

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
HAMEED KHALID DARWEESH, et al., : 17-cv-00480-AMD
:
Plaintiffs, :
- versus - : U.S. Courthouse
: Brooklyn, New York
:
DONALD TRUMP, et al., : January 28, 2017
Defendants :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR EMERGENCY MOTION
FOR STAY OF REMOVAL
BEFORE THE HONORABLE ANN M. DONNELLY
UNITED STATES DISTRICT JUDGE

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1 THE CLERK: All rise.

2 THE COURT: Good evening, everybody. You can
3 sit down.

4 THE CLERK: In the matter of Hameed Khalid
5 Darweesh and Haider Sameer Abdulkhaleq Alshawi v. the
6 respondents, President Donald Trump, Department of
7 Homeland Security, Customs and Border Protection,
8 Secretary John Kelly, Commissioner Kevin McAleenan and
9 Director James Madden.

10 Counsels, state your appearance, petitioner
11 first.

12 MR. GELERNT: Lee Gelernt from the National
13 Office of the ACLU.

14 THE COURT: Hi. Who is with you?

15 MR. GELERNT: This is Omar Jadwat, and Davis
16 Hausman, both --

17 THE COURT: Okay.

18 MR. GELERNT: -- from ACLU.

19 THE COURT: Okay.

20 MS. RILEY: Good evening, your Honor.

21 Susan Riley from the U.S. Attorney's Office,
22 Eastern District. Seated with me is Scott Dunn, Chief of
23 our Immigration Practice and Elliot Schachner, who is
24 also an immigration expert.

25 THE COURT: Okay.

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1 MS. RILEY: And also seated is Colleen Piccone
2 (ph.), a representative from Customs and Border
3 Protection.

4 THE COURT: Okay. Do we have somebody on the
5 phone?

6 MS. RILEY: Yes, we do. We have Gisela
7 Westwater from the District Court Section of the Office
8 of Immigration Litigation.

9 THE COURT: All right.
10 We're here considering an emergency stay
11 application in a removal case. I just have a couple of
12 questions about status. The two-named plaintiffs, what
13 is their status right now?

14 MR. GELERNT: Your Honor, one of them has been
15 released. We don't know whether the government is going
16 to take any action against him but he was released this
17 afternoon.

18 We are not sure as of this moment about the
19 second one. The government may be able to say more about
20 the second one.

21 MS. RILEY: We are sure, your Honor and he has
22 been released.

23 THE COURT: So both have been released. Let me
24 just ask you, are you opposing the application for a
25 stay?

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1 MS. RILEY: Well, we believe it's moot, your
2 Honor. Both of the named plaintiffs have been released
3 and there is no need for the issuance of a stay.

4 THE COURT: What about all the other people in
5 the class? Just because, I just want to be clear that I
6 have the class members here.

7 The petitioners are asking for certification of
8 a class that consists of all individuals with refugee
9 applications, approved by U.S. Citizenship and
10 Immigration Services, as part of the U.S. Refugee
11 Admissions Program, holders of valid immigrant and non-
12 immigrant visas, and other individuals from Iraq, Syria,
13 Iran, Sudan, Lybia, Somalia, and Yemen legally authorized
14 to enter the United States but who have been or will be
15 denied entry to the United States on the basis of the
16 January 27th, 2017 executive order.

17 So, I am assuming that there are going to be
18 more people that this executive order has an impact on,
19 is that correct?

20 MS. RILEY: Yes, your Honor.

21 THE COURT: All right. So, while the two-named
22 -- well, my second question is, is there any assurance
23 that there won't be some effort to remove the people that
24 are already here? Is there any assurance by that on the
25 part of the government?

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1 MS. RILEY: Do you mean the two-named
2 plaintiffs?

3 THE COURT: Yes.

4 MS. RILEY: I have no information in that
5 regard.

6 THE COURT: Okay.

7 MS. RILEY: And part of the government's
8 position, and I'm going to let Ms. Westwater take the
9 lead in arguing this, is that this has unfolded with such
10 speed, both the executive order and the actions taken
11 pursuant to the executive order, that we haven't had an
12 opportunity to address any of the issues, the important
13 legal issues, the status of anyone who may be at the
14 airport.

