Boumediene v. Bush

United States District Court, District of Columbia, 2008
579 F. Supp. 2d 191

RICHARD J. LEON, District Judge. Petitioners are six prisoners at the U.S. Naval Base at Guantanamo Bay, Cuba and allege that they are being unlawfully detained by Respondents President George W. Bush, Secretary of Defense Robert M. Gates [and other Defense Department officials] . . . .

BACKGROUND

To say the least, this is an unusual case. At the time of their arrest, all six petitioners, who are native Algerians, were residing in Bosnia and Herzegovina (hereinafter "Bosnia"), over a thousand miles away from the battlefield in Afghanistan. Petitioners held Bosnian citizenship or lawful permanent residence, as well as their native Algerian citizenship. All six men were arrested by Bosnian authorities in October 2001 for their alleged involvement in a plot to bomb the U.S. Embassy in Sarajevo. Respondents have since withdrawn that allegation as a basis for the petitioners' detention. On January 17, 2002, upon their release from prison in Sarajevo, petitioners were detained by Bosnian authorities and U.S. personnel. Petitioners were transported to the U.S. Naval Station at Guantanamo Bay and have remained there since their arrival on January 20, 2002.

In July 2004, after the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (holding that 28 U.S.C. §2241 extended statutory habeas corpus jurisdiction to Guantanamo), detainees filed, on their own behalf and through certain relatives as their "next friend," a petition for writs of habeas corpus, alleging, among other things, that the U.S. Government holds them in violation of the Constitution and various U.S. and international laws. The Government moved to dismiss this action in October 2004.

In January 2005, this Court granted the Government's motion to dismiss, holding that Guantanamo Bay detainees had no rights that could be vindicated in a habeas corpus proceeding. *See Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005). After intervening Supreme Court precedent and legislation changed the legal landscape in which these petitions were brought,[3] the Supreme Court, on June 12, 2008, reversed this Court and held in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that Guantanamo detainees are "entitled to the privilege of habeas corpus to challenge the legality of their detention." *Id.* at 2262.

Although the Supreme Court made it clear that the privilege of habeas corpus "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the

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3. *See, e.g.,* Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680; Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366,120 Stat 2600.

erroneous application or interpretation' of relevant law,"[4] *id.* at 2266 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)), it left largely to the habeas court's discretion to craft, in the first instance, the framework in which these unique habeas cases would proceed. *Id.* at 2276 (Accommodating the Government's "legitimate interest in protecting sources and methods of intelligence gathering" and "other remaining questions are within the expertise and competence of the District Court to address in the first instance."). Indeed, the Supreme Court even delegated the decision as to which definition of "enemy combatant" should govern these proceedings. *See id.* at 2271 ("The extent of the showing required of the Government in these cases is a matter to be determined."). Above all, the Supreme Court made it very clear that the detainees were "entitled to a prompt habeas corpus hearing." *Id.* at 2275 (noting that "[w]hile some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody").

With *Boumediene*'s instruction that habeas be "an adaptable remedy," *id.* at 2267, and the admonition in *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004), that the district courts should proceed in a "prudent" and "incremental" fashion in wartime habeas proceedings, this Court held its first status conference with Government and petitioners' counsel on July 24, 2008. [In the ensuing 90 days the court heard a number of arguments and reviewed several thousand pages of submissions by the parties.] . . . .

On October 23, 2008, the Court heard oral arguments from the parties regarding the appropriate definition of "enemy combatant" to be employed in these hearings. Four days later, the Court issued a Memorandum Order, adopting the definition which had been drafted by the Department of Defense in 2004 for the type of Combatant Status Review Tribunal ("CSRT") proceedings that these detainees were given. . . .

LEGAL STANDARD

. . . [T]he Government bears the burden of proving "by a preponderance of the evidence, the lawfulness of the petitioner's detention." The Government argues that petitioners are lawfully detained because they are "enemy combatants," who can be held pursuant to the Authorization for the Use of Military Force and the President's powers as Commander in Chief. The following definition of "enemy combatant" governs the proceedings in this case:

> An "enemy combatant" is 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.

Accordingly, the question before this Court is whether the Government has shown by a

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4. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (holding that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

preponderance of the evidence that each petitioner is being lawfully detained – *i.e.,* that each is an "enemy combatant" under the definition adopted by this Court.

