United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 20, 2010 Decided June 11, 2010

No. 09-5383

SUFYIAN BARHOUMI, DETAINEE,
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. 1:05-cv-01506-RMC)

Scott S. Barker argued the cause for appellant. With him on the briefs were *Jonathan S. Bender*, *Danielle R. Voorhees*, and *Shayana Kadidal*.

Sharon Swingle, Attorney, U.S. Department of Justice, argued the cause for appellee. With her on the brief were *Ian Heath Gershengorn*, Deputy Assistant Attorney General, and *Robert M. Loeb*, Attorney. *Jonathan H. Levy*, Attorney, entered an appearance.

Before: GINSBURG, TATEL, and KAVANAUGH, *Circuit Judges*.

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

TATEL, *Circuit Judge*: Sufyian Barhoumi, a detainee held at the U.S. naval base in Guantanamo Bay, Cuba, appeals the district court's denial of his petition for a writ of habeas corpus. The district court found that Barhoumi was "part of" an al-Qaida-associated force engaged in hostilities against the United States or its coalition partners and was therefore lawfully detained under the Authorization for Use of Military Force. Barhoumi contends that the court erred as a matter of law in admitting hearsay diary evidence and in applying a preponderance of the evidence standard of proof. These arguments, however, are foreclosed by prior decisions of this court. Barhoumi further argues that even if the diary evidence was admissible, the district court erred in relying on it and in concluding that the evidence showed that he was "part of" an associated force. Finding no reversible error, we affirm.

I.

In response to the September 11, 2001, terrorist attacks on the Pentagon and World Trade Center, Congress enacted a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (reprinted at 50 U.S.C. § 1541 note). Shortly thereafter, the President ordered U.S. military forces to invade Afghanistan, where the Taliban regime had been harboring al-Qaida.

This case concerns Sufyian Barhoumi, who was captured during the ensuing hostilities and has, pursuant to the AUMF, been held at the U.S. naval base in Guantanamo Bay, Cuba, for the last eight years. A 37-year-old Algerian citizen, Barhoumi left Algeria after completing high school and travelled throughout northern Africa and Europe, ultimately settling in London, where he lived for about two years. At his Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) hearings, Barhoumi recounted that while in London he attended a mosque where he saw films depicting Russian atrocities committed against Muslims in Chechnya. Inspired by these films, Barhoumi travelled to Karachi, Pakistan, and then to Jalalabad, Afghanistan, where he trained to fight alongside the Chechens in their struggle against the Russian government.

By his own admission, Barhoumi trained at several military camps in Afghanistan. In 1999, he trained at a camp located between Jalalabad and Kabul, where he received instruction in the use of rifles, small arms, and landmines. While practicing mine diffusion, he lost four fingers and badly damaged his thumb when a landmine he had unearthed exploded in his left hand. After recovering from his injuries, Barhoumi trained at another camp, Khaldan, from 1999 to 2000. Located in the Khowst region of eastern Afghanistan, the Khaldan camp was associated with Abu Zubaydah, a reputed terrorist leader who commanded his own fighting force and who figures prominently in this case. Although the Khaldan camp was not an al-Qaida facility, a government intelligence report states that Zubaydah had agreed with Usama bin Laden to coordinate training efforts and allow Khaldan recruits to join al-Qaida. According to the report, [redacted].

At the Khaldan camp, Barhoumi received additional small arms training, as well as instruction in tactical movement, navigation, artillery, mortars, radio communication, and military tactics used in Chechnya. Barhoumi left Khaldan in May 2000, but unable to make it to Chechnya—crossing the border apparently proved too dangerous—Barhoumi shuttled between a series of guesthouses in Kabul, Khandahar, and Jalalabad. Although the government claims he provided military training to others at these guesthouses, Barhoumi denied doing so, insisting that he spent this time teaching children the Koran and Arabic. Barhoumi admitted that he received additional antipersonnel mine instruction at another training camp during this period, though he later backtracked, claiming that he trained at only two military camps in Afghanistan, not three.

