

2002 WL 1332836
United States Court of Appeals, Sixth Circuit.

DETROIT FREE PRESS, INC.; et al.,
Plaintiffs-Appellees,
v.
John ASHCROFT, Attorney General, et al.,
Defendants-Appellants.

No. 02-1437.
|
April 18, 2002.

Before: DAUGHTREY, MOORE, and COLE, Circuit
Judges.

ORDER

***1** The defendants appeal a preliminary injunction that enjoins them from conducting closed immigration proceedings relating to Rabih Haddad and requires them to produce transcripts of Haddad's previously held proceedings and copies of documents related to his case. The district court denied the defendants' request to reconsider and to stay the injunction. The defendants have filed with this court an emergency motion to stay the effect of the district court's injunction pending appeal. The defendants also requested a temporary stay pending this court's ruling upon the motion for a stay, which we granted in part in our order of April 10, 2002.

The factors that govern the issuance of a stay pending appeal are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991). The first and second factors are inversely proportional. *Griepentrog*, 945 F.2d at 153.

"In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal." *Griepentrog*, 945 F.2d at 153. We believe

that the defendants have not made such a demonstration. To prevail on the merits, the defendants must prove either that the newspaper plaintiffs do not have a First Amendment right of access to Haddad's removal proceedings or that the plaintiffs' First Amendment right has not been infringed in violation of the Constitution. However, we believe that the justifications for access to criminal and civil proceedings, *see Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 10-13 (1986); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir.1983), *cert. denied*, 465 U.S. 1100 (1984), have comparable force when applied to the removal hearings at issue in this case. In addition, the defendants have not established that the total closure of removal hearings satisfies the stringent requirements of strict scrutiny.

The slim likelihood of reversal is not sufficiently offset by the likelihood of irreparable harm to the defendants. Three factors govern our evaluation of whether harm will occur if the requested stay is not ordered: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Griepentrog*, 945 F.2d at 154. "In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical." *Id.* We recognize that the Government alleges substantial injuries to the integrity of its terrorism-related investigation, but the likelihood of such harms occurring in this particular case is remote, given the fact that information about Haddad's detention has already been disseminated. We also are not persuaded that the alleged harm is certain, immediate, or more compelling than the harm frequently presented in significant criminal investigations. Furthermore, the availability of normal measures for protective orders tailored to a particularized showing of harm shields the Government from irreparable harm absent a stay. The Government has not made a particularized showing of harm at this time that precludes disclosure of transcripts and documents from past hearings or that warrants closure of future hearings concerning Haddad.

***2** The unlikely possibilities of reversal and irreparable harm to the defendants are more than counterbalanced by the harm to the newspaper plaintiffs and the public interest that would inevitably occur if this court were to order a stay pending appeal. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) ("[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)), *cert. denied*, 526 U.S. 1087 (1999). In any event, the Government remains free to seek a delay of Haddad's removal hearing before the immigration judge,

currently scheduled for April 24, 2002, until this court decides the merits of its appeal of the preliminary injunction, which has been expedited with all due speed.

It hereby is ORDERED that the partial temporary stay entered on April 10, 2002, be dissolved. The defendants' motion for a complete stay pending appeal is DENIED. The parties shall proceed with the briefing schedule set forth in our order of April 10, 2002. The case is returned

to the Clerk and Chief Judge for assignment to a panel.

All Citations

Not Reported in F.3d, 2002 WL 1332836, 30 Media L. Rep. 1767