

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

USAMA JAMIL HAMAMA, et al.,

Petitioners,

v.

Civil No. 17-11910
Hon. Mark A. Goldsmith
Mag. Judge David R. Grand

REBECCA ADDUCCI, Director, Detroit
District of Immigration and Customs
Enforcement, et al.,

Class Action

Respondents.

**RESPONSE IN OPPOSITION TO MOTION TO LIFT
PRELIMINARY INJUNCTION AS TO MAYTHAM AL-BIDAIRI**

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Whether this Court should alter the scope of its July 24 Order staying removal of Iraqi nationals with final orders of removal that predate June 24, 2017, to exclude a particular putative class member—even though that Order is pending on interlocutory appeal, the requested amendment would gravely alter the status quo, Respondents have not offered new information or asserted any changed circumstances to justify the suggested change, and the justification Respondents offer for the change is better argued in the immigration courts?

MOST CONTROLLING AUTHORITY

Basicomputer Corp. v. Scott, 973 F.2d 507 (6th Cir. 1992)

George S. Hofmeister Family Tr. v. Trans Indus. of Indiana, Inc., No. 06-CV-13984-DT, 2007 WL 128932 (E.D. Mich. Jan. 12, 2007)

ARGUMENT

On July 24, 2017, this Court preliminarily enjoined Respondents from “enforcing final orders of removal directed to any and all Iraqi nationals who had final orders of removal on June 24, 2017”. ECF 87, Pg.ID# 2355 (the “Order” or the “July 24 Order”). Respondents have moved to lift the Court’s protective preliminary injunction for putative class member Maytham Al-Bidairi. For the reasons set forth below, the motion should be denied.

Respondents do not dispute that Mr. Al-Bidairi falls under the Court’s Order; his order of removal was entered in August 2016, well before the June 24, 2017 date in the Court’s Order. Respondents do not assert that Mr. Al-Bidairi has decided that he no longer wishes to avail himself of the protections under the injunction, nor do they assert that he has utilized the process for such removals established by the Court. Nonetheless, Respondents claim that because his order of removal was issued in August 2016, “he had the opportunity to raise claims for relief from removal based upon the country conditions alleged by Petitioners in the instant lawsuit,” and that the injunction against removal should therefore be lifted in his case. Respondents’ Motion, ECF 143, Pg.ID# 3840. Specifically, Respondents assert that this Court’s July 24 Order was based on country conditions in Iraq “alleged to have changed beginning in 2014,” *id.* at Pg.ID# 3844, so that

Mr. Al-Bidairi could have pointed to those conditions during his removal proceedings.

It is apparent that this motion seeks modification of the July 24 Order, which is pending on interlocutory appeal. While this Court retains jurisdiction under Fed. R. Civ. P. 62(c) to modify an order that is the subject of an interlocutory appeal, that authority is limited. Some courts deem the authority in these circumstances “limited to modifications that preserve the status quo between the parties already before the circuit court by virtue of the notice of appeal.” *George S. Hofmeister Family Tr. v. Trans Indus. of Indiana, Inc.*, No. 06-CV-13984-DT, 2007 WL 128932, at *2 (E.D. Mich. Jan. 12, 2007) (attached as Ex. A) (citing *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1392 n. 1 (9th Cir.1984); *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962). Other courts allow “substantive modification to ‘preserve the integrity of the proceeding in the court of appeals.’” *Id.* (quoting *Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460, 464 (3rd Cir. 1989), and citing *Bd. of Educ. of St. Louis v. State of Missouri*, 936 F.2d 993, 996 (8th Cir. 1991)). Either way, the authority to modify a preliminary injunction pending on interlocutory appeal is far from “open-ended.” *Id.*

The Sixth Circuit has so far declined to choose between these approaches, *see Basicomputer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992) (citing above

courts of appeals cases), but under either of them, this Court lacks jurisdiction to reconsider the reach of the July 24 Order in the way that Respondents suggest here. Respondents' proposed amendment to the Order plainly does not preserve the status quo. And absent any showing of new developments, previously unknown facts or circumstances, or the like, the proposed amendment is not necessary to preserve the integrity of the pending proceedings. *See also, e.g.*, Rule 60(b)(5) (rule for a final judgment allows district court modification when "applying it prospectively is no longer equitable"); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, (1992); *Horne v. Flores*, 557 U.S. 433 (2009) (describing changes in law or circumstances that justify Rule 60(b)(5) modifications to final judgments).

