

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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SOULEYMANE DEMBELE, et al.,)
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Petitioners,)
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v.) No. 20 CV 02401
)
ROBERT GUADIAN, etc., et al.,) Chicago, Illinois
) April 29, 2020
Respondents.) 10:31 a.m.

TRANSCRIPT OF TELEPHONIC PROCEEDINGS
BEFORE THE HONORABLE REBECCA R. PALLMEYER

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1 (Proceedings heard telephonically:)

2 THE CLERK: The United States District Court for the
3 Northern District of Illinois is now in session. The
4 Honorable Chief Judge Rebecca R. Pallmeyer presiding.

5 20 CV 2401, Dembele versus Guadian.

6 THE COURT: Good morning. This is Judge Pallmeyer.
7 Could I have your appearances for the record?

8 MR. OSWALD: Craig Oswald, Jana Brady, and Elizabeth
9 Treacy, all Assistant United States Attorneys, on behalf of
10 the United States.

11 MS. CHOUDHURY: Your Honor --

12 THE COURT: And --

13 MS. CHOUDHURY: Sorry.

14 THE COURT: I'm sorry. Go ahead.

15 MS. CHOUDHURY: This is Nusrat Choudhury. I'm here
16 with Rebecca Glenberg, Ana Torres, Juan Caballero, and Aaron
17 Siebert-Llera for the petitioner.

18 THE COURT: Thank you. And we are --

19 MR. HOFFMAN: Your Honor?

20 THE COURT: Yes.

21 MR. HOFFMAN: I'm sorry. George Hoffman on behalf of
22 Sheriff Prim and Chief Sitkie in their individual capacities.

23 MS. COURIER: And Michelle Courier on behalf of Chief
24 Sitkie and the sheriff in their individual capacities.

25 MS. KINGSBURY: Also, Colby Kingsbury on behalf of

1 petitioner.

2 THE COURT: And we're --

3 MS. PICASSO: Malita Picasso on behalf of petitioner.

4 THE COURT: I'm sorry. Say that again.

5 MS. PICASSO: Malita Picasso on behalf of petitioner.

6 THE COURT: I wonder if I could ask you to spell your

7 last name for us.

8 MS. PICASSO: P-i-c-a-s-s-o.

9 THE COURT: All right. Thank you.

10 We're agreed that we can proceed by way of a
11 telephone hearing this morning. Is that right?

12 MR. OSWALD: Yes, your Honor.

13 MS. CHOUDHURY: Yes, your Honor.

14 THE COURT: All right. I've had a chance to review
15 the parties' submissions including the materials that the
16 government provided and the defendants concerning conditions
17 at McHenry County and the reply memorandum that was filed
18 yesterday or late last night. I understand Mr. Dembele is no
19 longer part of the case because he is no longer in the
20 facility, but Mr. Butt remains an issue in this case.
21 Correct?

22 MS. CHOUDHURY: Yes, your Honor. Mr. Dembele has
23 been released, so his request for preliminary relief is now
24 moot.

25 THE COURT: All right. What's left is a request for

1 preliminary relief on the part of Mr. Butt who is 65 years old
2 and reportedly suffers from diabetes and hypertension as well
3 as hyperlipidemia which I believe he is being treated for in
4 the facility and defendants believe are -- respondents believe
5 it is well controlled.

6 But he is concerned, nevertheless, about the risk
7 that he stays as a result of being in a confined space during
8 the pandemic. He alleges that individuals within the facility
9 are not being properly, maintain six feet -- not maintaining
10 six-foot distance and that no effort is being made on the part
11 of officers to enforce any social distancing requirements.

12 He also says that -- or at least a declaration
13 reports that he has been provided with just one mask per week
14 and that there's no effort made to ensure that people do wear
15 masks. In fact, not all of the staff is wearing masks.

16 I note that there are no confirmed cases of COVID-19
17 at McHenry County. I realize that is in part likely a
18 function of the fact that people are not tested unless they're
19 symptomatic, but I think it's unfair to say that the jail
20 officials have been deliberately indifferent to the risk of
21 COVID-19. It's clear from the reports that they've submitted
22 that they're very conscious of the risk and are doing what
23 they -- at least what they believe to be what they can do.

