

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 24, 2009

Decided June 28, 2010

No. 08-5537

BELKACEM BENSAYAH, DETAINEE, CAMP DELTA,
APPELLANT

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:04-cv-01166-RJL)

Mark C. Fleming argued the cause for appellant. With him on the briefs were *Stephen H. Oleskey*, *Robert C. Kirsch*, *Joshua D. Jacobson*, *Allyson J. Portney*, *Seth P. Waxman*, *Paul R. Wolfson*, *Robert J. McKeehan*, *Douglas F. Curtis*, and *Paul M. Winke*.

Sharon Swingle, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Michael F. Hertz*, Deputy Assistant Attorney General, and *Douglas N. Letter*, *Thomas M. Bondy*, and *Robert M. Loeb*, Attorneys. *Ronald J. Wiltsie II*, Attorney, entered an appearance.

Before: GINSBURG and HENDERSON, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: Belkacem Bensayah petitioned the district court for a writ of habeas corpus in order to challenge his detention at the Naval Station at Guantanamo Bay, Cuba. The district court denied his petition, holding the Government had shown by a preponderance of the evidence that Bensayah was being held lawfully pursuant to the Authorization for Use of Military Force (AUMF), Pub. L. 107-40, § 2(a), 115 Stat 224, 224 (2001), because he had provided “support” to al Qaeda. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (2008). On appeal the Government has eschewed reliance upon certain evidence the district court had considered and has abandoned its position that Bensayah’s detention is lawful because of the support he rendered to al Qaeda; instead it argues only that his detention is lawful because he was “part of” that organization — a contention the district court did not reach.

We agree with the Government that its authority under the AUMF extends to the detention of individuals who are functionally part of al Qaeda. The evidence upon which the district court relied in concluding Bensayah supported al Qaeda is insufficient, however, to show he was part of that organization. We therefore remand this case for the district court to determine whether, considering all reliable evidence, Bensayah was functionally part of al Qaeda.

I. Background

Bensayah, an Algerian citizen, was arrested by the Bosnian police on immigration charges in late 2001. He was

later told that he and five other Algerian men arrested in Bosnia were suspected of plotting to attack the United States Embassy in Sarajevo. Because the ensuing three-month investigation failed to uncover evidence sufficient to continue the detention of the six men, the Supreme Court of the Federation of Bosnia and Herzegovina ordered that they be released. The men were then turned over to the United States Government and transported to the U.S. Naval Station at Guantanamo Bay, where they have been detained since January 2002.

In 2004 Bensayah and the five other detainees petitioned the district court for writs of habeas corpus. Although their petitions were originally dismissed, *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005), they were reinstated after the Supreme Court held that detainees at Guantanamo Bay are constitutionally “entitled to the privilege of habeas corpus to challenge the legality of their detention,” *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

In August 2008 the district court entered a case management order (CMO) establishing the procedures that would govern this case. *See* CMO, *Boumediene v. Bush*, No. 04-1166 (RJL) (D.D.C. Aug. 27, 2008). The CMO placed upon the Government the burden of establishing, by a preponderance of the evidence, the lawfulness of the petitioner’s detention. The Government was required to submit a return stating the factual and legal bases for detaining that prisoner, who was then required to file a traverse stating the relevant facts in support of his petition and a rebuttal of the Government’s legal justification for his detention. The CMO allowed discovery only “by leave of the Court for good cause shown,” and required that requests for discovery

(1) be narrowly tailored; (2) specify why the request is likely to produce evidence both relevant and material to the petitioner's case; (3) specify the nature of the request ...; and (4) explain why the burden on the Government to produce such evidence is neither unfairly disruptive nor unduly burdensome.

It also required the Government to provide to the petitioner any exculpatory evidence "contained in the material reviewed in developing the return for the petitioner[] and in preparation for the hearing for the petitioner."

The Government claimed authority to detain the six men pursuant both to the AUMF and to the President's inherent powers as Commander in Chief. It argued each of the six men was lawfully detained as an "enemy combatant," which the district court had in an earlier order defined as

an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Boumediene v. Bush, 583 F. Supp. 2d 133, 135 (2008). The Government contended all six men were lawfully detained because they had planned to travel to Afghanistan in late 2001 in order to take up arms against the United States and allied forces. It also contended Bensayah's detention was lawful because he was a member of and a travel facilitator for al Qaeda. The only direct evidence the Government offered in support of its contentions about Bensayah was contained in a classified document [REDACTED] from an unnamed source and in certain other pieces of evidence it claimed corroborated that document.

The district court granted habeas to each petitioner other than Bensayah, holding the Government had failed to show by a preponderance of the evidence that they had planned to travel to Afghanistan to fight against the United States. *Boumediene*, 579 F. Supp. 2d at 197–98. Because the Government did not sufficiently establish the reliability of the allegations in the classified document about those petitioners, the court refused to credit those allegations.

The district court denied Bensayah’s petition because it determined “the Government has met its burden by providing additional evidence that sufficiently corroborates its allegations from this unnamed source that Bensayah is an al-Qaida facilitator.” *Id.* at 198. The corroborative evidence provided by the Government is of three sorts: (1) evidence linking Bensayah to al Qaeda, and specifically to a “senior al-Qaida facilitator”; (2) evidence of Bensayah’s history of travel “between and among countries using false passports in multiple names”; and (3) evidence creating “sufficient doubt as to Bensayah’s credibility.” *Id.*

Having deemed the allegations about Bensayah in the classified document reliable, the district court held “the Government has established by a preponderance of the evidence that it is more likely than not ... Bensayah not only planned to take up arms against the United States but also [planned to] facilitate the travel of unnamed others to do the same.” *Id.* The court further held such planning and facilitating “amounts to ‘support’ within the meaning of the ‘enemy combatant’ definition governing this case.” *Id.* Because it held Bensayah’s detention was lawful based upon his support of al Qaeda, the court did not go on to consider whether he was a “member” of al Qaeda or whether his detention was lawful on the alternative ground that he was “part of” that organization.

