UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BYRON HODGSON, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 13-cv-702 **DEFENDANDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P 12(b)(1) & (6)**

DEFENDANTS MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) & (6)

In this Complaint, Plaintiff Byron H. Hodgson, a native and citizen of Canada, alleges agents of the United States of America violated the Federal Tort Claims Act (FTCA) by detaining him for seventy days in physical custody during his removal proceedings. Specifically, Plaintiff contends that his physical detention by the United States constituted (1) negligence, as Defendant allegedly failed to investigate whether Plaintiff was an American Indian born in Canada not subject to removal under Federal law, and (2) assault, battery, false arrest, or false imprisonment, as Defendant purportedly lacked any basis for detaining him.

As explained below, these claims fail both for jurisdictional reasons and on the merits. First, the Court lacks jurisdiction to review Plaintiff's claims. Pursuant to 8 U.S.C. § 1252(g), "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." This provision forecloses jurisdiction in cases alleging constitutional violations arising from false imprisonment, *see, e.g.*, *Sissoko v. Rocha*, 509 F.3d 947, 950 (9th Cir. 2007), as well as garden variety FTCA claims like Plaintiff's. *See Alcaraz v. United States*, 2013 U.S. Dist. LEXIS 124051, * 4-6 (N.D. Cal. Aug.

29, 2013); *Valencia-Mejia v. United States*, 2008 U.S. Dist. LEXIS 110436, *6-12 (C.D. Cal. Sept. 15, 2008); *Guerrero v. United States*, 2008 U.S. Dist. LEXIS 120414, *7-19 (C.D. Cal. June 20, 2008).

Second, even assuming 8 U.S.C. § 1252(g) does not foreclose suit, the FTCA itself forecloses suit. First, the FTCA does not permit claims based on allegations of tortious conduct by government employees "investigative or law enforcement officers" under 8 U.S.C. § 2680(h). As the Ninth Circuit has held in a similar case, Plaintiff's claims "fail at the outset because [he] has not established that either the immigration judge or the INS attorneys are investigative or law enforcement officers under § 2680(h)." *Cao v. U.S.*, 156 Fed. Appx. 48, *50 (9th Cir. Nov. 29, 2005) (unpublished). Second, the United States may not be sued under the FTCA "based upon the exercise or performance or the failure to exercise or perform a discretionary function . . ., whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The decision to detain an individual for removal proceedings is a classic discretionary function. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-85 (1999). Third, immigration officers have the legal authority to arrest any alien in the United States if they have reason to believe the alien is in the United States in violation of any law or regulation. *See* 8 U.S.C. §§ 1357(a)(2), (a)(4), and (a)(5). Should such "reason to believe," which is the equivalent of "probable cause," exist, Plaintiff's detention cannot serve as the basis of an FTCA claim. *See, e.g., Williams v. United States*, 2009 WL 3459873, at * 17 (S.D. Tex. Oct. 20, 2009); *Tovar v. United States*, 2000 WL 425170, at *7-8 (N.D. Tex. Apr. 18, 2000).

Finally, even if it is appropriate to reach the merits, Plaintiff cannot in fact demonstrate that he qualifies as an American Indian of Canadian birth such that he could not be subjected to

removal proceedings, or that any United States personnel in fact acted negligently towards him or falsely imprisoned him.

LEGAL BACKGROUND

By law, certain American Indians born in Canada and possess "50 per centum of blood of the American Indian race" are entitled to special privileges not afforded other aliens. *See* 8 U.S.C. § 1359. This includes the privilege of moving freely between Canada and the United States. *See, e.g.*, *MacDonald v. United States*, 2011 U.S. Dist. LEXIS 148409, *8 (S.D. Cal. Dec. 23, 2011); *Akins v. Saxbe*, 380 F.Supp. 1210, 1213-14 (D. Me. 1974). That privilege was first recognized in the Jay Treaty of 1794 and was reiterated in the Explanatory Article of 1796. *See* Treaty of Amity, Commerce and Navigation, U.S. Great Britain, art. III, Nov. 19, 1794, 8 Stat. 116 ("It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling to either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America . . . ."); Explanatory Article to Article 3 of the Jay Treaty, U.S. Great Britain, May 5, 1796, 8 Stat. 130 ("That no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or Nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce secured by the aforesaid third Article of the treaty of Amity, commerce and navigation, to the subjects of his Majesty and to the Citizens of the United States and to the Indians dwelling on either side of the boundary-line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary-line . . . .").

