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By the CSO 9/9/08*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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	:	
IN RE:	:	
	:	
GUANTÁNAMO BAY	:	Misc. No. 08-442 (TFH)
DETAINEE LITIGATION	:	
	:	
_____	X	
	:	
MOHAMMED SULAYMON BARRE,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 08-CV-1153 (HHK)
	:	
GEORGE W. BUSH, <i>et al.</i> ,	:	
	:	
Respondents.	:	
	:	
_____	X	

**OPPOSITION TO MOTION FOR PARTIAL RELIEF AND CROSS-MOTION FOR AN
EXCEPTION TO SEQUENCING BASED ON EXCEPTIONAL CIRCUMSTANCES**

Introduction

Petitioner Mohammed Sulaymon Barre (“Petitioner”), by and through his undersigned counsel, respectfully opposes the Government’s Motion for Partial and Temporary Relief from the Court’s July 11, 2008 Scheduling Order (misc. dkt. No. 217) (“Respondents’ Motion”) and cross-moves before this Court for an exception to the sequencing described in the Court’s July 11, 2008 Scheduling Order (misc. dkt. no. 53, ¶ 4).

Respondents have demonstrated they continue to use delaying tactics as a fundamental part of their litigation strategy despite the explicit prohibition by the Supreme Court of further

unwarranted delay imposed on the victims of Respondents' practice of imprisonment without process. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008). Respondents' motion should be denied for the reasons set forth in the opposition briefs filed by the petitioners in *Al Odah v. United States*, Civil Action No. 02-828 (CKK) (D.D.C.), adopted and incorporated herein by reference (misc. dkt. no. 327) (attached hereto as Ex. 1), *Ameziane v. Bush*, Civil Action No. 05-392 (ESH) (D.D.C.), adopted and incorporated herein by reference (misc. dkt. no. 334) (attached hereto as Ex. 2), *Abdah v. Bush*, Civil Action No. 04-1254 (HHK) (D.D.C.), adopted and incorporated herein by reference.¹

Further, Petitioner's Cross-Motion for an Exception to Sequencing Based on Exceptional Circumstances should be granted for the following reasons: (1) Petitioner's unique status as a United Nations ("UN") mandate refugee; (2) the ongoing efforts of the United Nations High Commissioner for Refugees ("UNHCR") on his behalf, his express desire to return to Somaliland, the ongoing efforts of the Somaliland government to repatriate him safely, and the relative progress of the cases of the other two UN mandate refugees known to remain imprisoned at Guantánamo; and (3) the prompt resolution available in this case. These factors merit expedited processing of Petitioner Barre's factual return and a prompt habeas hearing. This cross-motion should be granted.

Statement of Facts

Petitioner Barre is unique among Guantánamo Bay prisoners in two important respects. First, he is from the Republic of Somaliland, a quasi-independent country that declared its independence from Somalia in 1991. He is one of only two Somalilanders at Guantánamo – the other is his father-in-law, Mohammed Hussein Abdullah, ISN #704. They are citizens of

¹ The *Abdah* filing is not attached as it was filed subsequent to the transmission of this filing to the Court Security Office.

Somalia, a country mired in civil war, who cannot return safely to their home country for fear of persecution based on their ethnic and tribal affiliation, and their designation as “enemy combatants” at Guantánamo Bay. They instead seek return directly to Somaliland, a country with which the United States has only informal, unofficial diplomatic relations through the U.S. Embassy in Djibouti. Indeed, the only conceivable reason that Petitioner and his father-in-law remain imprisoned at Guantánamo Bay is because of logistical difficulties in arranging their safe release directly to Somaliland.

Second, having fled to Pakistan from Somalia in the early 1990s in order to avoid persecution, Petitioner Barre and his father-in-law are internationally recognized refugees under the protection of UNHCR.² UNHCR has provided counsel for these prisoners (and the government) with documentation confirming their refugee status. UNHCR has also provided and continues to provide other documentation in support of Petitioner Barre’s habeas case, including evidence of his numerous interactions with UNHCR and its affiliates in Pakistan that directly contradict the government’s alleged bases for his detention at Guantánamo Bay.

