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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLVESTER OWINO, Sylvester
Otieno-Owino,

Petitioner - Appellant,

v.

JANET NAPOLITANO,** Secretary of
the Department of Homeland Security;
ERIC H. HOLDER Jr., Attorney
General, Attorney General; ROBIN
BAKER, Director of San Diego Field
Office U.S. Immigration and Customs
Enforcement; JOHN A. GARZON
Officer-In-Charge,

Respondents - Appellees.

No. 08-56392

D.C. No. 3:07-cv-02267-WQH-POR

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted June 23, 2009
Seattle, Washington

*This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

**Janet Napolitano is substituted for her predecessor, Michael Chertoff, as
Secretary of the Department of Homeland Security, pursuant to Fed. R. App. P.
43(c)(2).

Before: B. FLETCHER, FISHER and GOULD, Circuit Judges.

Sylvester Owino appeals the district court's denial of his habeas petition under 28 U.S.C. § 2241, in which he challenged his continuing civil detention under *Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001). We have jurisdiction under 28 U.S.C. §§ 1291, 2241(a), and we reverse and remand. In a separate appeal, *Owino v. Holder*, 06-74297, we reviewed the BIA's final order of removal and remanded Owino's claim for deferral of removal under the Convention Against Torture to the IJ on an open record. That disposition, filed concurrently herewith, bears significantly on our disposition of Owino's habeas petition here.

I. REMAND

When the district court considered Owino's habeas petition, he was subject to the BIA's final order of removal and this court had denied him a stay of removal while his petition for review was pending in his related appeal. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 n.5 (9th Cir. 2008) (holding that alien's removal period, during which civil detention is mandatory under 8 U.S.C. § 1231(a)(2), begins when this court denies the motion for a stay of removal). In that context, the district court applied *Lema v. INS*, 341 F.3d 853, 856-57 (9th Cir. 2003), and found that Owino's prolonged detention was authorized by statute because Owino was removable but had failed to cooperate with the government's efforts to remove

him to Kenya. *See id.*; 8 U.S.C. § 1231(a)(1)(C). Because we have granted Owino’s petition for review and remanded for further proceedings before the agency, we need not decide whether the district court erred by applying *Lema*.¹ The § 1231 framework is no longer applicable because Owino is now “[a]n alien whose case is being adjudicated before the agency for a second time – *after* having fought his case in this court.” *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 948 (9th Cir. 2008). While the administrative proceedings on Owino’s underlying CAT claim are pending on remand, he will not be subject to a *final* order of removal, so § 1231 cannot apply. *See id.* at 947; *cf. Prieto-Romero*, 534 F.3d at 1060. Thus, Owino’s continued detention would be authorized, if at all, under 8 U.S.C. § 1226(a). *See Casas-Castrillon*, 535 F.3d at 947-48.

We remand here to the district court so it may decide in the first instance whether Owino’s detention is authorized by 8 U.S.C. § 1226(a). As in *Casas-Castrillon*, the district court must decide whether Owino “faces a significant

¹ Owino argues that § 1231(a)(1)(C) does not apply, in part because he has made good faith efforts to seek asylum in third countries. Owino claims deportation officers have impeded his efforts by denying his requests for assistance in replacing his lost passport. We do not reach the merits of Owino’s § 1231 argument. We do note, however, that the government expressed its willingness to assist Owino in this regard at oral argument, and we restate here our view that to the extent informal resolution of Owino’s request for assistance is possible, the parties should not delay in making efforts to replace Owino’s passport.

likelihood of removal to [Kenya] once his judicial and administrative review process is complete.” *Id.* at 948.² If, under the *Casas-Castrillon* standard, Owino can show that he is not significantly likely to be removed, “the court should hold continued detention unreasonable and no longer authorized by statute,” and grant the writ. *Zadvydas*, 533 U.S. at 699-700. If, however, the district court determines that Owino’s continuing detention is authorized, then under *Casas-Castrillon*’s holding with respect to constitutionally required bond hearings, the court must “grant the writ unless, within 60 days, the government provides [Owino] with ‘a hearing . . . before an Immigration Judge with the power to grant him bail unless the government establishes that he is a flight risk or will be a danger to the community.’” *See Casas-Castrillon*, 535 F.3d at 952 (quoting *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005)).

II. EVIDENTIARY HEARING AND APPOINTMENT OF COUNSEL

The government relies on the declaration of Deportation Officer Eliana Hayes to show Owino can be removed at the completion of administrative and

² Having disposed of Owino’s petition under § 1231(a)(1)(C) and our cases applying that subsection, the district court had no occasion to decide whether Owino faces a significant likelihood of removal once his judicial and administrative review process is complete. We decline to make that determination in the first instance, and we express no view about the merits of Owino’s habeas petition under *Casas-Castrillon*.

judicial review, but Owino disputes whether his removal will be possible given political turmoil in Kenya. We hold that this disputed issue cannot be resolved without an evidentiary hearing. *See Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977) (“When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.” (quotation marks omitted)); *Chauncey v. Second Judicial Dist. Ct.*, 453 F.2d 389, 390 (9th Cir. 1971) (per curiam) (remanding § 2241 petition for evidentiary hearing because record on appeal insufficient to decide whether to grant the writ). Given that Owino has been civilly detained since November 2005, we urge the district court to expedite the hearing. The district court shall also appoint counsel because “[t]he rules governing habeas proceedings mandate the appointment of counsel if necessary for the effective utilization of discovery procedures . . . , or if an evidentiary hearing is required.” *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

REVERSED AND REMANDED.