24 Let me just ask this question. I know that the
25 facility is now at 48 percent capacity, and I know from the

1 photographs and the video that have been sent that although
2 certainly it appears that detainees in McHenry County are
3 often too close to one another, it also appears that they
4 would not have to be, that the space is relatively broad and
5 that Mr. Butt, should he choose to, could remain, even within
6 the dayroom or within the cafeteria, at a six-foot distance
7 from others if he chooses to do that.

8 What's of greater concern to me is the report about
9 masks and the information that only one mask is being provided
10 per inmate per week and that very few of the detainees are
11 actually wearing them.

12 Could I ask for a report from the defendants on
13 that -- from the respondents, I should say. I'm sorry.

14 MR. OSWALD: Yes. We've talked to officials at the
15 jail this morning, and there's a bit of an update on the mask
16 issue. As of Friday to com -- kind of in conjunction with
17 Governor Pritzker's order, everyone will be given a mask.
18 Everyone will have a mask. The masks have been available to
19 detainees upon request, and if a detainee asks for one, they
20 are given one. The masks have been -- and everybody, all
21 staff members and all detainees as of Friday will be wearing
22 masks.

23 On the meal issue, I just want to clarify something
24 else as well. As of last Thursday, I believe, detainees were
25 given the option to eat their meals in their cell. Mr. Butt

1 is currently observing, as of last Thursday through May 23rd,
2 he's observing Ramadan. That means that he gets two meals:
3 One at 3:30 a.m. and one at 7:40 p.m.

4 There are seven people in the unit that -- where he
5 is receiving his meals, and he is let out of his cell which is
6 normally for the -- the 3:30 a.m. meal, he is let out of his
7 cell to -- and he receives the meal, and there are seven
8 people. And he can eat that either in his cell or, I assume,
9 in the common area, but there's even less distancing, you
10 know, issues for the next -- through May 23rd than was
11 apparent even from the video.

12 But the mask is going to be everybody having to wear
13 one, and that will be enforced as of this Friday.

14 THE COURT: When you say "as of this Friday," you
15 mean as of Friday the 24th of April?

16 MR. OSWALD: No. I'm sorry. As of Friday, May 1st.

17 THE COURT: May 1st.

18 MR. OSWALD: Everybody will be required to wear a
19 mask. Obviously, they can't eat their meals wearing a mask.
20 And the mealtime will be, you know -- I mean, they can get
21 their meals, you know, from that -- in that situation. They
22 have the option to go get their meal, take it back to their
23 cell, and eat it there.

24 You know, I mean, some of this, Judge, becomes
25 somewhat problematic in that the jail doesn't really want to

1 take away the freedoms people have in terms of, you know,
2 their congregating during mealtime and things like that.
3 These people have all been in the facility for at least 21
4 days and, you know, have not shown any symptoms of COVID.

5 So there is nobody that's in there, that is getting
6 in there. When the staff members report for work, their
7 temperature is taken. Anybody who's got symptoms gets medical
8 treatment at the facility, and they are -- you know, they have
9 been in there for 21 days together, and nobody has shown
10 symptoms. So they really don't want to further restrict them
11 in terms of what they can do.

12 Obviously, as you can see from the mealtime, I mean,
13 it's not my cup of tea. I wouldn't be sharing food and
14 whatever, but I understand that. I mean, it's kind of like,
15 you know, being back in grade school. You know, are you going
16 to eat that kind of thing?

17 And, you know, if you don't want to do that, you've
18 got the freedom not to do it, but if they want to, they have
19 been -- they are permitted to do so. And I think that the
20 jail thinks that that's because -- you know, the reason that
21 they do that is because they have been together for 21 days,
22 and they're asymptomatic. And they really don't want to
23 further restrict people and make them unhappy, just have them
24 sit in their cell all day and do that and then we probably
25 might get sued for that.

1 So I think that they want to -- they're trying --
2 they are acting responsibly. And, you know, that's -- and
3 they have not had a positive case. And he has no cellmate now
4 in his cell. And McHenry is, you know, while they, you know,
5 articulate these things about McHenry having a high rate, it's
6 the lowest in the metropolitan area, one of the lowest in our
7 district.