After U.S. and coalition forces commenced military action in Afghanistan, Barhoumi decided to leave the country. At some point in late fall of 2001 (the precise timing is disputed), Barhoumi fled Afghanistan through the mountains into Pakistan, initially staying at a guesthouse in Waziristan, the mountainous region along the border, and then moving on to various guesthouses in Peshawar and Lahore. In his ARB hearing, Barhoumi testified that he travelled to a guesthouse in Faisalabad, Pakistan, in February 2002. Approximately ten days after he arrived there, Pakistani police officers raided the house and arrested him—along with Abu Zubaydah, who was also staying at the Faisalabad guesthouse. In May 2002, the U.S. military took Barhoumi into custody and transferred him to Guantanamo, where he has been detained ever since. Abu Zubaydah is also being held at the Guantanamo naval base.

In July 2005, Barhoumi filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia. Although the district court granted the government's motion to dismiss on the ground that section 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. §

2241(e), deprived the court of jurisdiction over habeas claims brought by aliens detained as enemy combatants, it later vacated that dismissal in light of the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). There the Supreme Court held that the constitutional privilege of habeas corpus extends to aliens detained at Guantanamo and struck down the MCA's jurisdiction-stripping provision as an unconstitutional suspension of the writ.

Following *Boumediene*, the judges of the district court, meeting in executive session, decided to coordinate proceedings in most Guantanamo habeas cases, including Barhoumi's. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (D.D.C. July 2, 2008). On November 6, 2008, Judge Hogan, the coordinating judge, issued a Case Management Order governing the consolidated proceedings. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008) ("CMO"). The CMO provided, among other things, that (1) individual judges hearing habeas corpus petitions may admit and consider hearsay evidence, and (2) the government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful. *Id.*, 2008 WL 4858241 at *3.

Ruling from the bench, the district judge hearing Barhoumi's petition explained that the AUMF authorized the President "to detain persons who were part of[,] or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported hostilities in aid of such enemy armed forces." Hr'g Tr. at 4, *Barhoumi v. Obama*, No. 05-1506 (D.D.C. Sept. 3, 2009). Applying this standard, the court concluded that Barhoumi was properly detained and therefore denied his habeas petition.

In reaching this conclusion, the district court relied on Barhoumi's own testimony in the CSRT and ARB proceedings, as well as on two diaries recovered at the [redacted]. The first of these diaries was authored by [redacted]. The second was written by one Abu Kamil al-Suri, who claimed in his diary to be a member of Zubaydah's militia. Although the record does not contain the al-Suri diary itself, it does contain an intelligence report that includes an English translation of the diary. In his diary, al-Suri described staying in a guesthouse in Pakistan along with Zubaydah and a person identified as "Ubaydah Al-Jaza'iri," which the district court concluded referred to Barhoumi, who had admitted to using that alias. The court observed that "the travel pattern of Mr. Barhoumi[,] as he describes it, is consistent with the travel pattern of Mr. Zubaydah and Mr. al Suri," as described in the [redacted] and al-Suri diaries: "each of them started in Afghanistan, crossed mountains into Pakistan, moved through Pakistan, went to Lahore and ended up in Faisalabad where they were arrested together." *Id.* at 5.

The district court also relied on the two diaries' descriptions of fighting at Tora Bora, the cave complex in the mountains of eastern Afghanistan where Taliban and al-Qaida fighters—reportedly including bin Laden—holed up after the commencement of hostilities and were besieged by U.S. and coalition forces. According to [redacted]'s diary, after the beginning of the war Zubaydah fled to Waziristan to help fighters escape from Tora Bora. Al-Suri recounts in his diary that "[i]n the evening, 'Ubaydah Al-Jaza'iri, one of the trainers at Khaldun[,] came in from Tora Bora" and reported that "300 of the brothers were gathered" there. [redacted]'s diary similarly refers to "one of our brothers who came from (Tora Bora)" and who reported that "300 brothers" fought there. Given the consistency of these diary entries, the district court determined that Barhoumi was in fact the person

referred to in both diaries as coming from Tora Bora to the Pakistan guesthouse where Zubaydah was staying.

