United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5424 **September Term 2008**

05-cv-01509, 05-cv-01602,
05-cv-01704, 05-cv-02370,
05-cv-02398, 08-cv-01310,
08-mc-00442

Filed On: October 20, 2008

Jamal Kiyemba, Next Friend, et al.,

Appellees

v.

George W. Bush, President of the United States, et al.,

Appellants

Consolidated with 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

BEFORE: Henderson, Randolph, and Rogers,* Circuit Judges

O R D E R

Upon consideration of the motion for stay pending appeal and for expedited appeal, the response thereto, the reply, and the letter filed pursuant to Federal Rule of Appellate Procedure 28(j), it is

ORDERED that the administrative stay entered by this court on October 8, 2008, be dissolved. It is

FURTHER ORDERED that the motion for stay be granted and the district court's order directing that appellees be released into the United States be stayed pending further order of the court. Appellants have satisfied the stringent standards required for a stay pending appeal. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 32-33 (2007). It is

FURTHER ORDERED that these appeals be expedited. See 28 U.S.C. § 1657(a); D.C. Cir. Rule 47.2. The following briefing schedule will apply:

No. 08-5424 **September Term 2008**

Appellants' Brief (not to exceed 14,000 words)	October 24, 2008
Appendix	October 24, 2008
Appellees' Joint Brief (not to exceed 14,000 words)	October 31, 2008
Reply Brief (not to exceed 7,000 words)	November 7, 2008

The parties are directed to file and serve their briefs by hand. This panel will hear oral argument in these consolidated cases on November 24, 2008, at 9:30 a.m.

Per Curiam

* A separate statement by Circuit Judge Rogers, dissenting from the grant of the motion for stay, is attached.

No. 08-5424, Kiyemba, et al. v. Bush, et al.

ROGERS, *Circuit Judge*, dissenting from the grant of a stay pending appeal of the habeas order of release on conditions. Petitioners are 17 Uighurs who were turned over to United States officials in Pakistan in 2001 upon payment of a bounty. For over 6 years, they have been imprisoned in the military prison at Guantanamo Bay ("Guantanamo"). Petitioners began filing habeas corpus petitions in July 2005. After this court held the government had failed to present evidence to support a finding that one of the petitioners was an enemy combatant, *Parhat v. Gates*, 532 F.3d 834, 854 (D.C. Cir. 2008), the government advised the district court that the other petitioners also were not enemy combatants. Pet'rs' Opp'n to Stay, Ex. G. The government also advised the district court that although it had made diplomatic efforts over several years to identify a country willing to receive these petitioners, its efforts had been in vain, and it could not state when petitioners could be released to another country. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, Mem. Op. at 9 (D.D.C. Oct. 9, 2008); Mot. Status Hr'g Tr. at 10-11 (Oct. 7, 2008). The district court granted the writs and scheduled a hearing on conditions of release. It denied the government's motion for a stay pending appeal. Now, in requesting a stay from this court of the district court's order granting the writs, the government seeks the continued imprisonment of petitioners at Guantanamo.

In *Boumediene v. Bush,* 128 S. Ct. 2229 (2008), the Supreme Court held that the Constitution entitles persons imprisoned at Guantanamo "to the privilege of habeas corpus to challenge the legality of their detention," *id.* at 2262, and that a court's power under the writ must include "authority to . . . issue . . . an order directing the prisoner's release," *id.* at 2271. *See also Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007) (Rogers, J., dissenting). On October 7, 2008, the district court in these habeas proceedings did exactly that, granting the petitioners' writs and ordering that they be brought to the United States and released. Their release was to be subject to conditions to be determined by the district court in light of the views of the Department of Homeland Security and proffers regarding housing and supervision made by their counsel. The court's release order was based on findings that are either uncontested by the government or clearly supported by the record. The government had filed no returns to the writs filed by ten of the petitioners, and the returns in response to the remainder consisted only of the hearing records from Combatant Status Review Tribunals ("CSRTs"), the type of record the court found wanting in *Parhat*. Although expressly offered the opportunity by the district court, the government presented no evidence that the petitioners pose a threat to the national security of the United States or the safety of the community or any person. Mot. Status Hr'g Tr. at 10-11 (Oct. 7, 2008); *see* 8 U.S.C. § 1226a(a)(6); *Clark v. Martinez*, 543 U.S. 371, 387 (2005) (O'Connor, J., concurring).

