

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHERIF el-MASHAD, et al.)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 1:05-CV-270 (JR)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	
ALLADEEN, et al.,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 1:05-CV-833 (JR)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS' OPPOSITION TO PETITIONERS'
MOTION FOR FACTUAL RETURNS**

Respondents' hereby oppose petitioners' October 13, 2005 Motion for Factual Returns in the above-captioned cases, and state as follows:

BACKGROUND

Petitioners' motion is brought in two cases involving, collectively, three petitioners. The procedural history of the two cases is as follows.¹

¹ As an initial matter, while petitioners' motion may appear to be brought on behalf of five different petitioners collectively, only three Guantanamo detainees are petitioners in these

With respect to the Alladeen case, the petition was filed on or about April 26, 2005 (dkt. no. 1). Simultaneous with the petition, petitioners moved for a preliminary injunction prohibiting their transfer or repatriation to another country (dkt. no. 2). On April 29, 2005, Judge Huvelle, before whom the case was pending at the time, ordered respondents to show cause “why this writ should not be granted and/or why the Court should not enter an Order staying this matter subject to the entry of a Protective Order and the requirements that respondents file a factual return within 90 days and provide for notice in the event of transfer, consistent with the Order entered by this Court in Ameziane v. Bush, Civ. No. 05-0392 (ESH) (D.D.C. April 12, 2005)” (dkt. no. 4). On May 20, 2005, respondents filed their response to the show-cause order (dkt. no. 9). On August 5, 2005, this case was transferred from Judge Huvelle to this Court. The Court has not ruled on several of the matters that Judge Huvelle, in the show-cause order, asked respondents to address.²

On October 14, 2005, petitioner filed a motion for a temporary restraining order, asking that respondents be prohibited from removing him from Guantanamo until the Court rules on his pending motion for preliminary injunction (dkt. no. 15). Respondents have opposed that motion, noting respondents’ intent to release petitioner Alladeen, who has been determined by a Combatant Status Review Tribunal (“CSRT”) to no longer be classified as an enemy combatant, from United States custody and repatriate him as soon as practicable (dkt. no. 16).

two cases. As noted in respondents’ Notice of Multiple Petitions filed in el-Mashad (dkt. no. 37) and Alladeen (dkt. no. 12), petitioners el-Mashad and Algazzar in the el-Mashad case are the same individuals as, respectively, petitioners al-Mashad and Rahman in Alladeen. Accordingly, the petitioners at issue in this matter are petitioners el-Mashad, Algazzar, and Alladeen (the third petitioner in Alladeen).

² On September 27, 2005, the Court issued a minute order granting a protective order.

With respect to the el-Mashad case, involving petitioners el-Mashad and Algazzar, the petition was filed on or about February 4, 2005 (dkt. no. 1). Simultaneous with filing the petition, petitioner moved for a preliminary injunction forbidding respondents from transferring or releasing petitioner – thus, effectively requiring that the United States continue to detain him at Guantanamo – for the duration of this action (dkt. no. 3). Respondents opposed that motion. Respondents also moved to stay proceedings in this case pending appeals of other Guantanamo detainee habeas cases that would address key legal issues (dkt. no. 16). On April 7, 2005, the Court issued an order granting respondents’ motion to stay proceedings, but included a provision staying any release or repatriation of petitioners pending further order of the Court (dkt. no. 29). On October 17, 2005, respondents requested that the Court modify the April 7, 2005 Order to permit the repatriation of petitioner Algazzar to Egypt (dkt. no. 40). Specifically, petitioner Algazzar, who is being held as an enemy combatant, will be transferred to the control of his home government for continued detention, investigation, and/or prosecution as that country deems appropriate.

On October 13, 2005, petitioners filed the motion to require respondents to provide factual returns, claiming that production of such returns would impose no burden on respondents and that petitioners’ counsel recently received security clearances and have scheduled a visit to Guantanamo Bay and thus need factual returns.

ARGUMENT

Petitioner Alladeen. As noted in respondents' prior filing in Alladeen, petitioner Alladeen has been determined by a CSRT to no longer be classified as an enemy combatant, and respondents intend to release him from United States custody and repatriate him as soon as practicable. Accordingly, respondents are no longer detaining petitioner Alladeen as an enemy combatant and plan to effect his release as soon as practicable. Any factual return filed by respondents in such circumstances would consist of little more than the certification of the Director of the CSRTs indicating the CSRT's finding that Alladeen can be classified as no longer an enemy combatant. Such an exercise is not needed, however. Further, to the extent petitioners envision some type of more extensive factual return, there is no reason to require any such submission. The entire purpose of a factual return in the habeas context is to "certify[] the true cause of the detention," see 28 U.S.C. § 2243, in order to justify a petitioner's continued detention. Accordingly, it makes no sense to require respondents to file additional materials for a factual return, when Alladeen's detention will not persist and the United States has no further interest in detaining him. In essence, the purpose of Alladeen's habeas petition will have been served by his forthcoming release, rendering the filing of any factual return superfluous.³ See, e.g., Almurbati v. Bush, 366 F. Supp. 2d 72, 78-79 (D.D.C. 2005) (Walton, J.) (stating that "[t]he ultimate objective of a habeas petition is release from custody"); Otey v. Hopkins, 5 F.3d 1125, 1130 (8th Cir. 1993) (explaining that "[t]he central focus of the writ of habeas corpus is to