In 1928, to secure this privilege of free passage, Congress enacted the Act of April 2, 1928, 45 Stat. 401, which provided that the Immigration Act of 1924 "shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States." Today, this provision is codified in 8 U.S.C. § 1359 and provides as follows: "Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."

The statute only exempts Canadian born American Indians from entry requirements into the United States. *See Akins*, 380 F.Supp. at 1213-14. Canadian born American Indians who live and work in the United States are not completely exempt from immigration requirements. *See id.* at 1214 ("It has been, and continues to be, the position of the Attorney General that Section 1359 exempts Canadian-born Indians from the pre-entry alien registration and visa requirements of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1301, but that Section 1359 does not exempt them from the post-entry alien registration and notification requirements of the Act, 8 U.S.C. §§ 1302(a), 1305, 1306, if they wish to remain in the United States for 30 days or more.").

Prior to 1978, the Board of Immigration Appeals ("BIA") construed 8 U.S.C. § 1359 narrowly as providing only that Canadian-born American Indians could not be precluded from entering the United States. *See Matter of Yellowquill*, 16 I. & N. Dec. 576, 577-78 (BIA 1978); *Matter of B--*, 3 I. & N. Dec. 191 (BIA 1948); *Matter of D--*, 3 I. & N. Dec. 300 (BIA 1948). Accordingly, the BIA's position was that although an American Indian born in Canada could be deported, each time he sought admission to the United States, he could not be refused and entered "with a clean slate." *Id.* However, in 1978, in *Matter of Yellowquill*, the BIA

reconsidered its position. Relying on the decision in *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974), the BIA held that "American Indians born in Canada who are within the protection of section 289 of the Act are not subject to deportation on any ground." *Id.* at 578. Thus, after 1978 American Indians who can demonstrate at least "50 per centum of blood of the American Indian race" cannot be removed from the United States.

FACTUAL BACKGROUND

According to the Complaint, Plaintiff is a "member of the Ermineskin Cree nation which is a branch of the larger Cree Nation." Complaint at ¶ 6.[1] He was born in Canada. *Id.* at ¶ 7. On or about September 22, 1975, he was admitted to the United States as a lawful permanent resident. *Id.* at ¶ 8.

On June 7, 2011, Immigration and Customs Enforcement (ICE) issued Plaintiff a Notice to Appear and took him into custody, charging him as removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien previously convicted of an aggravated felony. *Id.* at ¶¶ 12-14; Ex. 1 at 1. At the time, Plaintiff was serving a two-year sentence for Assault Family Violence, Repeat Offender, in violation of Section 22.01 of the Texas Penal Code. Ex. 1 at 1. In fact, Plaintiff was convicted of Assault Family Violence in Williamson County, Texas, on March 27, 1996, and as a repeat offender in Travis County, Texas on October 8, 1998 and in Hays County, Texas on

[1] All citations are either to the Complaint or documents referenced therein. Because Plaintiff incorporates these documents by reference, it is appropriate to consider them as part of the motion to dismiss pursuant to Rule 12(b)(1) without converting this motion into a motion for summary judgment. *See, e.g.*, *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). It is also appropriate to consider these documents and even documents outside of the complaint for purposes of the Government's motion to dismiss pursuant to Rule 12(b)(6), *see Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005), although the Government's jurisdictional motion does not rely on them. In any event, should the court disagree as to whether these documents may be considered as part of the Government's motion to dismiss pursuant to Rule 12(b)(1), the Government moves in the alternative for summary judgment.

September 22, 2010. Ex. 2 at 2-3. Plaintiff also has multiple convictions for driving while intoxicated, assault, and criminal mischief. *Id.*

Plaintiff appeared at a removal hearing on June 14, 2011,[2] at which he claimed to be a Canadian-born American Indian and asserted a claim of derivative United States citizenship through his naturalized mother. Ex. 3 at 3. The Immigration Judge (IJ) focused on the second claim, and continued the hearing so that Plaintiff could collect evidence concerning his claim of citizenship. Complaint at ¶¶ 21-24; Ex. 3 at 2-3. Plaintiff appeared at another hearing on July 6, 2011, at which he did not produce any evidence supporting his citizenship claim. Ex. 3 at 1. At this hearing he conceded removability to Canada and waived any appeal of the removal order. Complaint at ¶ 27; Ex. 3 at 1; Ex. 4 at 1.

