

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 04-CV-2022 (PLF)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	

**RESPONSE TO AMENDED PETITION FOR HABEAS CORPUS AND MOTION TO
DISMISS OR FOR JUDGMENT AS A MATTER OF LAW
AND SUPPORTING MEMORANDUM**

Petitioner has sued respondents in their official capacities and seeks a writ of habeas corpus and equitable relief on grounds that he has been unlawfully detained. Specifically, petitioner alleges that his detention violates the Fifth Amendment Due Process Clause and the Fourth, Sixth, and Eighth Amendments of the United States Constitution, Amended Petition for Habeas Corpus ("Petition") ¶¶ 13-16; the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, and "customary" international law, *id.* ¶¶ 3, 17-18; unspecified military orders and regulations, including Army Regulation 190-8, *id.* ¶¶ 19-20; and footnote 15 of Rasul v. Bush, 124 S. Ct. 2686 (2004), Petition ¶ 24-25. These claims are identical to legal claims previously asserted in various other of the coordinated Guantanamo Bay detainee cases. The claims are without merit for the reasons set forth in the Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed October 4, 2004 ("Response"), in the

coordinated cases. In the interest of economy and in recognition of the coordinated nature of these cases, those reasons will not be restated here, but instead, the brief is attached as Exhibit 1 and is incorporated herein. Petitioner's claims should be dismissed, and his request for relief should be denied.

Petitioner claims he is a lawful permanent resident ("LPR") of the United States. Petition ¶ 1. However, under controlling law in this Circuit, he has abandoned that status, and therefore the analysis of his claims, like the assessment of claims brought by the other Guantanamo Bay habeas petitioners, should proceed on the basis that petitioner is an alien. Although petitioner became a permanent resident alien in 1979, he left the United States in 1986 to live in Pakistan with no intention of returning to the U.S. Declaration of [Name Deleted] ("Dec.") (attached as Exhibit 2) ¶¶ 2, 4. He last visited the U.S. in 1998-99 and has remained out of the country since then. *Id.* ¶ 5; see *United States v. Yakou*, No. 04-3037, 2005 WL 13275, at *8 (D.C. Cir. Jan. 4, 2005) (finding abandonment of permanent resident status unless individual "retained that status from the time he acquired it" and is "returning to an 'unrelinquished lawful permanent residence' after a 'temporary visit abroad'"); *Ahmed v. Ashcroft*, 286 F.3d 611, 613 (2d Cir. 2002) (finding that courts determining abandonment of permanent resident status must assess whether time spent outside the U.S. was the result of a "temporary visit abroad," *i.e.*, for a "relatively short" period, fixed by some specific event). Furthermore, petitioner is a citizen of Pakistan, lives there

¹ The United States argued in *Yakou* that the defendant in that case – an LPR who left the country in 1993 but returned to the United States to visit family members on multiple occasions, many times using his “green card” to gain re-entry – could still be charged under criminal laws as a “U.S. person” since his relinquishment of LPR status has not been adjudicated administratively or documented formally. The D.C. Circuit rejected that contention, concluding that LPR status could be relinquished without formal administrative process by conduct evidencing abandonment of that status, and the decision is obviously controlling here.

with his immediate family, owns a house and businesses in Pakistan, and does not own a U.S. residence, U.S. property, or interest in a U.S. business. Petition ¶¶ 1, 1A, 7; Dec. ¶ 6. These facts indicate that petitioner has no intention to return to the United States for such purposes. See Singh v. Reno, 113 F.3d 1512, 1514-15 (9th Cir. 1997) (holding that factors to be considered in evaluating intent of alien include "the alien's family, property, and business ties in the foreign country"); Alvarez v. District Director of INS, 539 F.2d 1220, 1224 (9th Cir. 1976) (finding that a permanent resident alien can leave temporarily only if he "has a United States residence to which he . . . can return"). Thus, petitioner has abandoned his permanent resident alien status and enjoys no immigration status other than that of an alien. See Singh, 113 F.3d at 1516 (alien relinquished his permanent resident status by making eight or nine month trips abroad without any permanent residence or employment to which to return); Alvarez, 539 F.2d at 1222 (alien relinquished permanent resident status where she lived abroad over two or three year period despite spending two or three consecutive months living in the U.S. and staying with friends). His habeas petition should be evaluated accordingly. For example, petitioner enjoys no constitutional rights. See Response at 19-30, 51-53.