8 THE COURT: One more question I had. There was a
9 reference in the briefing to a post-order custody review. And
10 I believe Mr. Butt sought that post-order custody review but
11 was denied.

12 What is a post-order custody review?

13 MR. OSWALD: Liz Treacy from our office can address
14 that, your Honor.

15 MS. TREACY: Yes, Judge. This is Liz Treacy.

16 So generally speaking, after -- a post-order custody
17 review would be after 90 days in custody where a detainee's
18 custody status would be reviewed by enforcement removal
19 operations. They did complete that review, but they denied
20 Mr. Butt's release.

21 THE COURT: And does -- can somebody tell me
22 specifically, does Mr. Butt have access to a mask right now?
23 He can ask for one; is that right?

24 MS. TREACY: That's correct --

25 MS. COURIER: Your Honor, this--

1 MR. OSWALD: As far as we're aware, yes, he can ask
2 for one and receive one.

3 MR. HOFFMAN: Michelle, do you know more about that?

4 MS. COURIER: Yes. That's correct. If he were to
5 request one, he would receive one.

6 THE COURT: These circumstances are troubling for all
7 of us, and it's -- certainly, the petitioner's correct that
8 McHenry County is not in a position to guarantee that there
9 will be no infection within the facility just as I can't
10 guarantee there will be no infection within the courthouse.
11 And none of us can guarantee that we will not be infected if
12 we go to the grocery store as the jail officials are required
13 to do in order to stay alive.

14 There's some criticism of their -- you know, their
15 movement about society while they're off their shifts on the
16 part of the petitioner's brief, but it's just not realistic to
17 expect that people will not, in fact, need to provide for
18 themselves at the grocery store, the pharmacy. And we would
19 expect them to be careful.

20 Mr. Butt does have significant risk factors in his
21 age. He does have diabetes and hypertension. I understand
22 those are controlled but again, there are no guarantees. He's
23 subject, however, to a final order of deportation, and
24 although he has no previous criminal history, all of his
25 appeals, as I understand it, have been denied.

1 The expectation is that he will be removed to
2 Pakistan. Right now, I understand the expectation is that
3 that will happen early in June. I recognize that there's no
4 guarantee that flights will be leaving in early June or indeed
5 any time soon, but I understand the presumptive limit for the
6 amount of time that somebody can be kept in custody without
7 violating due process is six months. My understanding is
8 we're not close to that time with respect to Mr. Butt.

9 My -- recognizing that we're dealing with a difficult
10 situation, I don't believe that Mr. Butt has established a
11 clear likelihood of success on the merits of this claim. And
12 although I recognize the urgency, I'm afraid I need to deny
13 this motion.

14 What I will do is deny it without prejudice. It may
15 very well be that circumstances will change either within the
16 facility or with respect to the possibility of Mr. Butt's
17 travel. By that, I mean it may be that there will be greater
18 infection in the facility and greater danger despite what I
19 think are jail officials' genuine and significant efforts to
20 protect people.

21 It also may be that we will learn that, in fact,
22 Mr. Butt will never be -- will not be able to leave the United
23 States early in June as planned and perhaps won't be for quite
24 some time. Either of those circumstances might generate a
25 different calculus with respect to this motion but for now,

1 the motion is denied. Thank you.

2 MS. CHOUDHURY: Your Honor, may I --

3 THE COURT: Yes.

4 MS. CHOUDHURY: -- be heard for the petitioner,
5 please?

6 THE COURT: Sure.

7 MS. CHOUDHURY: We did want to make a few points.
8 And we hope that this will help kind of provide a bit of a
9 fuller record. Although social distancing is the cornerstone
10 of prevention and we've demonstrated that the photos and
11 videos that the defendants -- Mr. Butt has provided show a
12 current lack of enforcement of social distancing, they also
13 show a failure to ensure PPE use by staff and detainees as
14 well as a lack of hygiene.

15 They are also not identifying high-risk detainees
16 like Mr. Butt and ensuring that there are specific measures to
17 protect them as our medical expert, Dr. Homer Venters, who is
18 a correctional health expert, has indicated is necessary,
19 things like, you know, twice-a-day symptom checks and
20 temperature checks. And they're not currently testing to
21 identify if COVID-19 is positive.