Plaintiff alleges that around this time, ICE obtained documentation concerning Plaintiff's father indicating that Plaintiff and his father were American Indians born in Canada. Complaint at ¶ 25. However, it appears that this documentation revealed that Plaintiff was not at least 50% American Indian. Rather, this documentation revealed that Plaintiff's father, Harley Christopher Hodgson, was denied Ermineskin Band membership because Plaintiff's grandfather, Fred Hodgson, was not a member of the Ermineskin Band. Compare Ex. 6 and Ex. 7. Accordingly, Plaintiff is not in fact at least 50 percent American Indian. Even so, on August 16, 2011, ICE released Plaintiff from physical custody.[3] Complaint at ¶ 31.

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[2] In his Complaint, Plaintiff asserts this occurred on June 21, 2011. That is incorrect.

[3] Although Plaintiff asserts that ICE was fully aware that he was an American Indian by blood, this is incorrect. According to his admission documents, which he references at paragraph 4 of his Complaint, he was admitted to the United States as an "SA-1," a term no longer in use which at the time meant a "special immigrant who is an alien born in an independent Western Hemisphere country." *Corniel-Rodriguez v. Immigration & Naturalization Service*, 532 F.2d 301, 304 n.10 (2d Cir. 1976) (internal quotation marks omitted). Ex. 7. Thus the record available to ICE at the time of Plaintiff's apprehension did not indicate that he was an American Indian. Although Plaintiff asserts, Complaint at ¶ 19, that he received correspondence from Canadian

Thereafter, on September 28, 2012, Plaintiff filed an administrative claim with ICE concerning his detention. *Id.* at ¶ 3. ICE denied Plaintiff's administrative claim on April 11, 2013. *Id.* This suit followed. Defendant now moves to dismiss.

ARGUMENT

I. Standard of Review

A. Subject Matter Jurisdiction

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Krim*, 402 F.3d at 494. In considering a challenge to subject matter jurisdiction, the district court is "free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case." *Id*. When the court's subject matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing it. *See Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009).

B. Failure to State a Claim

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authorities stating that he was "registered as an Indian in accordance with Section 6(1)(a) of the Indian Act," which he then alleges he shared with ICE, Ex. 5 at 1; Complaint at ¶ 19, that registration says nothing about whether Plaintiff is in fact at least 50% American Indian by blood. Indeed, the letter itself notes that the Ermineskin band, and not the Canadian government, determines membership in the tribe. Ex. 5 at 1. ICE also had information in its possession concerning Plaintiff's grandfather by way of his father's A-File, indicating "Fred Hodgson erroneously was admitted in 1937 to the membership of the Ermineskin Band" after marrying a woman named Mina Minde, who was a member of the tribe. Ex 6 at 1-2. According to that information, "Fred Hodgson and his children, including Harley Christopher [Plaintiff's father] were removed from membership in the Ermineskin Band." *Id.* Accordingly, ICE had information in its possession by virtue of Plaintiff's A-file and his father's A-file suggesting that because only Plaintiff's grandmother was Ermineskin, Plaintiff is therefore only 25% American Indian. It is unclear from the Complaint if this is the information Plaintiff refers to at Paragraph 25 concerning "Mr. Hodgson's father." In any event, should the Court not deem this information incorporated by reference or relevant to its subject matter jurisdiction, it is appropriate to consider it as part of the Government's alternative motion for summary judgment concerning the merits of Plaintiff's claim to being 50% American Indian.

A motion to dismiss for failure to state a claim should be granted where the Complaint does not contain sufficient factual allegations, as opposed to legal conclusions, that state a claim for relief that is "plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 617 (5th Cir. 2012). Separately, regardless of how well-pleaded the factual allegations may be, they must demonstrate that the plaintiff is entitled to relief under a valid legal theory. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997).

Generally a court limits itself to the contents of the pleadings and its attachments. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (citing FED. R. CIV. P. 12(b)(6)). However, a court may consider certain other documents without treating the motion as one for summary judgment. "Documents that a defendant attaches to a motion to dismiss are [also] considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Id.* "In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Id.* at 499. Moreover, the Court may also consider "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inv. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995) ("Federal Courts are permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss.").

II. 8 U.S.C. § 1252(g) Forecloses Federal Jurisdiction Over Plaintiff's FTCA Claims

The crux of Plaintiff's Complaint is that the 70 days he spent in federal custody *after* a Notice to Appear (NTA) was issued, commencing removal proceedings, violated the FTCA.