With the assistance of UNHCR, Petitioner Barre settled in Karachi, Pakistan with his wife and was gainfully employed by an international money transfer company, Dahabshiil, with offices throughout the Middle East, Europe and the United States. However, on November 1, 2001, Petitioner Barre was abducted from his home in Pakistan. He was held at Bagram and Kandahar Air Bases in Afghanistan for approximately three months, and then transferred to Guantánamo Bay. He has been detained in near-constant isolation at Guantánamo Bay without charge or trial for more than six years.

² Respondents failed to notify UNHCR that there were internationally recognized refugees imprisoned at Guantánamo, including Petitioner Barre, until UNHCR discovered this information on its own and wrote to Respondent in December 2006. *See* Carol Rosenberg, *Two with Refugee Status Found in Detention Camp*, Miami Herald, Jan. 30, 2007, at A3.

On August 1, 2007, Petitioner Barre filed a petition for review, pursuant to the Detainee Treatment Act, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005) (“DTA”), challenging his enemy combatant designation and seeking immediate release from Guantánamo. Respondents have produced classified and unclassified Combatant Status Review Tribunal (“CSRT”) records in Petitioner’s corresponding DTA case. Respondents, however, have consistently refused to provide the Government Information as required by *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (“*Bismullah I*”), and *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) (“*Bismullah II*”), despite Petitioner’s filing of a motion to compel production. Petitioner’s corresponding DTA petition has thus far seen no development.

It was only after the Supreme Court’s recognition of the unconstitutionality of Congress’ attempted jurisdiction-stripping legislation in *Boumediene*, 128 S. Ct. at 2274, that Petitioner Barre could file a habeas petition in federal court. Soon thereafter, Petitioner Barre filed a habeas petition in this Court.³ *Barre v. Bush*, Civil Action No. 08-1153, dkt. no. 1 (July 1, 2008). To date, Respondents have not produced a factual return in Petitioner Barre’s case, but did produce classified and unclassified CSRT records in Petitioner’s corresponding DTA case on April 28, 2008. Under the Court’s July 11, 2008 Scheduling Order, the government is not

³ Counsel for petitioners have previously highlighted the fallacy in presuming that later-filed habeas petitions demonstrate that prisoners “may have sat on their rights.” Statement Regarding Hearing of July 8, 2008 (July 9, 2008) (misc. dkt. no. 35, ¶ 2) (“Petitioners who filed the earliest cases on the docket were those who were lucky enough to have family members on the outside who had reason to believe their loved ones had been spirited away to Guantánamo and were able to get in contact with attorneys at the Center for Constitutional Rights or others and indicate their desire to file habeas petitions. Other prisoners have faced cultural, linguistic, and logistical barriers to contacting attorneys. The government has never allowed attorneys to visit the base to explain to unrepresented prisoners that they have the right to file a habeas petition.”). Petitioner Barre is a case in point—one of only two Somalis among the general population at Guantánamo and with no communication with his family members subsequent to his detention. Declaration of Emilou MacLean (“MacLean Declaration”), ¶¶ 4-6, attached hereto as Ex. 3.

obligated to produce a factual return in this case until 2009, thereby guaranteeing unconscionable delay absent this Court's intervention.

In the meantime, counsel for Petitioner Barre have been engaged in an ongoing dialogue with UNHCR and high-ranking government officials from the Republic of Somaliland committed to Petitioner's voluntary return to freedom in Somaliland. Both UNHCR and Somaliland officials have recognized this case as of significant importance. *See* MacLean Declaration at ¶¶ 7-8.

In contrast to Petitioner's efforts to seek a resolution with or without judicial review to his indefinite detention, Respondents have consistently sought to delay any judicial review, most recently in Respondents' Motion. On July 11, 2008, this Court ordered Respondents to file factual returns and motions to amend factual returns "on a rolling basis at a rate of at least 50 per month," with the first fifty returns due by August 29, 2008. July 12 Order at 3-4. The schedule ordered by the Court was requested by Respondents. *See* Notice by Resp'ts, Misc. No. 08-442 (July 9, 2008) (Doc. 39); *id.* at Ex. A, Letter from Gregory G. Katsas to Hon. Royce C. Lamberth and Hon. Thomas F. Hogan (June 30, 2008). In setting these initial deadlines, the Court emphasized its general unwillingness to grant extensions except in "rare[]" instances upon a showing of good cause. *See* July 8, 2008 Hearing Tr. at 60, 82

However, upon the arrival of the very first deadline, Respondents notified the Court and Petitioners of their inability or unwillingness to adhere to the self-proposed and Court-ordered schedule. Respondents notified the Court that they were only able to produce ten of the fifty returns ordered by this Court, with an additional twelve factual returns produced before other Judges who had chosen to not coordinate their cases. Respondents expressed a "hope" that they will meet later deadlines and a pledge to "strive" to do so. Respondents' Motion at 1, 12. On the

modified schedule newly proposed by Respondents, the factual return for Petitioner Barre – a UN mandate refugee imprisoned without charge – would not be due until 2009, more than seven years after his initial abduction.

