

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 06-5324**

**September Term, 2006**

06cv01455

Filed On: October 27, 2006

[1001091]

Mohammad Munaf and Maisoon Mohammed, as Next  
Friend of Mohammad Muhaf,  
Appellants

v.

Francis J. Harvey, Secretary of the U.S. Army, et al.,  
Appellees

**BEFORE:** Sentelle, Henderson, and Tatel,\* Circuit Judges

## **ORDER**

Upon consideration of the emergency motion for injunctive relief, the response thereto, and the reply, it is

**ORDERED** that the motion be denied. Appellants have not satisfied the stringent standards required for an injunction pending appeal. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). It is

**FURTHER ORDERED**, on the court's own motion, that appellees be enjoined from transferring Appellant Mohammad Munaf to Iraqi custody before 4:30 p.m., Eastern Standard Time, on November 6, 2006, or until such time as the Supreme Court acts upon an application for stay or for other relief, whichever occurs last. The purpose of this decretal paragraph is to give appellants an opportunity to seek relief from the Supreme Court. If no relief is sought by 4:30 p.m., Eastern Standard Time, on November 6, 2006, then this injunction will be lifted. Counsel for appellants is directed to notify the Clerk of this court if an application is filed in the Supreme Court and the disposition of any such application.

## **Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY:

Deputy Clerk/LD

\*Circuit Judge Tatel would grant the motion for injunctive relief for the reasons set forth in the attached statement.

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TATEL, Circuit Judge, dissenting:

I would grant Appellant's Emergency Motion for Injunctive Relief. The immediately foreseeable consequence of the court's denial of the motion is that Mohammad Munaf, an American citizen, will be executed without full consideration of his claims under U.S. law.

Detained in Iraq by American forces operating as part of the Multi National Force-Iraq (MNF-I), Munaf, through his next friend, petitioned the District Court for a writ of habeas corpus to secure release from what he alleges to be illegal custody and to prevent an allegedly illegal transfer to Iraqi custody. Munaf then sought a Temporary Restraining Order to block transfer during the pendency of habeas proceedings. He updated this motion with an emergency filing following his conviction and death sentence imposed by the Central Criminal Court of Iraq, an event the government has told us will result in his transfer to Iraqi authorities. The District Court, relying on the fact that Munaf is held by the MNF-I, concluded that he is not "in custody under or by color of the authority of the United States," 28 U.S.C. § 2241(c)(1), and accordingly dismissed the petition for lack of subject matter jurisdiction. In doing so, the District Court relied on *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), which held that habeas did not reach World War II Japanese officials convicted by an American-led multi-national military tribunal. *Mohammed v. Harvey*, No. 06-1455, 2006 WL 2971926 (D.D.C. Oct. 19, 2006). In his Emergency Motion, Munaf asks us to temporarily enjoin his transfer to Iraqi custody pending this court's disposition of *Omar v. Harvey*, No. 06-5126 (D.C. Cir. argued Sept. 11, 2006), a case which raises similar issues regarding the applicability of *Hirota* to the MNF-I.

In this circuit, injunctive relief is governed by the four-factor analysis set forth in *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). Under this framework, "[t]he court must consider: (1) the likelihood that plaintiffs will prevail on the merits; (2) the prospect of irreparable injury to plaintiffs if relief is withheld; (3) the possibility of harm to other interested parties . . . if preliminary relief is granted; and (4) the public interest." *Dendy v. Washington Hosp. Ctr.*, 581 F.2d 990, 992 (D.C. Cir. 1978).

Given that Munaf faces execution, irreparable injury could not be more clear. Whatever harm might come to the government from a temporary delay, moreover, is greatly overshadowed by the ultimate injury that Munaf faces. What's more, public interest considerations clearly weigh in favor of resolving Munaf's important legal claims before his execution.

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The only close question, then, is whether Munaf has shown a likelihood of success on the merits of the jurisdictional question. Where, however, the other *Holiday Tours* factors weigh in favor of issuance—as they do here—the moving party need not demonstrate that he is more likely than not to win, but only that he has presented questions that are “so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Holiday Tours*, 559 F.2d at 844 (internal quotation omitted). In my view, given that two district courts have reached different conclusions on the applicability of *Hirota* to the MNF-I, Munaf clearly satisfies this standard. Compare *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006), with *Mohammed*, 2006 WL 2971926.