However, this precise claim is barred by 8 U.S.C. § 1252(g), which provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien *arising from* the decision or action by the Attorney General to *commence proceedings*, adjudicate cases, or execute removal orders against any alien under this chapter." (emphasis added). Every Court to address whether federal immigration custody following the issuance of NTA, regardless of whether it is in the Fourth Amendment, *Bivens*, or FTCA context has held that section 1252(g) forecloses suit. *See, e.g.*, *Sissoko v. Rocha*, 509 F.3d 947, 950 (9th Cir. 2007) (dismissing Fourth Amendment suit where claimant's' "detention arose from [Defendant's] decision to commence expedited removal proceedings. As a result, 8 U.S.C. § 1252(g) applies to the [claimant's] claim"); *Foster v. Townsley*, 243 F.3d 210, 211 (5th. Cir. 2001) (affirming district court's application of 8 U.S.C. § 1252(g) to preclude *Bivens* claim of Jamaican native who sued INS officials for wrongfully removing him from the country); *Alcaraz v. United States*, 2013 U.S. Dist. LEXIS 124051, * 4-6 (N.D. Cal. Aug. 29, 2013) (no FTCA claim where alleged false arrest and imprisonment arose "from the decision to execute the June 2010 removal order"); *Chen Chao v. Holder*, 2011 WL 6837761 at *6 n.9 (E.D.N.Y. Dec. 29, 2011) ("To the extent plaintiff seeks to hold Shanahan and Chavez individually liable for the mere detention of plaintiff by ICE, . . . the Court finds that the claim is barred by 8 U.S.C. § 1252(g)"); *MacDonald v. United States*, 2011 U.S. Dist. LEXIS 148409, *10-18 (S.D. Cal. Dec. 23, 2011) (dismissing FTCA claims because they challenged Plaintiff's detention, which arose from the decision to commence proceedings); *Rodriguez-Macias v. Holder*, 2011 WL 1253742 at *3 (D. Ariz. Apr 4, 2011) (dismissing *Bivens* claim because Plaintiff "is an 'alien' for purposes of § 1252(g) [and his] claims arise out of a decision to 'commence proceedings, adjudicate cases, or execute removal orders' against him"); *Guardado v. United States*, 744 F. Supp.2d 482, 487 (E.D. Va. 2010) ("Regarding the FTCA and

Bivens, § 1252(g) is quite clear that 'no court shall have jurisdiction to hear any cause or claim arising from the decision . . . to . . . execute removal orders.' The use of the word 'any' obviated the need for the statute to list out every possible cause or claim it barred."); *Chen v. Escareno*, 2009 WL 3073928 at *6 (S.D. Tex. Sep. 18, 2009) (dismissing both *Bivens* and FTCA claims because "the heart of the plaintiffs' complaint concerns actions by immigration officials to effect Chen's arrest, detention, and removal, which were undertaken pursuant to the in absentia removal order entered by the immigration judge [and] are connected directly and immediately with a decision or action by the Attorney General to execute the February 6, 2008 order of removal"); *Valencia-Mejia v. United States*, 2008 WL 4286979 at *4 (C.D. Cal. Sept. 15, 2008) (dismissing *Bivens* and FTCA claims pursuant to 1252(g) since decision to detain alien until his hearing arose from the decision to commence proceedings); *Arias v. ICE*, 2008 WL 1827604 at *7 (D. Minn. Apr. 23,2008) (The Court finds that "§ 1252(g) bars review of the [r]emoved Plaintiffs' [Bivens] claims"); *Guerrero v. United States*, 2008 WL 2523892 at *5 (C.D. Cal. June 20, 2008) (ruling that 8 U.S.C. § 1252(g) precludes *Bivens* and FTCA claims, including false imprisonment claim); *Bernardo v. United States*, 2004 U.S. Dist. LEXIS 27249, *7 (N.D. Tex. Apr. 05, 2004) ("the Court is deprived of jurisdiction under section 1252(g) [because the FTCA] action is clearly aimed at challenging the INS's decision to commence and pursue deportation proceedings against him").

As the Supreme Court has explained, section 1252(g) is designed to preserve prosecutorial discretion in immigration matters, particularly matters arising from "decision[s] or actions to commence proceedings, adjudicate cases, or execute removal orders." *Reno*, 525 U.S. 471, 482 (1999). As the Fifth Circuit has explained, "[c]laims that clearly are included within the definition of 'arising from' are those claims connected directly and immediately with a decision

or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." *Foster*, 243 F.3d at 214. Put another way, where an alien's detention occurs directly as a result of the initiation of removal proceedings, that detention arises from the decision to initiate proceedings, because but for that decision, the detention would not have happened. *See, e.g.*, *Sissoko*, 509 F.3d at 950-51 (concluding that § 1252(g) barred the alien's Fourth Amendment-based damages claim for false arrest and detention because that detention followed and was required by the decision to commence proceedings); *MacDonald*, 2011 U.S. Dist. LEXIS 148409 at *17 (a "challenge to confinement during removal proceedings" is a "decision or action" covered by section 1252(g) "because it stems directly from the Attorney General's decision to commence the removal proceedings"); *Chen*, 2009 U.S. Dist. LEXIS 85912 at * 13-18 (holding that claims challenging "actions by immigration officials to effect [Plaintiff's] arrest, detention, and removal" are "are connected directly and immediately with a decision or action by the Attorney General to execute the February 6, 2008 order of removal").

