

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SHARAF AL SANANI, ET AL.,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 05-CV-2386 (RBW)
)	
BARACK OBAMA,)	
President of the United States, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	
)	
ABDUL RAHMAN UMIR AL QYATI and)	
SAAD MASIR MUKBL AL AZANI,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 08-CV-2019 (RBW)
)	
BARACK OBAMA,)	
President of the United States, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS’ MEMORANDUM IN SUPPORT OF A STAY OF PROCEEDINGS
INVOLVING PETITIONERS WHO WERE PREVIOUSLY APPROVED
FOR TRANSFER**

Respondents respectfully submit this memorandum to address the concern raised by the Court on March 3, 2009, that cases involving certain petitioners who were previously approved for transfer by the Government are non-justiciable after *Kiyemba v. Obama*, --- F.3d ---, 2009 WL 383618 (D.C. Cir. Feb. 18, 2009). For the reasons stated below, such cases currently remain justiciable because such detainees’ detention must be reviewed pursuant to an Executive Order issued by the President on January 22, 2009. *See* Executive Order 13,492:

Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, § 4(c), 74 Fed. Reg. 4897 (Jan. 22, 2009). *Habeas* cases involving petitioners previously approved for transfer should be stayed, however, because the Government is giving heightened priority to such detainees and will make a renewed determination about their disposition “as promptly as possible.” *Id.* An approval for transfer resulting from the Executive Order review may render a petitioner’s case moot, in light of diplomatic efforts that would then be undertaken to effectuate a transfer. In such a situation, it is unlikely that such a petitioner would be entitled to meaningful Court relief related to the fact of their detention. On the other hand, compliance with litigation obligations relating to such cases involves the potential unnecessary disclosure of additional classified information and other burdens, as well as the potential to delay the resolution of other cases involving detainees who have not previously been approved for transfer.

BACKGROUND

On March 4, 2009, Respondents submitted a status report relating to petitioners in the above-captioned cases who were previously approved for transfer by the Government. Seven petitioners with active cases – ISNs 49, 257, 452, 455, 461, 519, and 687 – were previously approved for transfer by the Department of Defense under processes existing prior to January 22, 2009. Under those prior processes, once a detainee was approved for transfer, diplomatic efforts were initiated to attempt to repatriate or resettle the detainee. Such efforts attempted to ascertain or establish what measures the receiving government intended to take, pursuant to its own domestic laws and independent determinations, that would ensure that the detainee would not pose a continuing threat to the United States and its allies. The Government seeks humane

assurances in all cases. *See* July 7, 2008 Declaration of Ambassador Clint Williamson (attached as Exhibit 1); July 9, 2008 Declaration of Deputy Assistant Secretary of Defense for Detainee Affairs Sandra Hodgkinson (attached as Exhibit 2). Transfers of the seven petitioners previously approved for transfer were not completed under these processes prior to January 22, 2009.

Executive Order 13,492, signed January 22, 2009, orders the closure of Guantanamo Bay prison within one year of the date of the order. Exec. Order 13,492, § 3. The Executive Order also finds that “the Department of Defense has determined that a number of the individuals,” such as the seven above-noted petitioners in these cases, “currently detained at Guantanamo are eligible for [] transfer or release,” *id.* § 2(a), and that “[n]ew diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantanamo,” *id.* § 2(e). Accordingly, the Executive Order calls for a review to “determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantanamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release.” *Id.* § 4(c)(2).

The seven petitioners’ detentions are the subject of the Executive Order review process. Our understanding, however, is that cases like these, in which the detainees were approved for transfer under prior processes, will be given heightened priority in the Executive Order review process.

ARGUMENT

THE COURT SHOULD STAY CASES INVOLVING PETITIONERS WHO WERE PREVIOUSLY APPROVED FOR TRANSFER

Because petitioners who were previously approved for transfer must be reviewed as part of the Executive Review process established by Executive Order 13,492, cases involving such petitioners are not moot at this time. They may soon be rendered moot as to the core relief requested, however, and all cases involving petitioners previously approved for transfer should be stayed for prudential reasons.

A. THE COURT SHOULD STAY PROCEEDINGS INVOLVING PETITIONERS WHO WERE PREVIOUSLY APPROVED FOR TRANSFER BECAUSE A TRANSFER DETERMINATION MAY MOOT A PETITIONER'S CASE.

Under Executive Order 13,492, petitioners who have previously been approved for transfer will be reviewed expeditiously and on a priority basis to determine “whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release.” Exec. Order 13,492, § 4 (c). The Executive Order specifically notes that many such individuals have already been approved for release or transfer, *id.* § 2(a), and contemplates transferring detainees as part of the objective of promptly closing the Guantanamo Bay detention facility. Relevant agencies will be charged with engaging in renewed diplomatic efforts for relocating such detainees, consistent with the finding in the Executive Order that “[n]ew diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantanamo.” *Id.* § 2(e).