Argument

I. The Court should strike or deny Respondents’ Motion for Partial and Temporary Relief.

The Court should strike or deny Respondents’ Motion for Partial and Temporary Relief for the reasons elaborated in *Al Odah v. United States*, Civil Action No. 02-828 (CKK) (D.D.C.) (misc. dkt. no. 327), *Ameziane v. Bush*, Civil Action No. 05-392 (ESH) (D.D.C.) (misc. dkt. no. 334), and *Abdah v. Bush*, Civil Action No. 04-1254 (HHK) (D.D.C.) (misc. dkt. no. __*), each adopted and incorporated herein and attached as exhibits.

II. Petitioner’s Cross-Motion for an Exception to Sequencing Based on Exceptional Circumstances Should be Granted.

This Court has ordered that “any petitioners who have extraordinary circumstances may move before this Court for an exception to the sequencing” laid out by the Court. July 12 Order at 4. Petitioner’s case presents circumstances that call for an exception to the Court’s sequencing order and an expedited schedule for the processing of Petitioner’s factual return and his habeas hearing. The exceptional circumstances include (1) Petitioner’s unique status; (2) ongoing efforts to secure Petitioner’s safe repatriation, and efforts in related cases; and (3) the ability for this case to be speedily resolved.⁴

First, Petitioner’s unique status as a refugee under the protection of the UN mandate requires expedition. Petitioner Barre is the only known UN mandate refugee remaining at Guantanamo whose habeas petition has been coordinated by this Court. The habeas petitions of

⁴ Respondents’ Motion seeking partial relief from the Court’s sequencing order only underscores the risk of delay and the need for relief given Petitioner Barre’s exceptional circumstances.

the two other known UN mandate refugees who remain imprisoned at Guantánamo – Mohammed Hussein Abdullah, the father-in-law of Petitioner Barre; and Mammar Ameer, ISN #939 – are proceeding on a relatively expedited schedule. Both are before Judge Richard J. Leon who has opted out of this court’s coordination and who has ordered the processing of factual returns expeditiously, has set forth procedures to govern the habeas corpus proceedings, and has scheduled hearings for both before the end of December 2008. *See* Case Management Order by Judge Richard J. Leon, *Boumediene v. Bush*, Civ. No. 04-1166, Dkt. No. 142 (Aug. 27, 2008); Scheduling Order by Judge Richard J. Leon, *Mammar v. Bush et al.*, Civ. No. 05-0573, Dkt. No. 78 (Aug. 27, 2008); Scheduling Order by Judge Richard J. Leon, *Sliti et al. v. Bush*, Civ. No. 05-0429, Dkt. No. 109 (Aug. 27, 2008). In contrast, Petitioner Barre – on Respondents’ newly proposed schedule – could “hope” to receive a factual return in January 2009, with no hearing date yet set.

Petitioner Barre and his father-in-law have been imprisoned for nearly seven years because of the lack of legal or diplomatic pressure to secure their release.⁵ An individual’s country of nationality may be the most important factor in determining whether an individual is released from Guantánamo or remains imprisoned in 2008. *See supra* note 3; MacLean Declaration at ¶¶ 10-12. The habeas litigation imposes pressure on Respondents to transfer from Guantánamo prisoners who the government has no intention to maintain in custody, but for whom there is otherwise no pressure to release. *See Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005) (in the final hours before the Court of Appeals for the District of Columbia

⁵ *See* Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, Wall St. J, Jan. 26, 2005, at A1 (According to a former commander at Guantanamo: “Sometimes we just didn’t get the right folks,” and the reason that these men were still in Guantanamo is that “nobody wants to be the one to sign the release papers. There is no muscle in the system.”).

