UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	SEALED
GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-0442 (TFH)
	Civil Action Nos. 05-0392 (ESH) 05-1347 (GK) 05-1353 (RMC) 05-1504 (RMC) 05-2386 (RBW)

MEMORANDUM OPINION

Pending before the Court is Petitioners' Emergency Motion for Reconsideration of Order Vacating Injunctions Barring Transfer to Algeria, or, in the Alternative, for Stay Pending Appeal. Five petitioners in the above-captioned cases – Nabil Hadjarab (ISN 238), Motai Saib (ISN 288), Djamel Ameziane (ISN 310), Farhi Saeed bin Mohammed (ISN 311), and Abdul Aziz Naji (ISN 744) – ask the Court to reconsider its Order of February 4, 2010 ("February 4 Order") that dissolved injunctions barring Respondents ("Government") from transferring them to Algeria.[1] Upon consideration of the motion, Respondents' opposition, Petitioners' reply, supplemental filings, and the entire record herein, the Court will deny the motion.

Background

Petitioners are five Algerian nationals currently detained at the United States Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). In the fall of 2008, Petitioners filed individual motions to enjoin their respective transfers to Algeria on the grounds that they

[1] Petitioners also had requested that the Court stay the February 4 Order pending appeal. On March 9, 2010, the Court issued a sealed order denying that request. *See* Order (Mar. 9, 2010) [Dkt. No. 1922, 08-mc-0442].

would be persecuted or tortured if they were returned to Algeria. At the time, the Supreme Court had just issued *Boumediene v. Bush*, which granted the detainees at Guantanamo the privilege of habeas corpus. 128 S. Ct. 2229, 2262 (2008). One of the questions left open by *Boumediene* was whether a district court could bar the Government from transferring a Guantanamo detainee who feared the recipient foreign country would torture him. On September 25, 2008, the United States Court of Appeals for the District of Columbia Circuit heard oral argument in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), which concerned that precise issue. Because the D.C. Circuit was in the process of resolving the issue presented by Petitioners' motions to enjoin, the Court temporarily enjoined Respondents from "transferring Petitioner[s] from the United States Naval Base at Guantanamo Bay, Cuba, to Algeria pending the United States Court of Appeals for the D.C. Circuit's decision in *Kiyemba v. [Obama]*, No. 05-5487." *See, e.g.*, Order (Sept. 17, 2009) [Dkt. No. 610, 08-mc-0442]. Respondents appealed the injunctions.

On April 7, 2009, the D.C. Circuit decided *Kiyemba*, holding that a district court is precluded from "barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured . . . in the recipient country." *Kiyemba*, 561 F.3d at 516. Accordingly, on July 10, 2009, Respondents moved to dissolve the temporary injunctions. Since the duration of the injunctions was limited to the pendency of *Kiyemba,* and that decision precludes a district court from barring the transfer of Guantanamo detainees under the very circumstances raised by Petitioners, the Court granted the motion and dissolved the injunctions on February 4, 2010. *See* February 4 Order at 2-4.

On March 1, 2010, Petitioners filed the instant emergency motion for reconsideration of the February 4 Order. They request that the Court "restore the injunctions." Pet'rs' Mot.

for Recons. at 1. Throughout the motion, Petitioners highlight that a petition for a writ of certiorari was filed in *Kiyemba*. *Id.* at 5-11. In fact, Petitioners' "central argument" is that the Court should "temporarily enjoin their transfers . . . until the Supreme Court finally resolves the jurisdictional issues raised in *Kiyemba* . . . ." *Id.* at 5. However, after Petitioners filed the motion, the Supreme Court denied the certiorari petition. *See Kiyemba v. Obama*, 2010 WL 1005960 (U.S. Mar. 22, 2010) (No. 09-0581). Petitioners have since filed a supplement to their motion identifying four reasons why the denial of certiorari in *Kiyemba* does not preclude reconsideration. *See* Pet'rs' Resp. to Notice of Supplemental Authority ("Pet'rs' Resp.") (Mar. 26, 2010).

Legal Standard

Federal Rule of Civil Procedure 54(b) governs reconsideration of orders that do not constitute final judgments. *See Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). Rule 54(b) provides that "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." FED. R. CIV. P. 54(b). Although a federal district court has the discretion to reconsider interlocutory orders, the Supreme Court has admonished that "courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). In particular, a court should grant a motion for reconsideration of an interlocutory order "only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the

first order." *In re Vitamins Antitrust Litig.*, 2000 WL 34230081, at *1 (D.D.C. July 28, 2000) (internal citation and quotation omitted).

