**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 25-cv-02059-DDD-STV

HOSSEIN BATOOIE,

Petitioner,

v.

JUAN BALTAZAR, Acting Warden, Aurora ICE Processing Center,
ROBERT GUADIAN, Field Office Director, U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security,
KRISTI NOEM, Secretary, U.S. Department of Homeland Security, and
PAMELA BONDI, U.S. Attorney General, U.S. Department of Justice, in their official capacities,

Respondents.

REPLY TO RESPONSE (ECF No. 33) TO ORDER TO SHOW CAUSE (ECF No. 19)

Petitioner submits this reply to Respondents' Response (ECF No. 33) to the Court's OSC (ECF No. 19) why the Habeas Petition (ECF No. 1) should not be granted. Petitioner argues that: (1) he does not have an administratively final removal order, under binding agency precedent, where the Immigration Judge's (IJ's) decision did not include an explicit removal order, (2) the order relied upon by the Respondents also contains an order terminating proceedings which is incompatible with a removal order, (3) his membership in the *D.V.D.* class should not bar his individual, distinguishable claims, and (4) this Court has jurisdiction.

DISCUSSION

I. Under agency precedent binding on DHS, there is no final removal order.

The parties both recognize that the summary order issued by the IJ in 2004 (ECF No. 4-1), did not explicitly order Mr. Batooie's removal. ECF No. 33 at 4. The parties have been unable to locate any other order issued by the IJ, in writing or on audiotape, that clarifies, supplements, or replaces that written order, which is the sole basis for Mr. Batooie's current detention and future removal under 8 U.S.C. § 1231. *Id.* at 5, fn 1.

However, the Board of Immigration Appeals (BIA) has already determined the legal impact of such an omission, holding that in that scenario "there is no final administrative order of removal," thereby preventing DHS from executing a removal until the missing order is entered by an IJ. *Matter of I- S- & C- S-*, 24 I&N Dec. 432 (BIA 2008). That precedential holding binds all actions of DHS officers and employees, meaning that Mr. Batooie cannot be detained based on the current, facially deficient IJ order. 8 C.F.R. § 1003.1(g)(1) ("decisions of the Board ... are binding on all officers and employees of DHS").

I- S- & C- S- is on all fours with Mr. Batooie's case. In the former, in 2004, an IJ found the non-citizens removable, pretermitted their applications for asylum as asylum as untimely, denied as moot their requests for protection under the Convention Against Torture (CAT), but granted their applications for withholding of removal under 8 U.S.C. 1231(b)(3). *I- S- & C- S-*, 24 I&N Dec. at 432. Similarly, in Mr. Batooie's case, in 2004, he conceded his removability, withdrew his applications for asylum and CAT protection, and the IJ may[1] have also granted withholding of removal under § 1231(b)(3). ECF No. 24-1 ¶¶ 13-17. In neither case did the IJ include explicit language in the decision ordering removal to a designated country before ordering that removal withheld. *I- S- & C- S-*, 24 I&N Dec. at 432; ECF No. 4-1.

In *I- S- & C- S-*, DHS filed a motion with the IJ in 2006, arguing that it was error for withholding to be granted without the prior entry of a removal order. *I- S- & C- S-*, 24 I&N Dec. at 433. When the IJ denied the government's motion, DHS appealed, and the BIA sustained the appeal. *Id.*

[1] As discussed below, the IJ also entered an order terminating proceedings, adding another layer of ambiguity to his decision, as a grant of withholding cannot coexist with termination.

In siding with DHS, the BIA held that failing to enter an order of removal prior to granting withholding was not an insignificant technicality, noting that "[i]t is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld." *Id.* It reasoned that requiring an explicit order of removal was consistent with the relevant regulations, which require that an IJ's order fully dispose of a case (8 C.F.R. § 1240.12(c)) and that an IJ identify a country of removal (8 C.F.R. § 1240.12(d)). *Id.* Accordingly, the Board found that the proceedings in *I- S- & C- S-* were left "unresolved and incomplete because the Immigration Judge found the respondents removable and granted their application for withholding of removal but failed to order them removed." *Id.* at 434. The practical consequence of this ambiguity was that DHS had no authority to execute removal to a third country. *Id.* Because there was "no final administrative order of removal," DHS was unable to execute removal to an alternative country. *Id.*

The Board's binding and precedential decision in *I- S- & C- S-* means that there is no final administrative order of removal in Mr. Batooie's case. Absent such an order of removal, DHS has no authority to detain and remove Mr. Batooie under 8 U.S.C. § 1231(a), which only comes into play following the issuance of an administratively final removal order. 8 U.S.C. § 1231(a)(1)(B)(i).

