UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al., Petitioners and Plaintiffs, v. **REBECCA ADDUCCI**, et al., Respondents and Respondents.	Case No. 17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

RESPONDENTS' OBJECTION TO PETITIONERS' SECOND MOTION TO WITHDRAW STIPULATED ORDER (ECF 151) AND REINSTATE THE PRELIMINARY INJUNCTION (ECF 87) FOR WISAM IBRAHIM

INTRODUCTION

This Court should not rescind the stipulated order until Respondents have had the opportunity to evaluate Wissam Ibrahim ("Ibrahim") and this Court can decide the issue, if necessary. As set forth below, this Court has already set up procedures not only for allowing individuals to "opt-out" of the preliminary injunction through a labor-intensive, multi-step process to ensure that all waivers are knowing and voluntary *before* a stipulated order is entered, but also how the mental evaluation would occur in this specific case. In short, the mental competency of Ibrahim with respect to his desire to return to Iraq is an issue squarely before this Court, and not one that this Court should defer to the Macomb County Probate Court. Respondents' expert will soon be able to evaluate Ibrahim and, once that evaluation occurs, Respondents will be in a position to advise the Court of their position regarding

further litigation of this issue. Accordingly, the Court should deny this motion or, in the alternative, stay consideration pending the results of Respondents' evaluation and—if necessary—a hearing on the matter.

Additionally, Petitioners' request for a bond hearing for Ibrahim should be denied. Ibrahim has a final removal order. He was literally on his way to the airport to be returned to Iraq when this Court entered the January 23, 2018 order temporarily staying his removal. Accordingly, Petitioners cannot plausibly argue that Ibrahim is entitled to release on an order of supervision under *Zadvydas v. Davis*, 533 U.S. 678 (2001) because his removal is certainly reasonably foreseeable under the current facts.

BACKGROUND

As addressed in Respondents' earlier briefing on this issue, ECF No. 222, this Court has already created a procedure for determining whether a class member's desire to opt out of a stay of removal is knowing and voluntary—and specifically adopted the procedure *proposed by Petitioners*. *See* Order Regarding Further Proceedings, ECF 110 at 2 ("To ensure that a putative class member's decision to return to Iraq is made knowingly and voluntarily, the Court adopts Petitioners' [proposed procedures]."). Under this procedure, upon receipt of a detainee's form indicating a possible interest in removal, Petitioners' counsel identifies a pro bono lawyer to visit the detainee to "(a) advise the detainee about available options, (b)

confirm that no pressure is being exerted, and (c) ensure that any decision to forego the protections of this Court's stay [of removal] is knowing and voluntary." Joint Status Report, ECF No. 107 at 6. Petitioners explicitly noted that "[t]he pro bono lawyer can also be alert to the possibility of any *indicia of incompetency*." *Id.* (emphasis added). And this Court acknowledged that this process "will more likely result in detainees making an informed and voluntary choice whether to forego the protections afforded by the preliminary injunction." Order Regarding Further Proceedings, ECF 110 at 2.

Wisam Ibrahim ("Ibrahim") has been afforded the benefit of this court-approved process "designed to ensure that the Court has sufficient assurance . . . that . . . individuals have made knowing and voluntary choices to be removed." Joint Status Report, ECF No. 107 at 7. Specifically, on October 16, 2017, Respondents informed Petitioners of Ibrahim's request for prompt removal to Iraq. On October 30, 2017, Ibrahim consulted with counsel to discuss his rights under the preliminary injunction, signed the Detainee Stipulation for Prompt Removal to Iraq, and by all indications had knowingly and voluntarily waived his protections under the preliminary injunction. *See* Order Lifting the Preliminary Injunction for Wisam Ibrahim, ECF No. 151. Accordingly, on November 20, 2017, this Court entered a Stipulated Order Lifting the Preliminary Injunction for Ibrahim. ECF No. 151.

On January 23, 2018, however, Saeeb Ibrahem Mansy, Ibrahim's father, filed an emergency motion seeking to vacate the stipulated order. ECF No. 207. In his motion, Mansy states that he first learned of Ibrahim's request for prompt removal on January 15, 2018. *Id.*, Page ID # 5476. Based on his mental health history, however, Mansy maintains that Ibrahim was not competent to make this important decision of voluntarily waiving his protections under the preliminary injunction. *Id.* Mansy stated further that, based on his conversations with an ICE agent, his son was scheduled to be removed to Iraq that same day—January 23, 2018. *Id.* Accordingly, this Court entered an order temporarily staying Ibrahim's removal. ECF No. 210. The Court further ordered Mansy to file a brief to the Court by January 26, setting forth the standard and framework for determining Ibrahim's competency. *Id.* Respondents and Petitioners were then required to file responses to the proposed framework so that the matter could be discussed at a court hearing. *Id.*