Analysis

Petitioners argue that reconsideration is warranted for four reasons. *See* Pet'rs' Resp. at 1. The Court concludes that all four lack merit.

I. Jurisdiction to Dissolve the Injunctions

Petitioners aver that the February 4 Order fails to address their legal argument that the Court lacks "jurisdiction to dissolve (as opposed to modify) injunctions which the government has appealed and over which the D.C. Circuit has exercised jurisdiction and withheld relief." Pet'rs' Resp. at 1. Presumably, Petitioners' claim stems from Rule 62(c), which concerns "Injunctions Pending an Appeal." FED. R. CIV. P. 62(c). Under the rule, while an appeal is pending from an interlocutory order that grants an injunction, such as here, a federal court may "suspend, modify, restore or grant an injunction on terms . . . that secure the opposing party's rights." *Id.* Absent from the rule is any mention of dissolution. Since the February 4 Order dissolved the injunctions rather than modifying them, the Court committed a clear error of law and should reconsider the Order, or so Petitioners' argument ostensibly goes.

As mentioned in the February 4 Order, however, the Court need not rely on Rule 62(c) to dissolve the injunctions because they were set to dissolve by their own terms. Petitioners ignore the overt limiting language of the injunctions. The pendency of *Kiyemba* was a condition subsequent to the injunctions. Once *Kiyemba* was decided, the injunctions dissolved. Since the February 4 Order merely memorialized the terms of the injunctions, the dissolution does not implicate Rule 62(c), which concerns alterations to an injunction.

Though unnecessary in order to deny Petitioners' motion, the Court further observes

that Rule 62(c) does not preclude the Court from dissolving the injunctions. Although the D.C. Circuit has not opined on the issue, in *Decatur Liquors v. District of Columbia* the United States District Court for the District of Columbia indicated that a preliminary injunction under appeal could be dissolved if there were "changed circumstances or a change in the law." 2005 WL 607881, at *3 (D.D.C. Mar. 16, 2005). The Eleventh Circuit appears to be in agreement with the D.C. District Court, suggesting that a court may vacate an injunction pursuant to Rule 62(c). *See Pac. Ins. Co. v. Gen. Dev. Corp.*, 28 F.3d 1093, 1096 n.7 (11th Cir. 1994) (stating that vacating an injunction "arguably was proper under Rule 62(c)"). Only the Fifth Circuit has directly held to the contrary. *See Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 819-21 (5th Cir. 1989) (holding that the authority granted by Rule 62(c) does not extend to the dissolution of an injunction). Yet even the Fifth Circuit seemingly permits dissolution in the instant circumstances because the principle driving the circuit's prohibition on dissolution is that "the district court may not alter [an] injunction once an appeal has been filed except to maintain the status quo of the parties pending the appeal." *Id.* at 819; *see also Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2nd Cir. 1962) ("unless the judge is satisfied that his order was erroneous he shall use his power under Rule 62(c) only to preserve the status of the case as it sits before the court of appeals"). Here, the February 4 Order maintains the status quo since the injunctions, by their own terms, expired once *Kiyemba* was decided. The Court merely followed the instructions of the injunctions. *Cf. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 578-79 (5th Cir. 1996) (stating that with respect to an injunction that "*by its own terms* create the possibility for a change in its operations . . . [t]he court did not exceed its authority in stepping in to supervise this change through an amendment of its original order" (emphasis in

original)). Accordingly, the Court concludes that Petitioners have failed to demonstrate that the Court erred in dissolving the injunctions.[2]

II. Applying *Kiyemba*

Petitioners also contend that their cases "fall outside" of *Kiyemba* because it is unclear if the Government "has made a final determination that each of the Algerians may be safely repatriated to Algeria." Pet'rs' Resp. at 1. Though not citing to *Kiyemba*, Petitioners suggest that district courts are only barred from enjoining transfer when the Government has made a final, particularized determination that a detainee may be safely transferred to the recipient country. Therefore, they contend, the Court is not precluded under *Kiyemba* from enjoining the Government from transferring Petitioners in order to consider the merits of their torture fears. *See* Pet'rs' Reply at 5-6.