Even if petitioner remains an LPR, however, his claims should be dismissed because, as discussed in the Response at 31-42, he has received all the process he is due. Therefore, his claim for release should be denied.

Petitioner makes certain additional claims which were not addressed in the omnibus Response cited above. Those claims are also without merit for the reasons discussed below.

1. Petitioner Fails To State A Claim For Relief Under The United Nations Charter

Petitioner alleges that he was taken into detention while traveling between two nations at

peace in violation of the United Nations Charter. Petition ¶¶ 21-23. However, as an international treaty, the United Nations Charter is not self-executing and does not confer individual legal rights on petitioner that he can assert in Court. See Committee of the United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988); Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958), aff'd, 278 F.2d 252 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960); see also Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 n.5 (7th Cir. 1985) (and cases cited therein); Weir v. Broadnax, No. 89-7446, 1990 WL 195841, at *7 (S.D.N.Y. 1990) (and cases cited therein). The reasons for this are more fully explained in the Response at 67-72 (discussing the fundamental principle that international treaties do not typically create rights that are privately enforceable in federal courts, and that enforcement is reserved to the executive authority of the governments that are parties to the treaties). Petitioner therefore fails to state a claim under the United Nations Charter.

2. An Injunction Prohibiting Petitioner's Removal From The Court's Jurisdiction Would Be Based On Speculation And Should Be Denied

Petitioner seeks an injunction prohibiting his removal from the Court's jurisdiction. Petition Prayer for Relief ¶ E. Of course, dismissal of this case, which is appropriate for the reasons discussed in this motion, would render petitioner's request moot. In any event, even if petitioner were correct that a move or transfer would deprive the Court of jurisdiction, but cf. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2721 (2004) (stating that "when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release"), however, petitioner offers no evidence of

an impending transfer. As the Court found during the hearing on petitioner's request for a temporary restraining order, "there's no evidence that there is a likelihood or imminent likelihood that Mr. Paracha would be moved anywhere." Dec. 7, 2004 Transcript at 36 ll.17-19.²

Because petitioner's request for an injunction preventing his removal from the Court's jurisdiction is based only on "concern and apprehension," Dec. 7, 2004 Transcript at 37 l.8, rather than any real possibility of a transfer, the request should be denied. See Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931) (holding that injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time"), cited in Exxon Corp. v. Federal Trade Comm'n, 589 F.2d 582, 594 (D.C. Cir. 1978) ("Injunctions . . . will not issue to prevent injuries neither extant nor presently threatened, but only merely 'feared' . . .").³

² Indeed, petitioner was moved to Guantanamo Bay in September 2004, after the decision in Rasul v. Bush conferred federal court jurisdiction over the Guantanamo Bay detainees' habeas corpus challenges. Rasul v. Bush, 124 S. Ct. 2686 (2004). Had it been their objective to evade jurisdiction, respondents would not have transferred petitioner to Guantanamo Bay in the first place.

³ Furthermore, as noted in the December 7, 2004 hearing in this case, the government has taken steps to ensure that any detainees who are transferred to another country are not subject to torture by that country. Dec. 7, 2004 Transcript at 31 ll.1-9; see also id. at 36 ll. 19-23. The government noted that as of the December 7, 2004 preliminary injunction hearing, only two habeas litigants had been transferred to another country (France), and that assurances were received that France would not torture these individuals upon their return. (Since that hearing, an additional habeas litigant has been transferred to his home country of Kuwait, with several others slated to be transferred to the United Kingdom and Australia, all with similar assurances.) These transfers were conducted in accordance with the United States policy described in a letter from the General Counsel of the Department of Defense to the Senator Patrick J. Leahy (attached as Exhibit 3), which states as follows:

With respect to Article 3 of the [Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment], the United States does not "expel, return ('refouler') or extradite" individuals to other countries where the U.S. believes it is "more likely than not" that they will be tortured. Should an

(continued...)

3. An Order Requiring The Preservation Of Evidence Is Unwarranted

Petitioner requests an order requiring respondents to preserve all evidence and information concerning the treatment of prisoners in connection with interrogation. Petition Prayer for Relief ¶ F. Again, dismissal of this case, which is appropriate for the reasons discussed in this motion, would moot this claim. In any event, there is not a speck of evidence that respondents would improperly dispose of such evidence. See Federal Communications Comm'n v. Schreiber, 381 U.S. 279, 296 (1965) (stating that administrative agencies are entitled to presumption "that they will act properly and according to law"). Thus, an injunction requiring its preservation would be based solely on petitioner's conjecture and is unwarranted. See Connecticut v. Massachusetts, 282 U.S. at 674; Exxon Corp. v. Federal Trade Comm'n, 589 F.2d at 594. See also Respondents' Memorandum in Opposition to Petitioners' Motion for Leave to Take Discovery and for Preservation Order, filed Jan. 12, 2005, in Al-Odah v. United States, No. 02-CV-0828 (CKK), and a number of others of these coordinated cases.