22 And I think the overarching lesson from each of these
23 five deficiencies, you know, is not that the defendants -- or
24 the respondents are callous, that is not the argument at all,
25 but that these procedures fail to prevent the virus from

1 coming into the facility, particularly due to asymptomatic
2 transmission.

3 And both Dr. Golob and Dr. Venters and the CDC
4 guidelines that are in the record confirm that that is very
5 real, and that is why even though there's no confirmed case in
6 the jail right now, in absolutely comparable conditions, the
7 Central District of Illinois in Kankakee where there is less
8 COVID in the community -- and actually, the outbreak appears
9 to be relatively confined to several nursing homes in that
10 county -- did order relief and find that very comparable
11 conditions create an effectively unsafe environment for
12 medically vulnerable detainees.

13 We really do believe that that is the case here as
14 well in McHenry, if anything, because there is more COVID in
15 the community in McHenry than there is in Kankakee, about 200
16 more cases in McHenry County.

17 So we are concerned that, you know, each of these
18 issues taken in isolation is not the right approach, your
19 Honor. We really do believe that together, they show the
20 failure to guard against asymptomatic transmission. That
21 combined with Mr. Butt's well-established high risk of illness
22 and death from COVID both shows irreparable harm and the
23 objective unreasonableness.

24 And again to be clear, I think we made this clear in
25 our papers, the standard is not deliberate indifference, your

1 Honor. The standard is objective unreasonableness. This is
2 not reasonable for a person with Mr. Butt's medical
3 vulnerability.

4 There are around 20 courts around the country --
5 we've cited seven of those cases in our brief -- that have
6 released medically vulnerable detainees with conditions very
7 similar to Mr. Butt's where there is no confirmed case of
8 COVID in the facility, recognizing that the entry and exit of
9 staff on a daily basis as well as vendors and as well as
10 transitions inside the facility, transfers from one unit to
11 another, increase the mixing.

12 You know, the lack of hygiene and untouched surfaces,
13 the lack of sanitation of untouched surfaces simply make it
14 near inevitable that the virus is going to enter and when it
15 does, it will spread with warp speed.

16 And this is why we did attach to the papers we filed
17 yesterday a study published by a consortium of experts
18 including two of the Department of Homeland Security's medical
19 experts, Josiah Rich and Scott Allen, which concludes that
20 within 90 days, 77 to 99 percent of the people in a facility
21 like the McHenry County Jail are going to have COVID once it
22 enters. And it may already be there because there is no
23 testing. This -- these circumstances combined, your Honor, we
24 do believe, you know, creates an objectively unreasonable
25 condition of confinement for Mr. Butt.

1 And the respondents are holding him discretionarily.
2 They could release him. There's no argument here that he is
3 being subjected to mandatory detention. They're choosing not
4 to release him. And for someone who has lived peacefully in
5 the United States for 22 years who is not contesting his
6 removal -- this is not an effort to sidestep his
7 deportation -- he simply wants to be able to go home and
8 protect himself with his family because right now in the jail,
9 he cannot protect himself.

10 THE COURT: Well, let me interrupt just a second. I
11 think it's -- maybe I misunderstood the ability that he may
12 have or not have to protect himself. I understood that he
13 does have access to masks. If he wants one, he can have one.
14 That he can remain in the cell, and it's a single-person cell.

15 He does not need -- he is not required to eat in the
16 cafeteria with other detainees. He can have his food in his
17 cell if necessary. He's been provided with ample cleaning
18 supplies for his own space, recognizing that the concern here
19 is that the rest of the facility is not being cleaned; that he
20 himself, although -- that he himself is in a facility with
21 less than 50 percent capacity right now.

22 Am I wrong about any of those things?

23 MS. CHOUDHURY: There is more to that picture, your
24 Honor, to be very clear. The petitioners -- the respondents
25 have explained that he can stay in his cell the majority of

1 the time. He needs to leave his cell to be in the medication
2 line which also includes crowding, standing next to other
3 people getting their medicine. The nurses, in his declaration
4 as you'll see, some of them don't wear masks. He also needs
5 to leave his cell to go take showers and to go into the
6 dayroom.