15 THE COURT: Well, that's why I really started
16 by asking if you really oppose the stay because if you
17 haven't had a chance to address it -- I mean, if I don't
18 grant the stay, there are while not perhaps not these
19 two-named plaintiffs, there are, it sounds to me, like a
20 host of people who will be affected by this executive
21 order and I think just based on what the petitioners have
22 alleged today, is not something that's just -- that is
23 something that is very real.

24 And I do recognize that you haven't really had
25 a chance to review all of this but that's, I think, why

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1 they're asking for the stay.

2 Now is there something else you wanted to say?

3 MR. GELERNT: No, your Honor.

4 THE COURT: Okay.

5 MR. GELERNT: I just wanted to know if you
6 wanted to hear from me yet.

7 THE COURT: Not just yet. I do --

8 MR. GELERNT: Okay. That's fine, your Honor.

9 THE COURT: I do want to hear -- and I'm sorry,
10 who is on the phone?

11 MS. RILEY: Ms. Westwater.

12 MS. WESTWATER: Judge, this is --

13 THE COURT: Ms. Westwater?

14 MS. WESTWATER: -- Gisela Westwater.

15 THE COURT: Yes.

16 MS. WESTWATER: Yes.

17 THE COURT: Did you have anything you wanted to
18 say just on that subject?

19 MS. WESTWATER: I believe at this time, your
20 Honor -- I mean, the government's position is that the
21 two-named plaintiffs have been dismissed. That the
22 government can't make any assurances as to any other
23 individuals who are not named plaintiffs. They all have
24 very different situations. We believe that a stay at
25 this time would be inappropriate first because these are

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1 arriving aliens.

2 THE COURT: Well, I am going to stop you right
3 there. So, I think everybody agrees that under Supreme
4 Court precedent that considering the application, I am
5 going to apply the traditional four-factor test. You
6 agree with me on that, don't you?

7 MS. WESTWATER: I am sorry, in which four-
8 factor --

9 THE COURT: The four-factor test that you apply
10 for the traditional four-factor test for a temporary
11 restraining order. So, I'll just go through them for
12 you; likelihood of success on the merits, and really one
13 of the most significant factors which is irreparable
14 injury to the petitioner, the likelihood of injury to the
15 opposing party, which is you, and where the public
16 interest lies. And when the government is the opposing
17 party, those two final factors, the likelihood of injury
18 to the opposing party and the public interest merge.

19 So, I'm just -- let's just go right to that
20 irreparable injury to the petitioner. What is your
21 argument that there won't be irreparable injury to either
22 the petitioner or the members of the putative class?

23 MS. WESTWATER: Your Honor, we believe that's
24 something that is difficult without having the named
25 plaintiffs in front of us, and what exactly are

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1 plaintiffs arguing are the various statuses of these
2 individuals?

3 THE COURT: Well, let me just put it this way.
4 I mean, if they had comes in two days ago, we wouldn't be
5 here, am I right?

6 MS. WESTWATER: That would seem to be correct,
7 your Honor.

8 THE COURT: So presumably, and at least by
9 definition of the class that the petitioners are asking
10 to be certified, these are all people that have been
11 through a vetting process and at least these two named
12 petitioners have been through a very extensive -- I think
13 one of them, and I'm sure you'll correct me if I am
14 wrong, first applied in 2014. And our own government,
15 presumably, approved their entry into this country.

16 And so, that really goes to what is the
17 likelihood of injury to the government but the
18 petitioners have also alleged that not just these named
19 petitioners but members of the class, face real
20 irreparable injury and in some cases, people whose
21 families are already here, people who face threats if
22 they're returned to their country of origin, the named
23 plaintiffs have been -- according to the petition, have
24 been specifically targeted with violence in their own
25 countries.

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1 So, what I would like you to do, whether it's
2 you or whether it's one of your colleagues at the table,
3 is just explain to me how it is that the members of this
4 class will not suffer irreparable injury if I don't grant
5 the stay.

6 MS. WESTWATER: Your Honor, the difference as
7 we said -- there's a difference within the different
8 categories. This is an overly broad request --

9 THE COURT: But just that straightforward
10 question, how can you argue that they won't suffer
11 irreparable injury? I mean, sure you could argue about
12 who is an appropriate member of the class but that's not
13 my question. The identified members that the petitioners
14 have identified are all people that there's no question
15 about them being dangerous or anything like that, at
16 least as far as I understand. So, I mean, I don't hear
17 you to be arguing that there's some particular risk posed
18 by this class of people. Am I right about that?

