

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5218

September Term 2009

1:05-cv-01347-GK

Filed On: July 8, 2010

Farhi Saeed Bin Mohammed, Detainee,
Guantanamo Bay Naval Station and Moazzam
Begg, as next friend of Farhi Saeed bin
Mohammed,

Appellees

UNDER SEAL

v.

Barack Obama, et al.,

Appellants

BEFORE: Tatel,* Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the emergency motion for expedited summary reversal, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The preliminary injunction entered June 29, 2010, in Civil Action No. 05-1347 (D.D.C.), is hereby dissolved. The district court had enjoined the government from transferring Farhi Saeed Bin Mohammed to Algeria in light of his allegations that he would be tortured there by the Algerian government and by non-state actors. Under *Kiyemba v. Obama* (“*Kiyemba II*”), however, the district court may not prevent the transfer of a Guantanamo detainee when the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country. 561 F.3d 509, 516 (D.C. Cir. 2009); see *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008).

The government’s representations in this case satisfy that standard. The government avers that it evaluated “all information that is in any way relevant to whether a detainee is more likely than not to be tortured in the receiving country,” Emergency Mot. at 14, “including submissions [the government had] received to date from counsel representing the detainee,” Fried Decl. ¶ 3, July 9, 2009 [hereinafter July Fried Decl.]; see also *id.* ¶ 6; Fried Decl. ¶¶ 4, 7–8, Nov. 25, 2009, and has determined that, in the face of the allegations made by Mohammed, his transfer complies with “the policy that the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured.” July Fried Decl. ¶ 2. It is

FURTHER ORDERED, on the court’s own motion, that the preliminary injunction entered June 29, 2010, in Civil Action No. 05-1347 (D.D.C.), remain in effect until issuance of the mandate herein.

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Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate at 4:00 p.m., Wednesday, July 14, 2010.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk

* Circuit Judge Tatel would deny in part the motion for summary reversal for the reasons set forth in the attached statement, entered under seal.

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TATEL, *Circuit Judge*, concurring in part and dissenting in part:

The United States captured Fahri Saeed bin Mohammed in Pakistan in 2002 and has detained him at Guantanamo Bay ever since. In November 2009, the U.S. District Court for the District of Columbia found Mohammed's detention unlawful and granted his petition for a writ of habeas corpus. Although pursuant to its inherent remedial powers the district court possesses authority to ensure Mohammed's safe release, *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 ("[W]hen the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority . . . to formulate and issue appropriate orders for relief . . ."), the government argues that *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509 (D.C. Cir. 2009), precludes the district court or this court from second-guessing the Executive's determination that Mohammed faces no harm in Algeria, where the government intends to release him.

In *Kiyemba II* we held that "the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee." *Id.* at 514 (citing *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008)). The district court's injunction therefore cannot stand to the extent that it rests on Mohammed's fear of torture from the Algerian government or on the court's desire to question Ambassador Fried about his declarations.

In an allegation that the district court credited, however, Mohammed also claims that he will be targeted by non-governmental actors—armed Islamic militants unaffiliated with the Algerian government—if the United States sends him to Algeria. Even if the logic of *Kiyemba II* requires deference to the government's evaluation of threats from non-governmental entities, that decision still requires evidence of a governmental policy not to transfer a detainee where such harm is likely. Notwithstanding several rounds of briefing by Mohammed raising the issue, however, the government has never said in its declarations whether, as a matter of policy, it even considers threats from non-governmental entities—or whether it receives assurances from the recipient government regarding its ability to protect the detainee from such threats—when making transfer decisions. Pointing out that Ambassador Fried's declarations refer to United States policy against transferring "individuals to countries where it has determined that they are more likely than not to be tortured," Fried Decl. ¶ 3, Nov. 25, 2009, and stating that it has evaluated "all information that is in any way relevant" to that policy, Emergency Mot. at 14, the government suggests that this policy necessarily considers the likelihood of torture by non-governmental entities. But the declarations focus exclusively on "whether the *foreign government* concerned will treat the detainee humanely," and on whether "the *Government of Algeria* has treated any of these individuals in a manner inconsistent with its obligations under the Convention Against Torture." Fried Decl. ¶ 4, Nov. 25, 2009 (emphasis added); Fried Decl. ¶ 3, July 9, 2009 (emphasis added). In my view, then, the declarations fail to show that the

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government has specifically considered the likelihood of torture at the hands of non-governmental actors. If the government has in fact done so, all it needs to do is clearly say so in its declaration. To be sure, *Kiyemba II* prohibits courts from second-guessing government declarations regarding the risk of torture in the recipient country, but nothing in *Kiyemba II* requires courts to guess as to what the government's policy is.

Thus, while I agree with my colleagues that *Kiyemba II* compels us to reverse the district court with respect to Mohammed's allegations of torture by the Algerian government and the court's intention to interrogate Ambassador Fried, I would remand to allow the government an opportunity to submit supplemental declarations as to whether, in deciding it was safe to send Mohammed to Algeria, it considered potential threats posed by non-governmental entities.