Indeed, this case is virtually indistinguishable from the case of *MacDonald v. United States*, 2011 U.S. Dist. LEXIS 148409, *10-18 (S.D. Cal. Dec. 23, 2011), a case also addressing false arrest and imprisonment claims stemming from the commencement of removal proceedings against an alien asserting that he was an American Indian of Canadian birth. There, Plaintiff, indisputably at least 50% American Indian who was admitted as a lawful permanent resident, was convicted of possession of cocaine with intent to distribute. *Id.* at *2. After serving his sentence, ICE issued an NTA and commenced removal proceedings, taking Plaintiff into custody and subsequently deporting him. *Id.* at * 3-9. Plaintiff filed suit alleging, among other things, Fourth Amendment and FTCA violations based on his arrest and confinement. *Id.* Relying on the Ninth Circuit's decision in *Sissiko*, the court held section 1252(g) foreclosed any "Fourth

Amendment challenge to confinement during removal proceedings" because that confinement is a decision or action that "[s]tems directly from Attorney General's decision to commence the removal proceedings."[4] *Id.* at *17.

This case is no different. Here there is no dispute that Plaintiff is an alien to whom section 1252(g) applies.[5] Nor is there any dispute that once removal proceedings commenced, his detention was required by statute. *See* 8 U.S.C. § 1226(c)(B) (indicating that the "Attorney General *shall* take into custody any alien who" like Plaintiff "is deportable by reason of having committed any offense covered in section 1227 (a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title"). Accordingly, his detention which forms the basis of his FTCA claims "arises from" the decision to commence proceedings against him. *See, e.g.*, *Sissoko*, 509 F.3d at 950 (9th Cir. 2007); *Foster*, 243 F.3d at 214; *MacDonald*, 2011 U.S. Dist. LEXIS 148409 at *10-18; *Bernardo*, 2004 U.S. Dist. LEXIS 27249, *7. Therefore, the Court lacks jurisdiction over the Complaint pursuant to 8 U.S.C. § 1252(g) and should dismiss this lawsuit.

III. The FTCA Itself Forecloses Federal Court Jurisdiction Over Plaintiff's Claims

Even assuming section 1252(g) does not foreclose this lawsuit, the FTCA itself forecloses jurisdiction over Plaintiff's complaint. The FTCA waives the sovereign immunity of

[4] The Court dismissed the FTCA claims because Plaintiff named individual defendants, which the FTCA does not permit. *MacDonald*, 2011 U.S. Dist. LEXIS 148409 at *27-28. However the Court's reasoning concerning the Fourth Amendment would apply equally to the plaintiff's false imprisonment and arrest claims. *See, e.g*, *Alcaraz*, 2013 U.S. Dist. LEXIS 124051 at *4-6.

[5] The INA defines an "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Because Plaintiff was not born or naturalized in the United States, he is not a United States "citizen." *See* 8 U.S.C. § 1401 *et seq*. (defining a United States citizen and national at birth); *id*. § 1421 (naturalization authority). Similarly, because there is no indication that Plaintiff otherwise "owes permanent allegiance" to the United States, he is not a "national of the United States." *See* 8 U.S.C. § 1101(a)(22). Moreover, the applicable federal regulations list American Indians born in Canada among the "*[a]liens* not required to obtain immigration visas." *See* 22 C.F.R. § 42.1(f) (emphasis added). Thus, Plaintiff is an "alien" under the INA definition. *See* 8 U.S.C. § 1103(a)(3).

the United States for tort claims "in the same manner and to the same extent as a private individual under like circumstances." *See* 28 U.S.C. § 2674. The United States is only liable under the FTCA "in accordance with the law of the place where the act or omission occurred." *See* 28 U.S.C. § 1346(b)(1).