³ Requiring the filing of additional materials with respect to petitioner Alladeen is also problematic to the extent such materials would contain classified information. Respondents should not be required to disclose classified materials to even cleared counsel where such disclosure is not necessary and would serve no purpose with respect to justifying continued detention by respondents.

provide a remedy for prisoners who are challenging the fact or duration of their physical confinement and are seeking immediate release or a speedier release.”). There will be no further proceedings necessary on Alladeen’s habeas claim for release from the United States’ custody; the justification of his continued detention – the purpose of a factual return – is no longer an issue.

Petitioner Algazzar. As noted above, respondents also intend to relinquish custody of petitioner Algazzar and repatriate him to his home country of Egypt. Specifically, petitioner Algazzar will be transferred to the control of his home government for continued detention, investigation, and/or prosecution as that country deems appropriate.⁴ As respondents are relinquishing custody of Algazzar, there is no need to file a factual return justifying further detention. The entire purpose of a factual return in the habeas context is to “certify[] the true cause of the detention,” see 28 U.S.C. § 2243, in order to justify a petitioner’s continued detention by respondents, and here, the United States is relinquishing custody entirely. As noted in respondents’ motion to modify the April 7, 2005 Order, when the Department of Defense transfers a detainee to the control of another government, the detainee is no longer subject to the custody or control of the United States, and any subsequent confinement in the receiving country is based on the receiving government’s decision, based on its own domestic laws and interests, that the individual should be detained. See, Respondents’ Mot. for Partial Modification of the Court’s April 7, 2005 Order at 3-4 (dkt. no. 40). Indeed, the lack of control by the United States

⁴ As explained in respondents’ motion for partial modification of the April 7, 2005 Order (dkt. no. 40), this relinquishment of custody is consistent with United States policy not to hold those determined to be enemy combatants longer than necessary, as well as its policy to promote the vital cooperation and participation of other concerned governments in the global war on terrorism.

is exemplified by the fact that, should the home government subsequently determine to release a transferred detainee, the United States would not be in a position to prevent it from doing so.

“This Court has no authority to prevent a foreign sovereign from pursuing an independent law enforcement action against a detainee, or to order the United States to transfer a detainee to the country of his choosing.” Al-Anazi v. Bush, 370 F. Supp. 2d 188, 198 n.10 (D.D.C. 2005) (Bates, J.).

Because respondents intend to relinquish custody of petitioner Algazzar, the justification of his continued detention by respondents – the purpose of a factual return – is no longer an issue in his case, and a factual return for him should not be required.⁵ See also, Respondents' Mot. for Partial Modification of the Court's April 7, 2005 Order at 7-9 (dkt. no. 40) (pendency of habeas proceedings does not warrant preventing repatriation of petitioner).

Petitioner el-Mashad. Petitioner's request for a factual return for petitioner el-Mashad, who, like petitioner Algazzar, is being held as an enemy combatant, involves no special circumstances such as an intended transfer of petitioner from United States custody. While counsel seem not to acknowledge that the Court previously declined to require a factual return with respect to petitioner el-Mashad, petitioner is essentially asking the Court to modify its Order of April 7, 2005, which stayed the litigation until further order of the Court, without requiring a factual return. See Order April 7, 2005 (dkt. no 29). Modification of that stay to require a factual return is unwarranted and unjustified, however.

⁵ Requiring a factual return with respect to petitioner Algazzar is also problematic to the extent such materials would contain classified information. Respondents should not be required to disclose classified materials to even cleared counsel where such disclosure is not necessary and would serve no purpose with respect to justifying continued detention by respondents.