19 MS. WESTWATER: Your Honor, to the two-named
20 plaintiffs --

21 THE COURT: One of them worked for the
22 government. One of them worked for the United States
23 government, I believe, or at least the family members
24 did.

25 MS. WESTWATER: Yes, your Honor. However, the

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1 proposed class is broader and would include --

2 THE COURT: Yeah, but --

3 MS. WESTWATER: -- tourists, would include
4 people who are not making a claim, who have -- are coming
5 here on a tourist visa which would have a very different
6 interest and very concerns regarding harm.

7 THE COURT: Well, let me just ask, are tourist
8 visas included in this, as well, in your class?

9 MR. GELERNT: Yes, your Honor.

10 THE COURT: Okay.

11 MR. GELERNT: There is a broad range but we
12 would say that they've all been vetted and all been given
13 legal permission to come here. So, I think there's no
14 question that they've been vetted. And just with respect
15 to the different classes, I think your Honor has
16 basically put her finger on it, that that may end up
17 being different arguments on the merits but as to the
18 question that you're getting at, a factual question, are
19 they going to face irreparable harm, absolutely. I mean,
20 they are facing real harm because they are going back to
21 some of the most dangerous countries.

22 And as to your question about do we know
23 whether anybody could be sent back, I mean the government
24 was very candid saying that --

25 THE COURT: You don't know.

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1 MR. GELERNT: -- they can't give assurances and
2 we also just were told that the government is threatening
3 to put someone back on a plane at 9:20 and we don't even
4 know what's going on around the country. There are so
5 many people -- and so we are here, what we think is a
6 fairly modest request to the Court, to just keep things
7 in place until both sides can brief it.

8 We don't expect your Honor to figure out the
9 merits now. I mean, some of the merits issues are eye
10 glazing, to be truthful. We think we have the better of
11 it but certainly on irreparable harm, I haven't heard the
12 government say why they can't keep the people here. It's
13 not as if these people weren't vetted. I mean, they were
14 vetted, given legal permission and they were just caught
15 in transit. They took off before the executive order was
16 signed. They landed after. And so, they were in a
17 horrible position. They were on U.S. soil and they
18 certainly can't be sent back without, at a minimum, an
19 asylum hearing and a Convention Against Torture -- I mean
20 that is basic law.

21 THE COURT: Do you have a sense of how many
22 people we're talking about? that was another question
23 that I had.

24 MR. GELERNT: Yeah. You know, your Honor, we
25 believe that it's upwards of a hundred to 200. The

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1 government won't give us that information. They won't
2 tell us who the people are, so it makes it very
3 difficult.

4 And I was just passed a note that the
5 government is literally as we speak, putting someone back
6 on a plane back to Syria.

7 THE COURT: All right. Do you have anything
8 else you want to say from the government?

9 MS. WESTWATER: Yes, your Honor. It appears
10 the question seems to be what is irreparable harm. As
11 we've argued, for people coming here on a tourist visa --

12 THE COURT: But that's one category but this is
13 just an emergency stay and so I am interrupting you
14 because I'm not going to make the decision based on some
15 person that has not identified who might have a tourist
16 visa.

17 Apparently, there is somebody who they're
18 putting on a plane -- what do you think about that --
19 back to Syria? Irreparable harm?

20 MS. WESTWATER: Your Honor, the government does
21 not have sufficient information about this person or the
22 circumstances, your Honor, to be able to have a position.
23 And I'm sorry, as your Honor had suggested, we all do
24 require additional time to have more facts.

25 THE COURT: Well, that's exactly why that I am

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1 going to grant the stay. So, the stay is --

2 UNIDENTIFIED SPEAKER: (Inaudible).

3 THE COURT: No, no, no, no, not a word. Not a
4 word.

5 The stay is granted. I will sign it and I also
6 find, just so the record is clear, that each of these
7 four factors is met. Irreparable harm has been
8 established. There's no likelihood of injury to the
9 opposing party, nor is there any problem to the public
10 interest and the likelihood of success on the merits,
11 which we have not discussed, but I have reviewed the
12 submissions and for purposes of this application, there
13 is a likelihood of success on the merits.

14 I will also say that there is a likelihood with
15 respect to the certification of the class, that the class
16 will be certified.

17 So, for all of those reasons, I will sign the
18 order which includes the putative class and I think the
19 only thing that is left to do is to pick a date where you
20 can present your arguments more fully. Do you have one
21 proposed?