> Rule 23(c) of the Federal Rules of Appellate Procedure provides that:
>
> While a decision ordering the release of a prisoner is under review, the prisoner must — unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court . . . orders otherwise — be released on personal recognizance, with or without surety.

FED. R. APP. P. 23(c). Under *Hilton v. Braunskill*, the presumption of release pending appeal of a habeas grant is subject to consideration by the appellate court of the four factors traditionally considered in deciding whether to grant a stay. 481 U.S. 770, 777 (1987). Those four factors also weigh against a stay here.

First, as regards the likelihood of success on the merits, the government has abandoned its theory that petitioners can be held as enemy combatants, and the government does not argue that it may indefinitely imprison a person at Guantanamo solely because it deems him "dangerous." Instead, the government now makes two arguments: first, that under the separation of powers the decision on whether to admit the petitioners into the United States "rests solely with the political branches," Gov't's Mot. for Stay at 13-16, and second, that immigration laws preclude a habeas court from ordering the release of an inadmissible alien into the United States. On both points, the government does not show "a strong likelihood of success on appeal." *Hilton*, 481 U.S. at 778.[*] The first argument misstates the law. In interpreting immigration statutes, the Supreme Court has made clear that, in at least some instances, a habeas court can order an alien released with conditions into the country despite the wish of the Executive to detain him indefinitely. *Clark v. Martinez*, 543 U.S. 371, 386-87 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). It is thus both inadequate and untrue to assert that the political branches have "plenary powers over immigration," Gov't's Reply at 2. *See Zadvydas*, 533 U.S. at 695 (purported "'plenary power' to create immigration law" is "subject to important constitutional limitations.")

The government's second argument on the merits seems to be that — under either 8 U.S.C. § 1182(a)(3)(B), regarding aliens who have engaged in "terrorist activity," *id*. § 1182(a)(3)(B)(iii), or 8 U.S.C. § 1226a(a)(1) & (3), regarding the detention of terrorist aliens — petitioners are inadmissible because they were members of, or received weapons training from, a terrorist group. Gov't's Mot. at 13-14; *see* 8 U.S.C. § 1182(a)(3)(B)(i)(VIII). As an initial matter, the government did not proffer evidentiary support for this argument in the district court. Even putting that aside, the argument is at best problematic. As noted, the Supreme Court has held that even inadmissible

---

* Nor, as shown below, do the second and fourth factors militate against release. The government thus cannot rely on simply showing "a substantial case on the merits," if indeed it has so shown. *Hilton*, 481 U.S. at 778.

aliens cannot be held indefinitely under the normal immigration detention statute, 8 U.S.C. § 1231, and petitioners have been imprisoned for over six years. *Clark*, 543 U.S. at 386-87; *Zadvydas,* 533 U.S. at 689. Additionally the government has made no showing that either the Attorney General or the Deputy Attorney General has "certified" petitioners for detention under the special alien-terrorist provision, § 1226a(a)(3), as required by that statute. The government seems to offer in support, at least in part, the CSRT records that this court has already found to "lack sufficient indicia of . . . reliability." *Parhat*, 532 F.3d at 836. In *Boumediene* the Supreme Court held that these petitioners have a right to habeas and that this right must encompass the power of a court to order release. 128 S. Ct. at 2266-67. Statutes are to be construed to avoid interfering with the constitutional privilege of habeas corpus, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *Zadvydas*, 533 U.S. at 690, and interpreting the immigration statutes to bar release from Guantanamo robs the petitioners' habeas right of meaning. The government's newly-minted contention, notwithstanding the Supreme Court's holding in *Boumediene*, is that petitioners' right to habeas provides "[a]t most . . . a right of release from custody on the *basis of their status as asserted enemy combatants*" but not actual release from imprisonment. Gov't's Reply at 4 (emphasis in original). This position "overworks legal fiction [by saying] that one is free when by the commonest of common sense he is bound," *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting).