7 And as the video shows, the dayroom itself is not
8 cleaned between every time items are touched. And since
9 there's asymptomatic transmission, it's unclear if and when
10 the virus arrives, which surface it's going to be sitting on,
11 there is no way for the jail to ensure that he is not going to
12 get this virus from going to the dayroom to get his pre-fast
13 Ramadan meal in the morning or in the evening because simply
14 they cannot clean these surfaces rapidly enough, and there are
15 other detainees over him he has no control.

16 Now, Mr. Butt has explained that it wasn't until
17 April 26th that a sign was put up in his unit indicating that
18 detainees can request one mask. Now, there's no indication
19 from the record in this case right now that the jail has been
20 enforcing that everyone wear a mask: Staff, medical staff,
21 guards, and detainees. Right now, that is not happening.

22 And the use of a mask is not just for him to protect
23 himself but for others who are infected to guard against, you
24 know, transmitting the virus to other people.

25 They cannot eliminate his ability or they haven't

1 said that they're going to eliminate his ability to leave his
2 cell at all. And as Dr. Venters has indicated, complete
3 isolation can be harmful to the mental health of people in
4 detention as well.

5 So this overall condition is still not sufficiently
6 protective for someone with his unique vulnerabilities. And
7 that's what this case is really about. It's not about every
8 normal detainee in the facility. It's about a person with
9 acute vulnerability here. He is both older and has medical
10 conditions. And with far less, far fewer risk factors,
11 similar detainees have been found to require release since the
12 conditions are simply not enough to protect them.

13 THE COURT: Anything further from the McHenry
14 defendants -- or respondents, I should say?

15 MR. OSWALD: The answer to your question, Judge, was
16 you're not wrong on any of the assumptions that you made, you
17 know and even -- you know, there's nothing wrong with anything
18 that you said in any of the assumptions that you made.

19 THE COURT: Is it true that the nurses are not
20 wearing masks when they distribute medication?

21 MR. OSWALD: That's not true. As far as we're aware,
22 I mean, the allegation here was that one of the nurses wore a
23 mask. The other one let it hang. I wasn't there to see that.
24 I don't know that. According to the people at the facility,
25 the nurses wear masks when they're providing the medication.

1 The medication line, as I understand it, is in the
2 same room that you see in the videos. There's -- the one view
3 that I know we have, there's -- the nurse apparently comes
4 through the double doors to the facility and then detainees
5 line up for their medication. They're given their pills that
6 they need for that day, and they're either identified by
7 wristband or they respond to their name.

8 And the nurses are wearing masks. And everyone will
9 be wearing a mask as of Friday. And as far as we were told
10 and as far as we inquired on that issue, the nurses were
11 wearing masks.

12 The allegation in the papers that they submitted was
13 that one nurse wore it and one let it hang. I don't know that
14 that's true because that's not what they were supposed to be
15 doing.

16 MS. CHOUDHURY: And, your Honor, if I may just to add
17 to that point, I think this underscores precisely the
18 vulnerability that Mr. Butt has. A correctional institution
19 like McHenry County Jail necessarily has many, many people
20 working there, and they can't be under observation at all
21 times.

22 So what's notable to us that even after the outset of
23 this litigation, a guard overseeing meal distribution was not
24 wearing a mask, nor was he wearing gloves, nor was he
25 instructing detainees to ensure social distancing.

1 This is exactly the problem. I don't believe that on
2 this record, the record shows that the respondents can ensure
3 that every medical staff person, every detainee, every guard
4 is going to be wearing PPE at all times. And for the normal
5 person, maybe that's okay, but for someone as medically
6 vulnerable as Mr. Butt, this presents an objectively
7 unreasonable risk.

8 THE COURT: And what is your proposal for Mr. Butt's
9 release?

10 MS. CHOUDHURY: Your Honor has the authority to
11 release him with or without conditions. He would return home
12 to his family in Skokie. He understands that there's a final
13 order of removal and that he's going to be deported. He
14 simply wants to go home.