Respondents have known since the outset of this action that some of the putative class members have removal orders that were entered after 2014. *See, e.g.*, Kitaba-Gaviglio Declaration (July 16, 2017), ECF 77-20, Pg.ID# 1854 (chart showing, for 223 detainees, the final order dates; at that time 5 detainees had final orders from 2017, 5 detainees from 2016, and 8 from 2015). Indeed, Respondents flagged the issue in their brief in opposition to class certification. ECF 159, Pg.ID# 4150 ("[T]he claims by individuals who finished their proceedings after 2014, and especially those that concluded in early 2017, cannot be commonly resolved with that of an individual with a twenty-year old removal order."). As to Mr. Al-Bidairi in particular, Respondents have long been aware of Mr. Al-Bidairi's pending

habeas petition in the Northern District of Alabama; the government filed motions in July and August seeking extensions of time to respond to that petition, each referencing the fact that Mr. Al-Bidairi was covered by this Court's stay of removal. *See* Ex. B at 1-2 (Third Motion for Extension of Time, Al-Bidairi v. Sessions (N.D. Ala. 7:17-cv-00824-RDP-JHE), ECF 8) (describing procedural history). Moreover, had Respondents complied more quickly with this Court's Order and earlier provided Mr. Al-Bidairi with his A-file and Record of Proceeding, he would either have already filed his motion to reopen and it would be in the process of being adjudicated, or he would be nearing the close of the 90-day period provided by this Court after which the stay of removal under the July 24 Order would no longer be in effect.

If the Sixth Circuit upholds this Court's decision to grant injunctive relief, Respondents can file a motion to modify the scope of the injunction once their appeal is no longer pending, and this Court can then take into account any guidance provided by the Court of Appeals.

Even if it were appropriate for the Court to deal with this issue now, Respondents are wrong on the merits. This Court has made no definitive findings on when country conditions changed in Iraq, much less any determination of whether any specific individual covered by the stay of removal can assert a valid

claim of changed country conditions. Rather, the Court has, appropriately, left those specific nuanced factual determinations to the immigration courts.

Moreover, there is no merit to Respondents' argument that merely because Mr. Al-Bidairi's removal order issued in August 2016, subsequent to worsening of conditions in Iraq in 2014, he lacks any basis for a motion to reopen based on changed country conditions. As recognized in the Court's Order, although 2014 marked the "earliest" date at which Iraq's changed country conditions became apparent, "conditions threatening to some Petitioners [did not arise] until much later." July 24 Order, ECF 87, Pg.ID# 2342.

If Mr. Al-Bidairi cannot sustain a claim of changed country conditions, the immigration courts will say so, and reject his motion to reopen his immigration case. More generally, whether any individual putative class member can make out a claim for reopening based on changed country conditions is best left for the immigration court, the BIA, and the Court of Appeals to decide. To follow Respondents' suggested approach by excluding from the July 24 Order Iraqis whose removal was ordered after some undetermined date, based on country conditions in Iraq, would necessitate a complex evidentiary hearing.

Respectfully submitted,
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Dated: December 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2017, I electronically filed the attached Response in Opposition to Motion to Lift Preliminary Injunction as to Maytham Al-Bidairi with the Clerk of the Court using ECF system which will send notification of such filing to all counsel of record.

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

/s/ Kimberly L. Scott

Attorney for Petitioners and Plaintiffs

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

2017-7 P 15

MAYTHAM AL-BIDAIRI,)
A# [REDACTED])
)
Petitioner,)
)
v.)
)
JEFF SESSIONS, et al.,)
)
Respondents.)

U.S. DISTRICT COURT
N.D. OF ALABAMA

CIVIL ACTION NO.

7:17-cv-00824-RDP-JHE

THIRD MOTION FOR EXTENSION OF TIME

On July 5, 2017, the undersigned moved this Court for an extension of time of time to response to its Order to Show Cause due to events which had transpired in the Eastern District of Michigan in Case 2:17-cv-11910-MAG-DRG (E.D. Mich. July 11, 2017), including the issuance of a temporary nationwide injunction against the removal of individuals of Iraqi origin. See Doc. 6 at 2-3. This Court granted that motion through its Order of July 6, 2017 (Doc. 7).

The Eastern District of Michigan has subsequently issued two additional orders affecting the present action. On July 11, 2017, that court found that it did have jurisdiction "to grant Petitioners the limited relief they


request, i.e., an injunction against enforcement of the orders of removal so that their habeas rights can be meaningfully asserted and addressed before other courts." A copy of that Opinion and Order is attached as Ex. 1, and the quoted language is found on page 23. Then, on July 24, 2017, that court granted the Petitioners' motion for a preliminary injunction, which it indicated "shall remain in effect unless modified by the Court." A copy of that Opinion and Order is attached as Exhibit 2, and the quoted language is found on page 34.

It is unknown whether any of the parties will appeal this injunction. That process needs time to play out. Accordingly, the Respondents respectfully request an extension of time to file a response to this Court's Order of May 22, 2017. The undersigned respectfully requests that the Court use its discretion in determining the appropriate length of such extension, but requests that it be not less than 30 days.

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully request this Court issue an order granting an extension of time to respond to the Court's order of May 22, 2017.

Respectfully submitted,

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/s/ John D. Saxon, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and will send notice of the foregoing to the following *pro se* litigants by placing a copy in the United States mail:

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Gadsden, AL 35901


/s/ John D. Saxon, Jr.

John D. Saxon, Jr.
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