22 MR. GELERT: We will proceed on whatever
23 schedule the Court wants us to.

24 THE COURT: All right. Well, I think it really
25 is going to depend in part on how much time it's going to

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1 take. I think the government hasn't really had a full
2 chance to think about this. So, what time sounds good to
3 you?

4 MS. WESTWATER: I would ask --

5 THE COURT: Do you want --

6 MS. WESTWATER: -- if anyone in the -- if my
7 colleagues from the United States Attorney's Office would
8 have a potential proposed schedule?

9 THE COURT: What about Friday morning for an
10 argument, next Friday morning, is that too soon?

11 MS. RILEY: Yes.

12 THE COURT: Okay.

13 MS. RILEY: Yes, it is, your Honor.

14 THE COURT: Okay. So, let me just look at my
15 calendar because I may have a few other cases.

16 MS. RILEY: So, your Honor, we would request an
17 opportunity to submit papers.

18 THE COURT: Yes.

19 MS. RILEY: We do not understand the Court to
20 be certifying a class at this time.

21 THE COURT: I'm not at this time. It is for
22 purposes of the stay, otherwise I will be signing and
23 listening to application from 100 people and it sounds to
24 me like the class is pretty well defined, as outlined in
25 the petitioner's papers and so, it's what I specified at

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1 the beginning.

2 So, do you have a proposed order?

3 MR. GELERNT: Um --

4 THE COURT: It's okay if you don't. I have one
5 but --

6 MR. GELERNT: We can get it to you in 15
7 minutes if you need that.

8 THE COURT: I think I've got it. I just need
9 to put who the class is.

10 MR. GELERNT: Your Honor, can I make two
11 points?

12 THE COURT: Yes.

13 MR. GELERNT: The first is, we are not pushing
14 any schedule on the Court and want to proceed as the
15 Court feels appropriate. The only thing that we would
16 ask because I think the government is going to ask for
17 two weeks, it sounds as if the government is going to
18 keep all these hundreds of people who have been given
19 lawful status in detention. That's a long time.

20 And so, if the government is going to release
21 them on supervision, that would be the best of all
22 worlds. I think since they were, by our government,
23 given lawful status, if you're not going to release them,
24 then we would ask that you proceed as quickly as
25 possible.

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1 The only thing I wanted --

2 THE COURT: Well, let me just ask first of all,
3 are you in a position to say that right now?

4 MS. RILEY: We are not. We are not, your
5 Honor, but what we are in a position to do is point out
6 that today, the named plaintiffs were released.

7 THE COURT: Right.

8 MS. RILEY: And to the extent that requests are
9 made, we will act on them --

10 THE COURT: Well, obviously the --

11 MS. RILEY: -- one way or the other.

12 THE COURT: -- petitioners do have an interest.
13 If somebody is not being released, I guess I'll just hear
14 from you, if that happens.

15 MR. GELERNT: And that's how -- I mean, we
16 would ask that the government designate someone that we
17 could send that information to because I think right now,
18 we don't even have a person --

19 THE COURT: I think that's probably a good
20 idea. If you all can work out somebody with whom the
21 petitioner' can communicate with specific individuals.

22 MR. GELERNT: Right. And, you know, the other
23 problem for us as the government knows is, the government
24 is not letting us see all the people in all the airports.
25 If they want to provide a list on, you know, why they're

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1 going to release some and not the others, but right now
2 we're sort shooting -- I mean, what's happened is through
3 sort of happenstance, we found people at airports.

4 THE COURT: What do you want me to do?

5 MR. GELERNT: If the government would provide a
6 list of all the people and whether they're going to
7 release them or not, I think that would be the best
8 thing.

9 MS. RILEY: We don't know. Your Honor, we
10 don't know.

11 THE COURT: But can you provide at least a list
12 of who is being detained?

13 MS. RILEY: Well, your Honor, that is actually
14 more difficult than it sounds. People are coming in all
15 the time.

16 THE COURT: Well, why don't you try to work it
17 out? Get him a list of people that are detained.

18 MS. RILEY: We can try to work it out.

19 THE COURT: All right? Sorry. Go ahead.

20 MR. SCHACHNER: Just one question just to
21 define the contours of the stay. So, it's clear the stay
22 is in terms of not removing anyone.