ANALYSIS

The Government sets forth two theories as to why these men should be lawfully detained as enemy combatants. First, as to all six petitioners, the Government contends that they planned to travel to Afghanistan in late 2001 and take up arms against U.S. and allied forces. Additionally, as to Belkacem Bensayah alone, the Government contends that he is an al-Qaida member and facilitator. The Court will address each of these theories in turn.

I. The Plan to Travel to Afghanistan to Engage U.S. and Allied Forces

The Government alleges that all six petitioners planned to travel to Afghanistan to take up arms against U.S. and allied forces and that such conduct constitutes "support" of al-Qaida under the "enemy combatant" definition adopted by this Court. Petitioners disagree. Petitioners contend that the Government has not shown by a preponderance of the evidence that any of the petitioners planned to travel to Afghanistan to engage U.S. forces, and, even if the Government *had shown* that petitioners had such a plan, a *mere plan,* unaccompanied by any concrete acts, is not – as a matter of law – "supporting" al-Qaida within the meaning of the Court's definition of "enemy combatant." For the following reasons, the Court finds that the Government has failed to show by a preponderance of the evidence that any of the petitioners, other than Mr. Bensayah, either had, or committed to, such a plan.

To support its claim that petitioners had a plan to travel to Afghanistan to engage U.S. and allied forces, the Government relies exclusively on the information contained in a classified document from an unnamed source. This source is the only evidence in the record directly supporting each detainee's alleged knowledge of, or commitment to, this supposed plan. And while the Government has provided some information about the source's credibility and reliability, it has not provided the Court with enough information to adequately evaluate the credibility and reliability of this source's information. *See Parhat v. Gates*, 532 F.3d 834, 847 (D.C. Cir. 2008) ("[T]he factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty."). For example, the Court has no knowledge as to the circumstances under which the source obtained the information as to each petitioner's alleged knowledge and intentions.

In addition, the Court was not provided with adequate corroborating evidence that these petitioners knew of and were committed to such a plan. *Contra Parhat,* 532 F.3d at 849 (noting, in the Detainee Treatment Act context, that when assessing hearsay evidence in intelligence documents, "we do *not* suggest that hearsay evidence is never reliable – only that it must be presented in a form, or with sufficient additional information, that permits [the factfinder] to assess its reliability"). Because I cannot, on the record before me, adequately assess the credibility and reliability of the *sole* source information relied upon, for five of the petitioners, to prove an alleged plan by them to travel to Afghanistan to engage U.S. and coalition forces, the

Government has failed to carry its burden with respect to these petitioners. Unfortunately, due to the classified nature of the Government's evidence, I cannot be more specific about the deficiencies of the Government's case at this time.

Suffice it to say, however, that while the information in the classified intelligence report, relating to the credibility and reliability of the source, was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is *not* sufficient for the purposes for which a habeas court must now evaluate it. To allow enemy combatancy to rest on so *thin* a reed would be inconsistent with this Court's obligation under the Supreme Court's decision in *Hamdi* to protect petitioners from the risk of erroneous detention. *Hamdi,* 542 U.S. at 530.

Having concluded that the Government has not met its burden with respect to the *existence* of a plan to travel to Afghanistan to engage U.S. and coalition forces by these five petitioners, the Court need not address the issue of whether commitment to such a plan would be enough, as a matter of law, to constitute "support" under the Court's definition of "enemy combatant." Thus, because the Government has failed to establish by a preponderance of the evidence the plan that is the *exclusive* basis for the Government's claim that Messrs. Boumediene, Nechla, Boudella, Ait Idir, and Lahmar are enemy combatants, the Court must, and will, grant their petitions and order their release.

II. Belkacem Bensayah's Role as an al-Qaida Facilitator

As to Mr. Bensayah, however, 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. . . . In order to establish Bensayah's role as an al-Qaida facilitator, the Government depends on the same intelligence information described above, but also puts forth a series of other intelligence reports based on a variety of sources and evidence, which it contends corroborate the facilitator allegation. I agree. . . .

For all of those reasons and more, the Court concludes that the Government has established by a preponderance of the evidence that it is more likely than not Mr. Bensayah not only planned to take up arms against the United States but also facilitate the travel of unnamed others to do the same. There can be no question that facilitating the travel of others to join the fight against the United States in Afghanistan constitutes direct support to al-Qaida in furtherance of its objectives and that this amounts to "support" within the meaning of the "enemy combatant" definition governing this case. The Court accordingly holds that Belkacem Bensayah is being lawfully detained by the Government as an enemy combatant. As such, the Court must, and will, deny Bensayah's petition for writ of habeas corpus and will *not* order his release. . . .