In Mansy's motion, which was filed on January 26, he argued that Ibrahim should be given an immediate mental health assessment, and that he "should then be afforded a Competency Hearing in front of an Immigration Judge." ECF No. 214, Page ID # 5517-18. No mention was made that the appropriate venue for determining Ibrahim's mental competency should be the Macomb County Probate Court. Respondents and Petitioners responded to Mansy's proposed framework in kind, per this Court's order. ECF Nos 222, 224. Neither party raised the issue of whether the

Probate Court was the appropriate venue, and the parties agreed that *Rees v. Peyton*, 384 U.S. 314 (1966) could provide an appropriate standard for this determination. *Id.*

On February 14, 2018, Petitioners' expert witness, Dr. Debra Pinals, conducted a mental health evaluation of Ibrahim.

On March 7, 2018, this Court considered the framework proposed by Mansy, the responses of Petitioners and Respondents, and the evaluation by Dr. Pinals. Order, ECF No. 255. Following the hearing, this Court entered an order addressing how Dr. Pinals' report was to be shared between the parties in light of the important confidentiality concerns, as well as a procedure and timelines for Respondents to determine an appropriate course of action. *Id.*

Respondents complied with the Court's order, and have been diligently trying to secure an expert witness. Two professionals, who had initially expressed interest and availability, later withdrew. Respondents however now have an expert witness with an approved contract who is available to conduct an evaluation as soon as June 11, 2018.[1]

In the meantime, and unbeknownst to this Court or Respondents, Mansy filed a petition in the Macomb County Probate Court for a limited guardianship of his son.

[1] Respondents' expert was also available to conduct an examination on May 25, 2018, but given the uncertainty created by the present motion, Respondents decided not to expend the resources until they received further guidance from this Court.

Ibrahim opposed that petition, and was appointed an attorney for those proceedings. *See* Mansy Decl., Exhibit 2. The Probate Court granted the petition, entering a limited guardianship order on May 9, 2018. Respondents, however, were not informed of, or otherwise invited to participate in, those proceedings. It is also unclear from the Probate Courts' order what legal framework it applied in determining Ibrahim's competency.

ARGUMENT

This Court has already established a process for how Ibrahim's competency will be determined. At issue here is whether Ibrahim's decision to opt out of the stay of removal was knowing and voluntary. The parties agree that the proper standard for this analysis is the standard articulated in *Rees v. Peyton*. *See* ECF No. 244. Petitioners arranged for a mental health evaluation of Ibrahim. Respondents had some initial difficulty finalizing a contract with an expert, but that process is now complete and the evaluation can be performed as soon as June 11. This Court should allow Respondents to have their expert complete his mental health evaluation of Ibrahim. Once complete, Respondents will inform the Court and the Petitioners whether they agree with the assessments of Petitioners' expert concerning Ibrahim's mental status, or whether that issue should be decided by this Court.

This Court is not bound by the Macomb County Probate Court's limited guardianship order. Petitioners argue that the Probate Court's order is "dispositive .

. . and this Court should defer to that order, based on both comity and the Probate Court's specialized expertise in assessing competency issues." Pet'rs Mot., ECF No. 285, Page ID #6743. Petitioners cite no authority for their assertion that comity requires that this Court defer to the intervening state court order that purports to decide an issue that is currently the subject of ongoing litigation before this Court.

First, the principle of comity does not bind this Court—which squarely has the issue of Ibrahim's competency before it— to the Probate Court's determination regarding Ibrahim's capacity to make a knowing and voluntary waiver. Judicial comity is "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decision of another, *not as a matter of obligation*, but out of deference and respect." JUDICIAL COMITY, Black's Law Dictionary (6th ed. 1990) (emphasis supplied). Federal courts typically apply this doctrine where a legal matter is already before another state or other sovereign court: "Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, *and already cognizant of the litigation*, have had an opportunity to pass upon the matter." *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (internal quotations omitted).