However, the FTCA has numerous exceptions to this waiver of sovereign immunity that function as jurisdictional bars to an FTCA claim. One such bar is "investigative or law enforcement officer" exception. Pursuant to 8 U.S.C. § 2680(h), the FTCA waives sovereign immunity for claims based on "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," but only if the "acts or omissions" are caused by "investigative or law enforcement officers of the United States Government." An "investigative or law enforcement officer" is "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal Law." *Id.*

This section forecloses Plaintiff's claims, as the conduct of which he complains, if it happened at all, was the product of actions taken by an immigration judge and ICE officials who were the attorneys prosecuting his case, rather than law enforcement officers. Complaint at ¶¶ 23-28. Specifically, Plaintiff appears to allege that his detention was caused by an immigration judge "wrongly inform[ing Plaintiff] that his only legitimate defense to deportation was the potential claim of having derived U.S. citizenship from his mother," and refusing "to accept any evidence [Plaintiff] had about his claim of being an American Indian born in Canada." *Id.* at ¶ 23. He also alleges that a "USICE officer," meaning the ICE attorney prosecuting his case, "obtain documentation about [Plaintiff's] father," and therefore "had information that [Plaintiff's] father was an American Indian born in Canada." *Id.* at ¶ 25. Further he alleges that

"[n]either the USICE attorney nor the Immigration Judge considered or investigated [Plaintiff's] claim of being an American Indian born in Canada." *Id.* at ¶ 28.

But this is precisely what section 2680(h) forecloses. As the Ninth Circuit has observed in a similar context, these claims "fail at the outset because [Plaintiff] has not established that either the immigration judge or the INS attorneys are investigative or law enforcement officers under § 2680(h)." *Cao*, 156 Fed. Appx. at *50 (citing *Arnsberg v. United States*, 757 F.2d 971, 978 n. 5 (9th Cir.1985) ("When acting adjudicatively a judge or magistrate is not within the purview of § 2680(h)."); *Wright v. United States*, 719 F.2d 1032, 1034 (9th Cir.1983) (affirming district court's dismissal of FTCA claim against Assistant U.S. Attorney for lack of jurisdiction)). In this situation, "the actions of the [Immigration Judge] and INS attorneys in this case cannot form the basis of United States' tort liability" and "the claim must be dismissed for lack of jurisdiction." *Id.*; *see Sims v. U.S.*, 2008 WL 4813827, *5 (E.D. Cal. Oct. 29, 2008) (concluding that ICE attorneys are not "empowered to make arrests, execute warrants and make warrantless searches," and therefore their alleged conduct cannot form the basis of an FTCA claim); *accord Lea v. Gessleman*, 2010 WL 3816411, *7 (E.D. Tex. Aug. 23, 2010) (dismissing FTCA claim where Plaintiff failed to show "nurses" were "law enforcement officers"); *Lineberry v. U.S.*, 2009 WL 763052, *8 (N.D. Tex. March 23, 2009) (holding that even when allegations concern individuals that are law enforcement officers that "[u]nless the [officers] were acting in an investigative or law enforcement capacity, there is no FTCA jurisdiction under the law enforcement proviso");

Assuming section 2860(h) does not apply and that Plaintiff's allegations can be traced to actual investigative or law enforcement officers, a second bar to Plaintiff's suit is the "discretionary function" bar, which applies to claims "based upon the exercise or performance or

the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *Bernardo v. United States*, 2004 U.S. Dist. LEXIS 27249, *7-8 (N.D. Tex. April 5, 2004) (citations omitted). "Decisions to investigate, how to investigate and whether to prosecute generally fall within the discretionary function exception of the FTCA." *Bernardo*, 2004 U.S. Dist. LEXIS 27249 at *7 (citing *Sutton v. U.S.*, 819 F.2d 1289, 1293 (5th Cir. 1987); *Smith v. U.S.*, 375 F.2d 243, 247-48 (5th Cir. 1967) (section "2680(a) exempts the government from liability for exercising the discretion inherent in the prosecutorial function of the Attorney General, no matter whether these decisions are made during the investigation or prosecution of offenses," including negligence claims); *accord Reno* 525 U.S. at 483-85 (explaining that the decision to detain an individual for removal proceedings is a classic discretionary function).