The government's reliance on *Mezei* is misplaced, most fundamentally because the Supreme Court's decision in that case rested on the proposition that inadmissible aliens have no constitutional rights because they are outside the territory of the United States, *id.* at 212; *Zadvydas*, 533 U.S. at 693. Here, the Supreme Court in *Boumediene* explicitly recognized that Guantanamo detainees have a constitutional right to habeas, 128 S. Ct. at 2267. (For this same reason, the government's attempt to distinguish *Clark* and *Zadvydas* on the grounds that petitioners are outside the territory of the United States, Gov't's Reply at 3, also fails.) This difference between the rights and remedies of Guantanamo detainees and Mezei makes sense because Mezei sought admission to the United States of his own will while these petitioners require admission because they were abducted by bounty hunters, brought by force to Guantanamo, and imprisoned as enemy combatants, which the government has conceded the petitioners are not. As petitioners point out, "[a]t least in the narrow context presented by this case, where the Government has created its own dilemma, *Mezei* cannot override *Boumediene's* core principle that the Constitution's design demands effective habeas review of unwarranted Executive intrusion into liberty." Pet'rs' Opp'n to Stay at 14.

Under the second factor, the government fails to establish irreparable harm. In arguing that the district court's order of release impinges on the political branches'

exclusive authority over the admission of aliens and the winding up of detention of former enemy combatants, the government restates its legal position, which is flawed absent further guidance from the Supreme Court. Further, petitioners' status will be as clear as that of any aliens since *Clark* granted conditional release, and any cloud over their status would hardly be irreparable harm sufficient to overcome the harm of unlawful imprisonment. Having failed to file returns for many of the petitioners or to proffer evidence to the district court, the government can point to no evidence of dangerousness, and regarding such record as exists in this court the government has not pointed to evidence of such risk. Indeed such record as exists suggests the opposite. *See Parhat,* 532 F.3d at 835-36, 838; Pet'rs' Opp'n to Stay, Ex. G. The fact that petitioners received firearms training cannot alone show they are dangerous, unless millions of United States resident citizens who have received firearms training are to be deemed dangerous as well, and, in any event, the district court found there is no evidence petitioners harbor hostility toward the United States. *Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, Mem. Op. at 12.

Under the third factor, the petitioners clearly have a substantial interest in release, for the interest in release is "always substantial." *Hilton*, 481 U.S. at 777-78. Finally, as regards the public interest, the fourth factor, the Supreme Court emphasized in *Boumediene* that

> the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

128 S. Ct. at 2259. Because the government has failed to show irreparable harm, the government's belated invocation of the immigration laws is problematic given both the length of time that petitioners have been denied their liberty and the length of time the government was on notice of the need to make a sufficient evidentiary showing to traverse the petitions seeking the writ. Under immigration laws, even for a repeat felon not lawfully entitled to enter the United States, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized." *Clark*, 543 U.S. at 378 (quoting *Zadvydas*, 533 U.S. at 699). How much more so here for persons not convicted, indeed no longer even accused of any criminal wrongdoing.

Combined with the government's failures so far to "ma[k]e a strong showing that [it] is likely to succeed on the merits," *Hilton*, 481 U.S. at 776, or that the public interest weighs in favor of continued unlawful imprisonment of these petitioners at Guantanamo, its additional failure to present evidence of irreparable harm necessarily means that the government has failed to meet its burden of proof in seeking a stay. The court consequently has no basis for staying pending appeal the district court's order granting the habeas writs.