After a detainee has been approved for transfer to another country under the Executive

Order review process, in many cases a detainee will have received the only relief the Court can provide with respect to the fact of the detainee's detention. Because *Kiyemba v. Bush*, --- F.3d ---, 2009 WL 383618 (D.C. Cir. Feb. 18, 2009), forecloses the possibility of a court order directing the Government to transfer a detainee into the United States, in many cases there will be no relief as to the fact of detention available beyond already mandated diplomatic efforts to find an appropriate receiving country. There is no reason to question such efforts, and a Court cannot direct them. *Id.* In such cases, therefore, the Executive's decision approving a detainee for transfer may render the detainee's request for *habeas* relief, *i.e.*, release, moot. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (“[T]hroughout the litigation, the plaintiff ‘must have suffered or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’” (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990))). Furthermore, even if a court ruling would make a detainee more attractive to a prospective receiving country, a petitioner's reputational interest in a ruling that he has not been lawfully held as an “enemy combatant” would not support continued jurisdiction. *See, e.g., Spencer*, 523 U.S. at 14-16 & n.8; *Idema v. Rice*, 478 F. Supp. 2d 47, 51 (D.D.C. 2007).

Finally, there is no reason to question the finality of any decision to transfer a detainee made in the Executive Order review process, given the Executive Order's mandate and its purpose. *See Commercial Cable Co. v. Burlison*, 250 U.S. 360, 362 (1919) (finding challenge to presidential seizure “wholly moot” after President returned seized cable lines, despite asserted

“fear that [the cable lines] may again be wrongfully taken”).¹ In any event, the concern can be addressed by granting a stay, rather than outright dismissal.

B. CASES INVOLVING PETITIONERS PREVIOUSLY APPROVED FOR TRANSFER SHOULD BE STAYED FOR PRUDENTIAL REASONS.

Even if a prior approval of a petitioner for transfer does not have the effect of mooting the petitioner’s case, cases involving detainees previously approved for transfer should be stayed for prudential reasons. This Court has the discretion to stay proceedings in light of the particular circumstances of a case. *See United States v. Stover*, 576 F. Supp. 2d 134 (D.D.C. 2008) (citation and quotation omitted) (*habeas*); *Int’l Painters & Allied Trades Indus. Pension Fund v. Painting Co.*, 569 F. Supp. 2d 113, 120 (D.D.C. 2008) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (quoting *Landis*, 299 U.S. at 254-55). “A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” *Painting Co.*, 569 F. Supp. 2d at 120 (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-

¹ These mootness arguments were recently considered by the Supreme Court in granting the Government’s motion to dismiss the appeal as moot and vacate the judgment below in *Al-Marri v. Spagone*, --- S. Ct. ----, 2009 WL 564940 (U.S. Mar. 6, 2009). There, the Government indicated its intent to transfer the petitioner from military custody to the custody of the Attorney General for criminal prosecution and end his military detention. *Id.* The Government did not change his enemy combatant designation before transferring him.

64 (9th Cir. 1979)). When future circumstances may moot the case currently before the court, a stay is appropriate. *See Painting Co.*, 569 F. Supp. 2d at 120-21.

Staying all proceedings for the seven petitioners at issue here will promote judicial economy and the appropriate use of the Court's and parties' resources in the unique circumstances of this litigation. As noted above, petitioners previously approved for transfer will be given heightened priority under the Executive Order review process. In light of the potential mootness of the petitioners' requests for *habeas* relief, *i.e.*, release, a stay pending such a decision is appropriate. Neither Respondents nor the Court should dedicate limited time and resources to *habeas* proceedings concerning the detention of petitioners whose requests for *habeas* relief may soon become moot. On the other hand, Respondents continue to maintain custody over scores of other detainees who have *habeas* proceedings pending before the Court and who are not similarly situated in that they were not previously approved for transfer or release. A stay of all proceedings concerning these seven petitioners will permit the Government, the Court, and counsel representing other detainees to focus exclusively on these other cases. This focus will expedite the detainee litigation as a whole, and will also serve the broader purposes of judicial economy and fairness.

Finally, the consideration of the relative interests involved counsels in favor of a stay. As noted above, the Court should not force Respondents to litigate the merits of these cases that may soon become moot as to the ultimate relief sought, *i.e.*, release. Further, Respondents have filed factual returns for each of these petitioners. Should a decision be rendered not approving a detainee for transfer such that further litigation is necessary or appropriate as compared to the other Guantanamo cases, the Court may lift the stay and promptly resume proceedings. It is

essential that the scores of Guantanamo cases be sequenced in a reasonable fashion if this litigation is to be feasible, especially in light of the scope of discovery and other obligations that the Government is handling and that petitioners – including ones previously approved for transfer – are demanding.

CONCLUSION

For the foregoing reasons, cases involving petitioners who were previously approved for release or transfer should be stayed.

Dated: March 9, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

TERRY M. HENRY
Assistant Branch Director

/s/ Christopher Hardee

PAUL AHERN
CHRISTOPHER HARDEE (D.C. Bar No. 458168)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, DC 20530
Tel: (202) 305-8356
Fax: (202) 305-2685

Attorneys for Respondents