Petitioner's motion seeking an order requiring respondents to file a factual return merely elaborates on and rehashes previous arguments made by petitioners in the briefing on respondents' motion to stay regarding counsel's desire for a factual return. While petitioner reargues that the filing of a factual return will pose no burden for respondents, see Pets' Mem. at 4-6, for the reasons previously stated in respondents' Motion to Stay Proceedings Pending Related Appeals and for Continued Coordination (dkt. No. 16), and the supporting reply memorandum (dkt. No. 24), the filing of a factual return is not warranted at this time. To summarize the previous arguments, production of factual returns at this point would not only result in the needless expenditure of judicial and litigation resources, but also ignores the cascade effect that could follow. Presently, there are more than 160 habeas cases pending on behalf of over 250 detainees at Guantanamo Bay; the large majority of those cases and petitioners were not subject to the decisions of Judges Leon and Green in Khalid and In re Guantanamo Detainee Cases. A decision to allow proceedings or submission of factual returns to go forward pending the resolution of the appeals could precipitate a chain reaction — the scores of petitioners in other pending Guantanamo Bay detainee habeas cases, seeking parity of treatment, would request the Court to allow additional proceedings or access to factual returns in those cases, perhaps even by lifting or modifying stays that have already been entered.⁶ This scenario is exactly what Judge Green aimed to avoid when she denied petitioners' motion to reconsider her order granting a stay pending appeal "in light of the substantial resources that would be expended and the significant

⁶ Indeed, petitioner's motion is of a piece of such a cascade effect. It argues that this Court should reverse its previously charted course merely because of petitioner's perception as to the burden production of factual returns places on respondents. As noted above, however, petitioner offers no new justification or changed circumstances sufficient to warrant forcing respondents to relitigate matters previously decided and relied upon in this case.

burdens that would be incurred should this litigation go forward.” See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal in In re Guantanamo Detainee Cases (Feb. 7, 2005) (Green, J.). Thus, in the interest of efficiency of judicial and litigation resources, as well as to minimize administrative burdens and risks related to disclosure of classified documents, the Court should deny the requested modification of the stay.

Petitioners’ also argue that a modification of the stay to require a factual return is needed so that counsel may be apprised of the reasons for petitioner’s detention prior to a scheduled visit to Guantanamo Bay. See Pets’ Mem. at 8-9. First, to clarify the record, while petitioners’ counsel have requested a visit to Guantanamo Bay for November 17-22, 2005, the dates for this requested visit have not yet been finally approved and scheduled.

Second, and in any event, petitioner’s counsel’s representations that they have recently received their security clearances and are currently arranging to travel to Guantanamo Bay, do not warrant any order requiring that a factual return be submitted. As an initial matter, it would be unduly burdensome to key any requirement to produce factual returns to a scheduled or desired visit to Guantanamo Bay by counsel. There are currently pending more than 160 Guantanamo habeas cases, involving more than 250 petitioners, in which significant numbers of counsel have requested or are requesting factual returns and in which counsel visits are being or very likely will be requested. The logistics of making a factual return and the logistics of arranging counsel visits involve two separate and unrelated undertakings, and the ability to arrange for a visit does not mean that factual returns pertaining to detainees involved in any particular visit can necessarily be completed prior to the visit. Indeed, certain other Judges of the Court have imposed various deadlines regarding the submission of factual returns (in the cases

where they have been ordered) – deadlines that were not selected or imposed due to any desired or scheduled visit by detainee counsel. Furthermore, the possibility of return visits to Guantanamo by petitioners’ counsel would counter the “need” for a factual return prior to any particular visit.

Additionally, even if a factual return is produced, the petitioner cannot use it to advance the litigation as the case, including factual development through litigation, is stayed. And even if counsel had access to a factual return, they would not be able to share classified information in the return with petitioner. See Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 8, 2004), ¶ 30. Thus, there is no reason why counsel need access to a factual return at this time.⁷

Importantly, petitioner’s counsel’s argument regarding the need for a factual return for factual development purposes does nothing to undermine the most important reason justifying the current status of the case – the pending appeals in the D.C. Circuit Court that will provide substantive guidance as to how the Guantanamo Bay cases should proceed, including whether the cases can be decided without reference to factual returns for petitioners or any further factual development. See Mot. for Stay at 7-9 (dkt. no. 16). In addition, counsel’s argument does nothing to rebut the burdens that would be involved in respondents being required to provide factual returns at this time. See Resp. Opp. To Modification of Stay at 4-7 (dkt. no. 24).

⁷ In this vein, various Judges of this Court have declined to require factual returns during the pendency of the stay. See, e.g., Sliti v. Bush, No. 05-CV-0429 (RJL) (dkt. no. 5); Imran v. Bush, No. 05-CV-0764 (CKK) (dkt. no. 6); Attash v. Bush, No. 05-CV-1592 (RCL) (dkt. no. 12).

Petitioner cannot provide any justification with respect to petitioner el-Mashad to require the Court to reverse its present course and direct the filing of a factual return.⁸

CONCLUSION

For the foregoing reasons, respondents respectfully request that petitioner's Motion for Factual Return be denied.

Dated: October 24, 2005

Respectfully submitted,

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⁸ Even if petitioners Alladeen and Algazzar were not slated for release from United States custody, these considerations disfavoring present production of a factual return in petitioner el-Mashad's case would also weigh heavily against such present production in those cases.

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