Such is the case here with Plaintiff's tort claims. "'Because there is no allegation or evidence of intentional misconduct, this is essentially a claim that the [ICE] officers failed to adequately perform a discretionary duty, which falls squarely within the discretionary function exception.'" *Bernardo*, 2004 U.S. Dist. LEXIS 27249 at *8 (quoting *Nguyen v. United States*, 65 Fed. Appx. 509 (5th Cir. March 31. 2003) (unpublished). "Because the [ICE] agents in this case did not exceed their authority either in investigating the case or in detaining [Plaintiff], their actions are protected by the discretionary function exception of the FTCA." *Id.* Accordingly, the Court lacks jurisdiction over Plaintiff's tort claims based on negligence[6] and

[6] Many other cases find bare negligence claims barred by the FTCA. *See, e.g.*, *McElroy v. United States*, 861 F. Supp. 585, 592 (W.D. Tex. 1994) (concluding that even if Defendant had in fact been negligent under Texas law, "the discretionary function exception applies to exclude Plaintiff's negligence claim"); *Flax v. United States*, 847 F. Supp. 1183, 1188 (D.N.J. 1994) (finding that action against FBI agents for negligent surveillance of a kidnapping victim was barred by the discretionary function exception of the FTCA); *Mesa v. United States*, 837 F. Supp. 1210, 1212 (S.D. Fla. 1993) (concluding that action against DEA agent for negligently

"assault/battery/false arrest/false imprisonment." *See id.* (holding that FTCA barred suit alleging false imprisonment and negligent failure to investigate an alien's claim of citizenship); *accord McGuire v. United States (In re FEMA Trailer Formaldehyde Prods.*, 713 F.3d 807, (5th Cir. 2013) (holding that negligence claims raised under the FTCA are "barred by the discretionary-function exception"); *Davila v. United States*, 713 F.3d 248, 263-64 (5th Cir. 2013) (same).[7]

Even were that not so, Plaintiff's claims concerning his detention are not cognizable under the FTCA for a third reason. As noted, the United States is only liable under the FTCA "in accordance with the law of the place where the act or omission occurred." *See* 28 U.S.C. § 1346(b)(1). In this case, that is Texas. To establish a false imprisonment claim under Texas law, a plaintiff must show that a defendant carried out (1) a willful detention, (2) without consent of the detainee and (3) without authority of the law. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644-65 (Tex. 1995) (citing *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375

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investigating and arresting the wrong person was barred by the discretionary function exception); *Patel v. United States*, 806 F. Supp. 873, 878 (N.D. Cal. 1992) (holding that DEA agents' decisions to investigate, obtain search warrant, and raid suspected drug hideout were discretionary functions).

[7] To the extent the Court finds a distinction between the discretionary decision to institute proceedings and the mandatory decision to detain pursuant to 8 U.S.C. § 1226(c), an FTCA claim premised on the latter would be barred by another exception, the "due care" exception, which precludes jurisdiction over "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . . ." 28 U.S.C. § 2680(a). This exception "prevents the United States from being held liable for actions of its officers undertaken while reasonably executing the mandates of a statute" and applies when a statute or regulation that "specifically proscribes a course of action for an officer to follow" and the officer must have "exercised due care in following the dictates of that statute or regulation." *Welch v. United States*, 409 F.3d 646, 65-521 (4th Cir. 2005). That is indisputably true here, where 8 U.S.C. § 1226(c) mandated detention of Plaintiff based on his previous conviction for an aggravated felony. *See* U.S.C. §§ 1226(c)(B); 8 U.S.C. § 1227(a)(2)(A)(iii). Because there is no allegation in this case that an immigration officer "deviated from the statute's requirements," *Welch*, 409 F.3d at 652, the due care exception precludes Plaintiffs' FTCA claims to the extent the court distinguishes between arrest and detention.

(Tex. 1985)). The burden is on the plaintiff to establish all three elements. *Sears*, 693 S.W.2d at 376.

The third element forecloses Plaintiff's claims. "Because the [ICE] agents are federal agents acting pursuant to federal law, a Texas court would consult federal law to determine whether the Plaintiff was lawfully detained." *Nguyen v. United States*, 2001 WL 637573, at * 7 (N.D. Tex. June 5, 2001). Immigration officers have the authority to detain aliens who are arrested for being illegally present in the United States and are ordered removed from the United States. *See* 8 U.S.C. §§ 1226, 1231. Immigration officers also have the legal authority to arrest any alien in the United States if they have reason to believe the alien is in the United States in violation of any law or regulation. *See* 8 U.S.C. §§ 1357(a)(2), (a)(4), (a)(5). "Reason to believe" is the equivalent of probable cause. *See United States v. Cantu*, 519 F.2d 494 (7th Cir. 1975); *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981); *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.). "Probable cause exists 'when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Haggerty v. Texas Southern University*, 391 F.3d 653, 655-656 (2004) (quoting *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001)).