Here, *this Court* was already considering Ibrahim's competency—as Mansy was aware—when he filed his motion seeking the appointment of a guardian in the Probate Court. There is no question that this Court obtained jurisdiction over the issue of Ibrahim's competency first. Courts have long held that where a state and a federal court have concurring jurisdiction over the same parties and the same subject matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to decide every issue or question properly arising in the case. *See Smith v. McIver*, 22 U.S. 532 (1824) ("In all cases of concurrent jurisdiction, the court which first has possession of the subject-matter must determine it conclusively."); *Jackson v. Parkersburg & O. V. Electric Ry. Co*. 233 F. 784 (N.D.W.Va. 1916) ("Where suits are brought in courts of concurring jurisdiction, involving a controversy between substantially the same parties or their privies, and no seizure of the res is made, that court in which suit is first brought is entitled to exclusive jurisdiction."). Respondents do not know if the Probate Court was informed of the proceedings here, but under the principle of comity it should have refrained from deciding an issue squarely within this Court's province.

As explained, the issue of whether Mr. Ibrahim had or has the capacity to make a knowing and voluntary decision to opt out of a stay of removal is the subject of ongoing litigation before this Court. *See* ECF Nos 207, 222, 224, 225, 244. Mansy first sought to intervene on son's behalf in this litigation in January 23, 2018. ECF.

Nos. 207, 225. Thus, he was clearly aware of the ongoing litigation in this Court over Ibrahim's competency. And Petitioners proffer no explanation for why Mansy had to go to state court, instead of here, to have a guardian ad litem appointed for Ibrahim. Indeed, pursuant to Federal Rule of Civil Procedure 17(c), this Court is authorized to appoint a guardian ad litem for a minor or incompetent person who is unrepresented in this matter. However, rather than let the process play out at the federal district court, Mansy sought state court intervention in a matter in which he already had pending motions in federal court. *Romine v. Compuserve Corp.*, 160 F.3d 337, 341 (6th Cir. 1998) ("The legitimacy of the court system in the eyes of the public and fairness to the individual litigants also are endangered by duplicative suits that are the product of gamemanship or that result in conflicting adjudications." (internal quotations omitted)). In essence, Mansy created parallel court proceedings without informing Respondents or this Court, and it is unclear whether the Probate Court was informed of the ongoing district court litigation regarding Ibrahim's competency. Thus, the state court proceedings cannot be said to have adequately protected the federal defendants' rights in this case, in a manner sufficient to warrant this Court deferring to the state court's order. *See Romine,* 160 F.3d at 341. Although arising in different contexts, "[c]ases are legion which affirm the exercise of a federal court's power to prevent state court action from interfering with federal jurisdiction and from undermining federal court judgments." *United States v. State of Mich.*,

505 F. Supp. 467, 483 (W.D. Mich. 1980); *see also Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263 (5th Cir. 1969) (party enjoined from proceeding with state court suit in order to protect federal judgment awarding one-half of the royalties under an oil and gas lease); *Miller v. Climax Molybdenum Co.*, 96 F.2d 254 (10th Cir. 1938) (prosecution of state court suits affecting railroad properties in a way likely to threaten an ICC order enjoined); *Fresno v. Edmonston*, 131 F. Supp. 421 (S.D.Cal. 1955) (state water rights proceedings enjoined on the theory, among others, that the "res" of the dispute was before the federal court).

Second, it is unclear how the Probate Court's "specialized expertise in assessing competency issues" should inform the issue before the Court. The parties "agreed that the standard to [assess competence to waive one's right in this case] should be that articulated in *Rees*." Pet'rs' Mot. Withdraw, ECF No. 244, Page ID # 6156-57 (citing *Rees v. Peyton*, 384 U.S. 312, 314 (1966)). It is not clear, however, if the Probate Court applied this standard. *See Crosby v. Pickaway Cty. Gen. Health Dist.*, 303 F. App'x 251, 261 (6th Cir. 2008) ("Although the district court and state court came to different conclusions about 'finality,' the district court was not obliged to adopt the state court's definition of finality nor was the state court obliged to defer to the district court's earlier determination of the matter. The reason is that the two standards of 'finality' are actually distinct legal inquiries."). Moreover, Petitioners do not assert that the agreed upon standard should be deviated from or that the state

court applied the standard articulated in *Rees*. Further, whatever standard the Probate Court applied, Respondents were not able to participate in that hearing.

Because Petitioners have not provided any legal basis demonstrating that this Court is bound by the Probate Court's determination, or provided a sufficient basis on which this Court could conclude that it should defer to the Probate Court's "expertise" on the knowing and voluntary waiver in this case, the Probate Court's order is not "dispositive" of the issue before this Court.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion or, alternatively, defer ruling on it until Respondents' expert witness has had an opportunity to evaluate Ibrahim.

Dated: May 24, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served via CM/ECF upon all counsel of record.

Dated: May 24, 2018

Respectfully submitted,

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