

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL
ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Civil Action No. 02-828 (CKK)

MEMORANDUM OPINION
(September 30, 2005)

I. INTRODUCTION

Counsel for Petitioners have filed a motion for a temporary restraining order seeking an order from the Court requiring broad judicial oversight of the medical treatment of Petitioners, including requiring the Government to provide both the Court and Petitioners' counsel with periodic reports on the medical condition of the detainees as well as access to the detainees' medical records, and to permit telephone communications between the detainees and family members.

After careful consideration of the parties' briefs and the relevant law, the Court shall deny Petitioners' motion for a temporary restraining order and request for a hearing.

II. LEGAL STANDARD¹

For Petitioners to obtain the emergency relief they seek, they must establish (1) that they

¹The Court notes that the parties did not present their arguments on this motion in the appropriate framework required for considering a request for a temporary restraining order. The Court has provided this legal framework, and evaluated the pleadings accordingly.

possess a substantial likelihood of success on the merits; (2) that they would suffer irreparable injury if the injunction were not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction. *See Serono Lab. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C. Cir. 1989); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Vencor Nursing Ctrs. v. Shalala*, 63 F. Supp. 2d 1, 7 n.5 (D.D.C. 1999) (noting that the same factors apply to a temporary restraining order as to a preliminary injunction). No single factor is dispositive; rather the Court "must balance the strengths of the requesting party's arguments in each of the four required areas." *CityFed*, 58 F.3d at 747. This calculus reflects a sliding-scale approach in which an injunction may issue if the arguments for one factor are particularly strong "even if the arguments in other areas are rather weak." *Id.* Thus, the U.S. Court of Appeals for the District of Columbia Circuit has held that "[a]n injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.*

III. DISCUSSION

A. *Factual Background*

This motion for a temporary restraining order concerns two of the Kuwaiti Petitioners, Fawzi Al Odah and Abdulazziz Al Shammari, who are currently taking part in a hunger strike.²

²Counsel for Petitioners indicate briefly in their motion that when they met with another of their clients, Abdullah Al Kandari, they discovered that he too was on a hunger strike. *See* *Petr.*' Mot. at 9. The Government has indicated that although Mr. Al Kandari was categorized as being on a hunger strike on September 10, 2005, he received counseling on September 11 and

Counsel for Petitioners originally requested a temporary restraining order on August 30, 2005, seeking intervention from the Court with respect to scheduling a visit with Petitioners in September. At that point, counsel for Petitioners had information from another detainee in the form of an unclassified statement that a hunger strike was taking place, and counsel sought to determine the state of their clients' participation in the hunger strike and their health.

Over the course of several conference calls on the record with the Court and the parties, held on August 30-31, 2005, it became clear that several Kuwaiti detainees were participating in the hunger strike. The parties reached an agreement permitting counsel to schedule a visit to meet with some of their clients on September 13-14, 2005. Having left open the question of how counsel would interview their clients if some of them were hospitalized as a result of the hunger strike, counsel for Petitioners requested that their August 30, 2005, motion for a temporary restraining order be held in abeyance.

Counsel for Petitioners flew down to Guantanamo Bay, Cuba, on September 12, 2005. While en route, they received word from Government counsel that the medical condition of Fawzi Al Odah and Abdulazziz Al Shammari was such that it was not clear whether Petitioners' counsel would be able to meet with them because they could be hospitalized. On the morning of September 13, 2005, Petitioners' counsel met with two detainees, not the ones at issue in the instant motion, who indicated that Fawzi Al Odah and Abdulazziz Al Shammari were in grave condition and about to expire as a result of the hunger strike. Petitioners' counsel called the

12, 2005, and he resumed eating meals on September 12, 2005. Resps.' Opp. Ex. B (Henry Decl.) ¶ 6. After eating three consecutive meals, he was no longer classified as on a hunger strike on September 13, 2005. *Id.* Petitioners have not disputed the Government's representation in their Reply.

Court from a payphone at Guantanamo Bay, and the Court held a conference call on the record with counsel for both parties. The Court asked counsel for the Government to arrange for Government counsel and the Court to speak directly with a physician knowledgeable as to the medical condition of the two detainees, not through a third party. Counsel for Petitioners agreed that the Court and Government counsel could speak to the physician *ex parte*.