Respondents acknowledge *I- S- & C- S-*, but question how that 2008 decision can be applied retroactively to events from 2004. ECF No. 33 at 8. As a general matter, however, it is recognized that agencies may announce new rules through adjudication and apply them retroactively. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency"). Agency decisions, like judicial decisions, are generally applied retroactively, given that they "say what the law is." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)).

There are times, admittedly, when an agency announces a new rule, and it would be unfair to apply the change retroactively. *See, e.g., Afanador v. Garland*, 11 F.4th 985, 990-91 (9th Cir. 2021) (holding that it would be unfair to apply the BIA's decision regarding a crime involving moral turpitude retroactively). To prevent such situations, the BIA adopted a two-part approach for determining whether a precedential decision applies retroactively. In *Matter of Cordero-Garcia*, the BIA held that it first considers whether its holding is a change in the law, while cautioning that a decision that interprets a previously unclear statute does not constitute a change in law for retroactivity purposes. 27 I&N Dec. 652, 656-57 (BIA 2019). Instead, its test for determining whether a decision constitutes a change in law is whether the BIA "'consciously overrules or otherwise alters its own rule or regulation,' or 'expressly considers and openly departs from a circuit court decision.'" *Id.* 656 (quoting *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1279 (9th Cir. 2018)). If there is a change in law, then the Board determines in a second step whether it would be unfair to apply the new rule retroactively. *Id.* at 657.

To date, the Board has never held that *I- S- & C- S-* should be applied prospectively only and the presumption of retroactivity should attach. Even if presented with the question, however, the Board would likely find retroactive application appropriate. First, its holding in *I- S- & C- S-* did not overrule or alter any explicit rule or depart from a circuit court decision. At the time of the 2004 IJ decision, no law explicitly authorized an IJ to not issue an order of removal when granting withholding. *I- S- & C- S-*, 24 I&N Dec. at 433. At best, the laws governing withholding were ambiguous, in that no statute or regulation mandated the inclusion of a removal order. *Id.* So, when the BIA issued *I- S- & C- S-*, it was simply bringing clarity to the withholding statute, noting that the title of 8 U.S.C. § 1231, "Detention and Removal of Aliens Ordered Removed," was a strong textual clue "that a removal order must precede any grant of withholding of removal." *Id.* Accordingly, it is likely the BIA would find *I- S- & C- S-* was not a change in the law for retroactivity purposes.

Even if the BIA found *I- S- & C- S-* constituted a change in the law, however, it is unlikely that it would find its retroactive application to be unfair. This is because the procedural remedy sanctioned in *I- S- & C- S-*, a DHS motion filed with the IJ for entry of a removal order, would be simple for DHS to perform, with no prejudice to its future ability to execute a perfected order should the IJ grant the motion. *Id.* at 433, 435. But in Mr. Batooie's case, DHS has yet to obtain a new IJ order, despite being aware of the lack of an explicit removal order since at least the start of litigation, and with its actions bound by *I- S- & C- S-*.

Left without an explicit removal order that complies with *I- S- & C- S-*, the Respondents are left relying on "indicia" of an order of removal. However, none of those hints of a removal order can substitute for an actual order. Respondents note that if the IJ granted withholding of removal, then he necessarily found Mr. Batooie to be removable. ECF No. 33 at 7. Petitioner agrees but notes that an IJ finding him to be removable based on his admissions and concessions is not the same as entering an order of removal. This was recognized by the BIA in *I- S- & C- S-*, where it noted that "[b]ecause the Immigration Judge found the respondents removable, they remain subject to removal from the United States by the DHS." 24 I&N Dec. at 434. Despite that finding of removability, however, DHS could still not carry out removal in the absence of an actual order of removal. *Id.* Put more simply, in the Board's view, a finding of removability is not the same as an actual order of removal.

The Respondents also mistakenly rely on information on the Immigration Court's public-facing website, which notes an order of removal for Mr. Batooie, and the issuance of work permits by DHS in a category reserved for withholding recipients. ECF No. 33 at 8. The former is insufficient absent evidence of the underlying source material. The latter is insufficient because it necessarily relied, at least in part, on the same summary order missing a removal order. *See* Instructions for Form I-765, Application for Employment Authorization, available at:

https://www.uscis.gov/i-765 (requiring an applicant to include a copy of the IJ order granting withholding).

II. The summary order relied on by the Respondents to detain Mr. Batooie also contains an order terminating proceedings which cannot be reconciled with a removal order.

The summary order issued in 2004 noted that removal proceedings against Mr. Batooie were terminated. ECF No. 24-1 ¶ 17. Once removal proceedings have begun, DHS may move to terminate proceedings on the ground that, among other reasons, "circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." 8 C.F.R. §§ 239.2(a)(7), (c). An IJ has authority to adjudicate this request "based on an evaluation of the factors underlying the motion." *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998).