4. Petitioner's Request For Unmonitored Communications Is Moot

Petitioner asks the Court for an order allowing unmonitored communications between him and his attorney. Petition Prayer for Relief ¶ G. The procedures for counsel access to detainees are set forth in the November 8, 2004 Order at Exhibit A and are binding on petitioner

³(...continued)

individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.

and his counsel. See Order of Dec. 16, 2004. Those procedures provide for unmonitored (except by visual monitoring) communications between counsel and detainee. Nov. 8, 2004 Order at Exhibit A, section (X)(F). Petitioner's claim with respect to unmonitored communications is therefore moot.

5. Petitioner's Request For Attorney's Fees Should Be Denied

In his habeas petition, petitioner seeks an appointment as counsel and requests the payment of attorney's fees from government funds under the Criminal Justice Act, 28 U.S.C. § 3006A ("CJA"), and the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). Petition Prayer for Relief ¶¶ H, I, J. In three briefs filed in the Guantanamo Bay cases, respondents have already addressed these issues and shown that no such relief is warranted. See Zemiri v. Bush, No. 04-2046 (CKK), Respondents' Memorandum in Opposition to Petitioner's Motion for Appointment of Counsel Pursuant to § 3006A(a)(2)(B), filed Dec. 13, 2004; O.K. v. Bush, No. 04-CV-1136 (JDB), Respondents' Memorandum in Opposition to Petitioner's Motion for Appointment of Counsel Pursuant to 18 U.S.C. § 3006A(a)(2)(B), filed Nov. 16, 2004; El Banna v. Bush, No. 04-CV-1144 (RWR), Respondents' Motion for Reconsideration of Order Granting Petitioners' Motion for Appointment of Counsel and Memorandum in Support Thereof, filed Oct. 5, 2004. In the interest of economy, the briefs are incorporated herein.⁴

To summarize respondents' position, petitioner is not entitled to fees for three reasons. First, the CJA is inapplicable as an initial matter because it only provides for the appointment of counsel in criminal proceedings or in those proceedings intimately related to the criminal

⁴ Although petitioner has not filed a motion for appointment of counsel pursuant to the CJA, respondents are responding to petitioner's claim to the extent he intends his prayer for relief to serve as a substitute for such a motion.

process, Perez-Perez v. Hanberry, 781 F.2d 1477, 1480 (11th Cir. 1986), and petitioner does not seek relief relating to a criminal conviction or proceeding. Second, requests for retroactive appointments of retained counsel under the CJA must be accompanied by detailed evidence documenting the circumstances of the representation, which evidence petitioner has failed to provide. See United States v. Thompson, 361 F. Supp. 879, 887 (D.D.C. 1973), vacated in part, aff'd in part without opinion, 489 F.2d 1273 (D.C. Cir.1974), overruled on other grounds, United States v. Hunter, 394 F. Supp. 997 (D.D.C. 1975). Third, petitioner's next-friend has failed to submit evidence or meet her burden of demonstrating her financial eligibility for appointment of counsel, as is required by the CJA. See 18 U.S.C. § 3006A(c); United States v. Sarsoun, 834 F.2d 1358, 1361 (7th Cir. 1987). Instead, the Petition merely asserts that petitioner "is without available resources, having been confined for over fourteen months." Petition ¶ 12.⁵ Of course, evidence of petitioner's financial eligibility is also lacking.

CONCLUSION

For these reasons, the claims in this case should be dismissed, judgment in favor of respondents should be granted, a writ of habeas corpus should not issue, and the relief requested by petitioner should be denied.

Dated: Jan. 18, 2005

Respectfully submitted,

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⁵ Because petitioner has not prevailed in this litigation, he is also not entitled to fees under EAJA, 28 U.S.C. § 2412(d)(1)(A), nor would he ever be entitled to such an award in a habeas action. See, e.g., Sloan v. Pugh, 351 F.3d 1319 (10th Cir. 2003).

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