At 4:30 PM on September 13, 2005, the Court held a conference call on the record with counsel for the Government and three military officers, including the physician who serves as the Officer-in-Charge³ of the detention hospital. The doctor indicated that he was personally familiar with Fawzi Al Odah and Abdulazziz Al Shammari. Tr. 7:17-20. He stated that Mr. Al Odah had been on a hunger strike since August 8, 2005, and had lost about ten percent of his body weight, placing his weight at about eighty percent of his ideal body weight. Tr. 8:1-10. On September 4, 2005, the medical staff had started tube feeding Mr. Al Odah, a procedure which the doctor indicated was still taking place at the time of the hearing. Tr. 8:12-14. The tube feeding, which was involuntary, consisted of a tube passing through Mr. Al Odah's nose into his stomach, allowing the medical staff to infuse the nutritional formula through the tube and into his stomach. Tr. 9:15-18 ("He is receiving what we call involuntary feeding, ma'am. He has a – into his nose into his stomach and then we are infusing nutritional formula into his stomach directly."). The doctor indicated at that time that Mr. Al Odah was clinically stable, had stable vital signs, and conversed with the doctor that day "very well." Tr. 8:14-16. The doctor stated that Mr. Al Odah was weak, and as a result "had a little bit of difficulty with ambulation," which required him to

³The Court has sealed the name of this doctor, but has unsealed the transcript of the conference call.

use a walker. Tr. 8:16-24. The doctor stated that as long as Mr. Al Odah “continues to receive nutrition his prognosis is very good.” Tr. 9:9-10. The doctor stated that Mr. Al Odah’s treatment plan was scheduled to be modified on the following Thursday morning to allow Mr. Al Odah to receive feeding twice per day on an outpatient basis at the hospital, rather than requiring him to remain in the hospital at all times. Tr. 10:1-10. The doctor indicated that, if the treatment proceeded as planned, Mr. Al Odah would be able to meet with his counsel on Thursday in the normal space for attorney-client meetings. Tr. 10:15-20.

With respect to Abdulazziz Al Shammari, the doctor indicated that he had been on a hunger strike since August 4, 2005, and had lost about five percent of his body weight, leaving him at about seventy-nine percent of his ideal weight. Tr. 11:11-14. Mr. Al Shammari was being fed twice per day at the hospital on an outpatient basis. Tr. 11:16-18. The doctor indicated that at that time, his medical condition was stable, he was communicative, and he walked unassisted. Tr. 12:4-9. The doctor also stated that Mr. Al Shammari would be in a position to meet with his counsel during their visit. Tr. 12:8-12.

That Thursday, September 15, 2005, counsel for Petitioners were able to meet with both Mr. Al Odah and Mr. Al Shammari. Counsel spoke with their clients in the normal interview facilities. Although the two Petitioners’ feeding tubes were still in place, they were not being fed at the time. Upon their return to Washington, DC, counsel for Petitioners filed the instant motion for a temporary restraining order, arguing that their clients’ condition was such that Court oversight of their medical care, and the intervention of the Petitioners’ families were required. Counsel for Petitioners disputed the doctor’s assessment of the detainees’ ambulatory abilities.

See Petrs.' Mot. at 10-11. Counsel also suggested that the doctor had stated that Mr. Al Odah was receiving nutrition directly into his stomach, i.e., not through a nasal tube, and counsel perceived this to be a misrepresentation on the doctor's part. *Id.* at 11. In addition, counsel suggested that the detainees had been falsely told that the military authorities at Guantanamo Bay had obtained court orders authorizing the tube feeding. *Id.*

The Government opposed Plaintiffs' motion, including supporting declarations by counsel for the Government, who had communicated with the physician, and Major General Jay W. Hood, who serves as the Commander of the Joint Task Force-Guantanamo ("JTF-GTMO"). It is clear from Major General Hood's declaration that the Government has regular procedures for determining when detainees are on a hunger strike, when medical intervention is required, and what is the appropriate treatment in order to preserve the lives of the detainees. Major General Hood has stated that "[c]onsistent with Department of Defense policy the JTF will prevent unnecessary loss of life of detainees through standard medical intervention, including involuntary medical intervention when necessary to overcome a detainee's desire to commit suicide, using means that are clinically appropriate." Resps.' Opp. Ex. A (Hood Decl.) ¶ 2. Furthermore, "it is JTF-GTMO's standard operating procedure . . . to avert death from hunger strikes and failure to drink, as well as to monitor the health status of detainees who are fasting voluntarily," and "[e]very attempt will be made to allow detainees to remain autonomous up to the point where failure to eat or drink might threaten their life or health." *Id.* ¶ 4. When a detainee has declined food and water for nine consecutive meals or for more than two days, the detainee's medical condition is evaluated, and "if medical personnel have reason to believe that the continuation of a