Maybe that happened here. But an order of removal cannot coexist with an order terminating proceedings. Respondents contend that various hints in the record indicate the IJ intended the former rather than the latter. ECF No. 33 at 6-9. Presumably, they must therefore believe that the IJ order terminating proceedings was erroneous. However, the remedy for such a significant error would be a new order from the IJ in response to a DHS motion, identifying which door he meant to choose in 2004. Twenty-one years later, however, DHS has failed to successfully move for such an order. In the absence of a new order, this Court cannot guess with sufficient clarity which check mark on the summary order is the correct one.

III. Mr. Batooie can file an individual habeas petition to challenge his third country deportation without notice or an opportunity to seek protection from persecution because his claims go beyond those in the *D.V.D.* class action.

Even if there is an administratively final order of removal, with withholding of removal limited to only Iran, Mr. Batooie has challenged his deportation to an unnamed alternate country without a meaningful opportunity to present a claim for protection from persecution in that country due to his apostasy. ECF No. 1. Respondents contend that this Court should, as a matter of discretion, dismiss that claim where Mr. Batooie is a member of the designated class in *D.V.D. v. DHS*, No. 25-cv-10676-BEM (D. Mass). ECF No. 33 at 10.

While Mr. Batooie admittedly would be a member of the *D.V.D.* class if he had a final removal order, he could still litigate his own separate claim for injunctive relief where his claims go beyond those in the class action. *See Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (holding that, while a district court may have discretion to "dismiss those portions of [a] complaint which duplicate [a class action's] allegations and prayer for relief," it may not dismiss allegations that go beyond those in the class action.; *see also Brewer v. Swinson*, 837 F.2d 802, 804 (8th Cir. 1988) ("While the general principle is to avoid duplicative litigation, the determining factors should be equitable in nature, giving regard to wise judicial administration.").

Mr. Batooie's claims are distinguishable from those in *D.V.D.* in two respects and the relief he seeks is not available through the *D.V.D.* litigation. First, he seeks to enjoin DHS from failing to provide a meaningful opportunity to seek withholding of removal prior to a third country removal. But the complaint in *D.V.D.* did not seek class-wide injunctive relief with respect to withholding of removal due to 8 U.S.C. § 1252(f)(1), which bars courts from "enjoin[ing] or restrain[ing] the operation of" specified provisions of the INA, including 8 U.S.C. § 1231, "other than with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated."

Second, Mr. Batooie contends that the Department's current procedures for carrying out third country removals violate his due process rights. ECF No. 1. Those current procedures are articulated in a March 30, 2025, policy memorandum (https://discuss.ilw.com/articles/articles/568452-article-noem-guidance-on-third-country-removals-by-kit-johnson-for-immigration-prof-blog). This claim was not raised in the complaint in the *D.V.D.*

litigation because DHS issued the March 30th memo only after the district court issued a TRO on March 28th.

IV. This Court has jurisdiction.

Sections 1252(a)(5) and 1252(b)(9) of Title 8 do not deprive this Court of jurisdiction. While expansive, the scope of those provisions was not meant to "preclude habeas review over challenges to detention that are independent of challenges to removal orders." H.R. Rep. No. 109-72 at 175. Mr. Batooie's claims are independent of a removal order. He does not challenge any determination that he is removable. Instead, he challenges the Respondents' attempts to divine the existence of a removal order where none exists in the four corners of the IJ's order, and he challenges the Department's attempt to designate a country of removal never identified in any removal order without reopening the removal proceedings so that an IJ could make the designation in the first instance and determine whether his life or freedom would be threatened in that country. To resolve these issues, the Court does not need to review a removal order. Instead, it needs only to find one.

8 U.S.C. § 1252(g) does not strip this Court of jurisdiction even if it discerns the existence of a valid removal order to Iran. Mr. Batooie would not challenge the execution of that order, because its execution would have been withheld by the IJ's withholding grant. Instead, Mr. Batooie challenges his detention and potential removal to a country *other* than Iran, for which there currently exists no final removal order. Accordingly, his claims do not challenge the Department's "decision or action … to … execute removal orders." *See Reno v. Am.-Arab Anti Discrim. Comm.*, 525 U.S. 471, 486 (1999) (adopting a "narrow reading of § 1252(g)" that excludes from its reach "many other decisions or actions that may be part of the deportation process").

V. Conclusion

Respondents had two decades to obtain a clear order from the IJ or to move for reopening for the IJ to designate an alternate country of removal. But they didn't. This Court should not now sanction their belated shortcuts, where Mr. Batooie's life is at stake.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Petitioner hereby certifies that the foregoing reply complies with the type-volume limitation set forth in DDD Civ. P.S. III(A)(1) as it contains 2,700 words out of a permissible 2,700.

s/ Mark Robert Barr
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CERTIFICATE OF SERVICE

I certify that on August 20, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following recipients by e-mail:

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