23 THE COURT: Correct.

24 MR. SCHACHNER: But is the stay also to prevent
25 any sort of processing of these foreign nationals? For

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1 example, if the processing would lead to their --

2 THE COURT: I don't think anybody is asking
3 that. You're not asking --

4 MR. SCHACHNER: I want to be clear on the
5 kind --

6 MR. GELERNT: I mean, if you're talking about
7 you're going to process them and then admit them in their
8 same status, I mean, we obviously wouldn't object to that
9 but that's not what I understand you to be saying.

10 MR. SCHACHNER: I just want to be clear what
11 the --

12 MR. GELERNT: I think we want to preserve the
13 status quo.

14 THE COURT: I think that's the whole point of
15 this hearing is to preserve this status quo and, you
16 know, if this had been two days ago, we would not be
17 here. So, I don't think it's unduly burdensome to
18 identify the people that we're talking about here within
19 the specific class. And I don't think it's unduly
20 burdensome to designate somebody with whom the
21 petitioners can communicate.

22 This is not a situation as I understand it,
23 where anybody is asking any information about anybody who
24 has previously been deemed to pose some kind of a threat
25 to national security. So, that's not the request and

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1 that's not what I am saying.

2 So, I have an order but I do think it needs to
3 be amended to specify the parameters of the class.

4 MR. GELERNT: Your Honor, I am sorry, just one
5 last thing.

6 THE COURT: Going to snatch defeat from the
7 jaws of victory there?

8 MR. GELERNT: No, I hope not but I am worried
9 about the person and probably other people who are about
10 to get on the plane, whether the government could then
11 tell their offices at the --

12 THE COURT: Yeah, I'm going to direct you, if
13 there's somebody right now who is in danger of being
14 removed, I am going to direct you to communicate that I
15 have imposed a stay. Nobody is to be removed in this
16 class, okay?

17 MS. RILEY: Well, your Honor, one thing I do
18 want to point is that there is nothing preventing anyone
19 who is --

20 THE COURT: If somebody comes in and does
21 something they're not supposed to do --

22 MS. RILEY: -- and they want --

23 THE COURT: -- obviously --

24 MS. RILEY: No.

25 THE COURT: I think you know what I am talking

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1 about.

2 MS. RILEY: Your Honor, there are people who
3 may request the opportunity to return to their country
4 and --

5 THE COURT: Well, I am not going to say that
6 you have to trap them here. So -- right? I mean, I
7 don't --

8 MS. RILEY: I --

9 THE COURT: I'm trying to make this as --
10 frankly, as common sense as possible. I am not directing
11 you to hold somebody against his or her will that wants
12 to go back to his or her home country. And I don't
13 understand you to be asking me to do that.

14 MR. GELERNT: No.

15 THE COURT: I think you understand the
16 parameters of the order. One person is nodding, so I am
17 going to go with yes. And I am going to draft it. But I
18 just want to make sure there's no misunderstanding. All
19 right.

20 Anything else that anybody has to say? All
21 right. Give us just a little bit of time to draft the
22 order. It won't take much.

23 (Court and clerk confer)

24 THE COURT: You know, I do have -- the order is
25 ready.

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1 (Pause)

2 THE COURT: All right. So, I have signed an
3 order. We'll give you copies of the original, as soon as
4 we make them and if there's nothing else, we're done.
5 Okay. Thank you.

6 MR. GELERNT: Thank you.

7 MS. RILEY: Was a date set, your Honor?

8 THE COURT: Oh, we didn't pick a date, did we?

9 MS. RILEY: We would ask until February 10th.

10 THE COURT: February 10th for filing your
11 papers?

12 MS. RILEY: Yes.

13 THE COURT: Okay. And then how much time will
14 you need to respond?

15 MR. GELERNT: That's a long time from now.
16 We'll respond within 48 hours.

17 THE COURT: All right. So, I think February
18 12th is a holiday but --

19 MS. RILEY: February 20th, I think is a
20 holiday.

21 THE COURT: All right. Do you want some time
22 to respond -- to reply, I mean?

23 MS. RILEY: We would ask for seven days, your
24 Honor.

25 THE COURT: Okay. So, where does that take us?

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1 THE CLERK: So, that puts the petitioners'
2 response at February 13th and the government's reply at
3 February -- the 20th is President's Day -- the 21st?

4 MS. RILEY: Yes. Thank you.

5 THE COURT: All right. I think that's it.

6 MR. GELERNT: Thank you.

7 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 30TH day of January, 2017.



Linda Ferrara

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