Petitioners are mistaken. *Kiyemba* does not require the sort of particularized, petitioner-by-petitioner determination of safe repatriation that Petitioners claim is lacking here. Rather, the D.C. Circuit relied on the general "policy of the United States not to transfer a detainee to a country where he is likely to be tortured." *Kiyemba*, 561 F.3d at 514. Respondents submitted a declaration to the Court echoing that very policy. *See* Gov't's Mot. to Dissolve the Prelim. Injs. at 12 (July 10, 2009). Petitioners argument is particularly perplexing since Respondents provided the type of final determination that Petitioners allege is lacking. In an attachment to Respondents' Motion to Dissolve the Preliminary Injunctions, Daniel Fried, the Special Envoy for the Closure of the Guantanamo Bay Detention Facility, explains that the State Department concluded that Petitioners "can be repatriated to Algeria

[2] Though not discussed by the parties, it bears noting that Petitioners are attempting to preserve an appeal filed by Respondents.

consistent with [the United States'] policies on post-transfer humane treatment." Decl. of Daniel Fried ¶ 3, July 9, 2009. The Court thus finds no error in its prior conclusion that *Kiyema* specifically precludes a federal court from enjoining Petitioners' transfer to Algeria based on their fear of torture.

III. New Evidence

Petitioners' final two arguments concern new evidence. First, Petitioners present documentary evidence that "if forcibly repatriated to Algeria they could face further detention by agreement with or on behalf of the United States." Pet'rs' Resp. at 1. Though *Kiyemba* precludes a district court from barring the transfer of detainees on the grounds that they are likely to be tortured in the recipient country, the D.C. Circuit expressed "no opinion concerning the transfer of detainees resulting in their continued detention on behalf of the United States." *Kiyemba*, 561 F.3d at 515 n.7 (quotation and citation omitted). Because of this new documentary evidence, Petitioners contend the injunctions should be extended and the Court should hold a hearing to consider whether they would be detained in Algeria on behalf of the United States. *See* Pet'rs' Mot. for Recons. at 7. Second, Petitioners indicate that Judge Gladys Kessler granted Farhi Saeed bin Mohammed's habeas petition. According to Petitioners, this means that Respondents "lack[] authority to transfer him to Algeria or any other country against his will." Pet'rs' Resp. at 1-2.

It is unclear if either set of new facts merit an injunction barring Respondents from transferring Petitioners (or Petitioner bin Mohammed) to Algeria. For example, Petitioners fail to cite authority indicating that the Government cannot transfer a detainee to his native country against his will if his habeas petition has been granted. Nevertheless, the Court refrains from exploring the ramifications of this alleged new evidence because Petitioners'

request exceeds the Court's authority under Rule 62(c).

Petitioners are asking the Court to modify the now-dissolved injunctions based on new evidence. With the first set of new evidence, Petitioners seek to enjoin their transfer until a hearing is held on whether they would be detained in Algeria on behalf of the United States and whether such proxy detention bars their transfer. As for Petitioner bin Mohammed, Petitioners request that the Court permanently enjoin his transfer to Algeria. Either modification to the injunctions would be made pursuant to Rule 62(c). *See* FED. R. CIV. P. 62(c) (while an appeal is pending from an interlocutory order granting an injunction, the court may "suspend, modify, restore or grant an injunction on terms . . . that secure the opposing party's rights"). However, under Rule 62(c), parties are "not usually entitled as of right to present new evidence or argument to the trial court, which in the exercise of a sound direction will exercise jurisdiction only to preserve the status quo as of the time of appeal." *Sayco*, 302 F.2d at 625. Here, the evidence appears to be new and was not presented to the Court before it issued the injunctions. Most importantly, either of Petitioners' proposed modifications would alter the status quo since the injunctions would no longer be limited to the pendency of *Kiyemba*. For this reason, the Court declines to consider Petitioners' new evidence. To the extent Petitioners seek new injunctions based on new evidence, their requests should be submitted to the Merits Judges.

Conclusion

Therefore, the Court concludes that Petitioners have failed to demonstrate that reconsideration is warranted. Any future motions regarding the transfer of Petitioners should be directed to the Merits Judges.

An order accompanies this memorandum opinion.

April 19, 2010

Thomas F. Hogan
United States District Judge