15 So your Honor could, if you -- whatever conditions
16 you deem appropriate, for example, he would need to isolate
17 himself at home, ensure that he was quarantined appropriately.
18 He would need to check in with ICE officers regularly to
19 ensure that they know where he is and that he is where he is
20 indicating that he's going to be.

21 There are numerous examples. And we would be happy
22 to provide a sample order to the Court. And we would direct
23 your attention to the Central District of Illinois case where
24 the judge, you know, went through and assessed the conditions
25 that she felt appropriate in that case.

1 THE COURT: Have you proposed a secured bond?

2 MS. CHOUDHURY: We have not made any proposals, your
3 Honor. I think that we are open to what your Honor would feel
4 is necessary for Mr. Butt's release, you know. As I've
5 explained, like release is what he is looking for.

6 MR. OSWALD: Your Honor, I mean, the standard here is
7 reasonableness. This is absolutely -- they've acted
8 absolutely reasonably in all of this. There have been no
9 cases. He is -- again, for all the reasons that were
10 articulated previously, you can't -- I mean, we're not -- I
11 mean, for counsel to sit there and say it's not -- nobody can
12 provide -- I mean, this is a danger to all of us.

13 We have tried to act in every -- and the institution
14 has acted in every way possible to execute their duties, to
15 carry out their duties, and to do this in a safe manner. And
16 I can't observe every nurse that's wearing every single mask
17 nor can anyone. But, I mean, the procedures are in place.

18 And there's been absolutely no indication that
19 there's been any real variance from this other than that one
20 statement about a mask hanging, and this individual that's
21 cited here was in the room. They will be wearing a mask as of
22 Friday. And Mr. Butt is getting his meals completely in a
23 different time in a completely different way and is completely
24 able to do everything in his own cell.

25 And there is absolutely nothing in terms of legal

1 authority to say that he needs to be out to do that. There's
2 nothing -- there's nothing under the law that makes that
3 something that's mandatory when they've acted completely
4 reasonably. And it's not their burden to show that they have
5 been -- they've done everything here to come forward to show
6 what they've done has been reasonable.

7 THE COURT: I think with respect to reasonableness,
8 the only real challenge to reasonableness is, A, that the
9 argument is that somebody in Mr. Butt's physical condition
10 can't reasonably be detained in a facility like this. That's
11 one argument.

12 Another argument is that the institution hasn't done
13 enough to enforce, for example, social distancing requirements
14 or the expectation that all staff be wearing masks at all
15 times. Those are the arguments. I don't think that they're
16 compelling. I also don't think that I've had -- I've had a
17 compelling motion or set of conditions that have been
18 proposed.

19 Mr. Butt is facing a final order of deportation that
20 I understand he challenged for years and years without
21 success. He was also -- an intimation at least in the
22 respondents' memoranda that he is hoping to get -- use his
23 son's status in order to apply for a green card, I don't see
24 how that's possible in these circumstances. But the real
25 concern is that he is -- when that flight is available, that

1 he's on it. That's the real concern. And that's why he's
2 detained right now.

3 Here's what I'm going to do. I want to look at the
4 video one more time. I'm really not inclined to grant this
5 motion, but I'm not going to deny it right this minute. What
6 I will do is put this over to early next week. If you have
7 any additional -- if there's new additional information that I
8 need to consider, if there are new developments, I'm confident
9 that you can let me know.

10 And if the petitioner has some conditions that he
11 wants to propose other than simply reporting to ICE, for
12 example, a secured bond, I would consider that because it
13 seems to me that he really has been given ample opportunity to
14 protect himself. And if he thinks something more is
15 necessary, he ought to be able -- he ought to be willing to
16 put something very substantial before the Court to guarantee
17 that he -- that that's the reason for his wanting to be
18 released from custody right now.

19 All right. Thank you.

20 THE CLERK: Court's in recess.

21 (Proceedings adjourned at 11:00 a.m.)
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C E R T I F I C A T E

I, Judith A. Walsh, do hereby certify that the foregoing is a complete, true, and accurate transcript of the telephonic proceedings had in the above-entitled case before the Honorable REBECCA R. PALLMEYER, one of the judges of said court, at Chicago, Illinois, on April 29, 2020

/s/ Judith A. Walsh, CSR, RDR, F/CRR May 15, 2020

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division