Based on all this evidence, the district court concluded that Barhoumi was "part of" Zubaydah's militia—an "associated force that was engaged in hostilities against the United States or its coalition partners"—and therefore lawfully detained pursuant to the AUMF. Hr'g Tr. at 12. Barhoumi now appeals the district court's denial of his habeas petition. In considering this appeal, we have benefitted from the superb briefs and excellent oral argument by counsel for both parties.

II.

We begin with two threshold legal issues. Barhoumi argues that the district court erred in admitting into evidence the al-Suri and [redacted] diaries, which are hearsay. *See* FED. R. EVID. 801(c). He further argues that the district court should have applied a clear and convincing evidence standard of proof rather than a preponderance standard. We consider each issue in turn.

The Diaries

Barhoumi contends that in admitting the diaries, the district court adjudicating his habeas petition failed to comply with the CMO, which set forth the following procedures regarding the admission of hearsay evidence:

> On motion of either the petitioner or the government, the Merits Judge may admit and consider hearsay evidence that is material and relevant to the legality of the petitioner's detention if the movant establishes that the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the

> government's efforts to protect national security. The proponent of hearsay evidence shall move for admission of the evidence no later than 7 days prior to the date on which the initial briefs for judgment on the record are due.

CMO, 2008 WL 4858241 at *3 (internal citation omitted). Barhoumi points out that the government never timely filed a motion specifically requesting admission of the diaries, as required by the CMO. Rather, the government submitted a memorandum in which it made general assertions regarding the admission and reliability of hearsay evidence in all the Guantanamo detainee cases, but made no mention of the diaries or any other evidence in specific connection to Barhoumi's factual return. Later, after the deadline established in the CMO had passed, the government filed a motion in Barhoumi's case to supplement the record with the diaries. The district court admitted all the hearsay evidence, including the two diaries, explaining:

> Because these Guantanamo proceedings are unique and difficult, I have decided to receive and consider all of the evidence offered by both sides, but have assessed it item by item for consistency[,] the conditions in which the statements were made and the documents found. The personal knowledge of the declarant and the levels of hearsay. I have given the evidence the weight I think it deserves.

Hr'g Tr. at 4.

Barhoumi argues that the district court's decision violated the CMO not only because the government failed to timely move to admit the diary evidence (according to Barhoumi, the generic hearsay memorandum, though timely, failed to qualify as a motion to admit the diaries), but also because the government never demonstrated that "the

provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security," as the CMO required. CMO, 2008 WL 4858241 at *3. Quoting the Federal Circuit, Barhoumi states that "parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders, and that failure to do so may properly support severe sanctions and exclusions of evidence." Appellant's Br. 20 (quoting *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1369 (Fed. Cir. 2006)) (internal quotation marks omitted); *see also Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998) ("[L]itigants have an unflagging duty to comply with clearly communicated case-management orders."). Given this, Barhoumi argues, the district court's alleged failure to comply with the CMO in and of itself constitutes grounds for reversal. We disagree.

Although the cases Barhoumi cites hold that *parties* have a duty to comply with case management orders, he cites no authority for the proposition that *judges* are required to follow their own—much less another judge's—case management order. In any event, the CMO governing the Guantanamo habeas cases expressly authorizes judges assigned to adjudicate habeas petitions to "alter the framework [set out in the CMO] based on the particular facts and circumstances of their individual cases." CMO, 2008 WL 4858241 at *1 n.1. That is precisely what the district court did here. Citing the "unique and difficult" circumstances inherent in the Guantanamo proceedings, the district court decided—after giving Barhoumi an opportunity to respond to the government's motion to supplement the record—that the circumstances of Barhoumi's case justified admitting all hearsay evidence. Hr'g Tr. at 4. Other district judges have made the same determination in similar circumstances. *See, e.g.*, *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (receiving all evidence offered by either side but assessing it "item-by-item for consistency, the conditions in which