Here, once ICE had probable cause to arrest and detain Plaintiff, ICE had the necessary legal authority to detain Plaintiff under Texas law, barring any claim of "assault/battery/false arrest/false imprisonment" arising from his arrest and detention. Indeed, "no action will lie against an officer for unlawful restraint, false arrest or false imprisonment where probable cause is shown to have existed, as the existence of probable cause provides the authority to arrest." *Williams v. United States*, 2009 WL 3459873, *17 (S.D. Tex. Oct. 20, 2009); *accord Tovar v.*

United States, 2000 WL 425170, at *7-8 (N.D. Tex. Apr. 18, 2000) (noting that INS agents had "legal authority" to detain plaintiff under INA, barring false imprisonment claim under Texas law); *Bernardo*, 2004 U.S. Dist. LEXIS 27249 at *8 (holding that because "no regulation or statute prevented the INS agents from pursuing deportation proceedings against [claimant] based on the information available to them . . . the INS agents in this case had sufficient reason to believe that [claimant] was an alien). Accordingly, Plaintiff's suit is barred by the FTCA and the action should be dismissed.

IV. Plaintiff is not in Fact At Least 50% American Indian

Finally, even assuming Plaintiff's suit is not foreclosed either by 8 U.S.C. § 1252(g) or by the FTCA itself, Plaintiff cannot succeed on the merits of his claim because he cannot allege plausibly that he is in fact 50% American Indian. As noted, ICE possesses, and Plaintiff refers to in his Complaint, documentation concerning Plaintiff's father, Harley Christopher Hodgson, which shows he was denied Ermineskin Band membership because Plaintiff's grandfather, Fred Hodgson, was not a member of the Ermineskin Band. *See supra*, Footnote 3. According to that information, "Fred Hodgson and his children, including Harley Christopher [Plaintiff's father] were removed from membership in the Ermineskin Band." Ex. 6 at 1-2. Accordingly, ICE had information in its possession by virtue of Plaintiff's A-file and his father's A-file suggesting that because only Plaintiff's grandmother was Ermineskin, Plaintiff is therefore only 25% American Indian. Therefore, Plaintiff is not in fact at least 50 percent American Indian and his claims fail on the merits.[8] *See* 8 U.S.C. § 1359; *United States v. Curnew*, 788 F.2d 1335, 1338 (8th Cir. 1986).

[8] There is very little case law the undersigned is aware of that addresses the process of determining whether an individual is 50 percent Native American under the relevant statute. The Eighth Circuit addressed the issue in the context of an illegal re-entry prosecution, holding that

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint for lack of subject matter jurisdiction, or, alternatively, for failure to state a claim upon which relief can be granted.

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"an individual must present some combination of evidence from which the finder of fact can reasonably conclude that the individual in fact possesses 50 per centum or more American Indian blood. Proof only that an individual possesses some unidentifiable degree of Indian blood without more will be insufficient." *Curnew*, 788 F.2d at 1338. In other words, "section 1359 is a blood-line test requiring an individual to establish a specific percentage of American Indian blood," that is, 50 percent. *Id.*; *accord* 1 INS and DOJ Legal Opinions § 93-65 (stating that a "Canadian born American Indian who has at least 50 percent Indian blood may qualify as a person eligible to enter the United States under 8 U.S.C. Sec. 1359 upon presentation of sufficient proof of his or her 50 percent Indian blood through tribal records, birth certificates, and similar documentation."). Thus, the fact that Plaintiff might be deemed an American Indian in Canada is irrelevant, as unlike the relevant American law, "Canada does not have a blood quantum requirement and does not record the blood quantum of those recognized as Indians." *See* Charles Gordon, *et al*., 1-10 Immigration Law and Procedure § 10.06 at n.18; *see also* Paul Spruhan, *The Canadian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. Rev. 301, 317-20 (2009) (discussing issues of proof in such cases). Indeed, for this reason, government agencies do "not accept Indian-status documents issued by the Canadian government." *Id.*; *see* 1 INS and DOJ Legal Opinions § 93-65 (stating that a "Canadian Certificate of Indian Status (Form IA-1395) is not a valid entry document for admission into the United States" as an American Indian born in Canada because "this certificate only indicates that the person to whom the certificate relates is enrolled in an Indian tribe or band of Canada" and "[m]embership in such a tribe or band does not by itself indicate that a person has at least 50 percent Indian blood"). For that same reason, Plaintiff's letter he relies on at Paragraph 20 of his Complaint is irrelevant and cannot, as a matter of law, establish his blood line.

Dated: November 12, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2013, I electronically filed the foregoing document with the Clerk of Court using CM/ECF, to which opposing counsel is a member.

/s/ *Erez Reuveni*
EREZ REUVENI
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