report and Recommendation of the Honorable James P. Donohue, Chief United States Magistrate Judge, in its entirety. (Dkt. No. 18.) Respondents' Motion to Dismiss is DENIED. Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2241 is GRANTED. (Dkt. No. 1.) The determination by the Office of Refugee Resettlement that Petitioner was over the age of 18 at the time he was placed into Immigration and Customs Enforcement custody is VACATED. Respondents shall immediately TRANSFER Petitioner from the custody of ICE to the custody of ORR until Petitioner reaches the age of 18 based on the birth date he reported to Department of Homeland Security officials at the time he applied for admission into the United States. Petitioner's requests for declaratory and injunctive relief under the Administrative Procedure Act are DENIED.

The Clerk is directed to send copies of this Order to all counsel of record and to the Honorable James P. Donohue.

DATED this 2nd day of May, 2016.


Marsha J. Pechman
United States District Judge

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