Circuit was scheduled to hear oral argument in the case of two Uighurs classified as non-enemy combatants yet still imprisoned, Respondents transferred the *Qassim* petitioners from Guantánamo to Albania and moved to dismiss the case as moot).

Generally lacking a country to demand their humane treatment or safe repatriation, the UN mandate refugees are in the greatest need of legal pressure to compel their release. *See* MacLean declaration at ¶ 12. Yet, UN mandate refugees are also more likely to be isolated in Guantánamo by linguistic, cultural, and national barriers and isolated from lawyers due to these same barriers and the inaccessibility of their families. *See Id.* at 4-6.⁶ Thus, under this Court's order, Petitioner Barre is doubly punished by his refugee status: there is limited pressure on Respondents to facilitate his release because of his nationality; and further, his delayed access to the Court due to the particular barriers he faced as a UN mandate refugee from an isolated and quasi-independent country places him at the back of the line for a factual return absent an exception to the sequencing. Yet, paradoxically, his refugee status should make him one of the priorities for an urgent review.

Second, ongoing efforts to secure Petitioner's safe repatriation to Somaliland, as well as developments in related cases, merit expedited processing of the factual return in Petitioner's case. Counsel for Petitioner have been engaged in discussions with high-ranking officials of the Somaliland government as well as with the UNHCR to facilitate Petitioner's safe transfer out of Guantánamo. *Id.* at ¶¶ 7-8. Counsel for Petitioner have also been coordinating efforts with

⁶ *See also Razak v. Bush*, 05-1601, dkt. 41 (Dec. 1, 2006) (“[The detainee] is unfamiliar with the United States Court System. He does not speak English. He likely does not know what the term *habeas corpus* means. He has no criminal charges against him. He has every reason to distrust his captors and keepers. . . .He has every reason to challenge his confinement. . . . He cannot communicate with an attorney, not does he even know at present that he has an attorney. He has no expectation of release, ever. In light of these facts, there can be little doubt in the Court's mind that Mr. Al Razak is not able to challenge the legality of his detention.”).

counsel for the other known UN mandate refugee from Somaliland at Guantánamo, Petitioner’s father-in-law. *Id.* at 9. The fact that Petitioner Barre’s father-in-law’s case is proceeding on a relatively expedited schedule may frustrate efforts to facilitate a speedy and safe transfer for Petitioner Barre out of Guantánamo. The immediate litigation developments in the habeas case of Petitioner Barre’s father-in-law, coupled with the efforts of the Somaliland government and UNHCR, may jointly create the favorable circumstances that compel the safe repatriation of Petitioner Barre’s father-in-law. However, circumstances favoring release can be tenuous, as this Court has recognized in the cases of the Uighur refugees who also face diplomatic hurdles thus far preventing their safe release. *See, e.g.*, Uighur Status Hearing Tr. at 11, 16-17 (Aug. 21, 2008). The expedited litigation schedule that will serve to encourage the speedy transfer of Petitioner Barre’s father-in-law must not be lost on Petitioner. *See* MacLean Declaration at ¶¶ 7-9, 12.

Third, the particular facts of this case make possible a speedy resolution by summary judgment, without discovery, barring amendment of Petitioner Barre’s return. A record has already been produced within the context of Petitioner’s DTA petition. No further discovery is required. No matter what legal standard the Court applies, or whether the Court permits the introduction of hearsay evidence, Petitioner Barre’s detention is unlawful. The Court could order Respondents to allow Petitioner to use the DTA record as a factual return to avoid further delay⁷ or file a motion to amend that return if warranted. There is no justification for Petitioner

⁷ The government has already agreed to this in other habeas cases involving other detainees. *See, e.g.*, Resp’ts’ Resp. to Uighur Pet’rs’ Motion to Use CSRTs Provided in DTA Action in this Case at 1-2, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. filed Aug. 1, 2008) (dkt. no. 228) (“Subject to adherence to the standard protective orders entered in each of the habeas cases, respondents agree that these petitioners may use the classified CSRT records already filed in their DTA action here in their habeas cases, as long as that is done in a manner consistent with the protective orders.”).

Barre to be imprisoned for an additional six months, on top of eighty months of arbitrary detention without charge, when this case could be resolved with the production of a factual return and summary judgment briefing. As the Supreme Court duly cautioned, “the costs of delay can no longer be borne by those who are held in custody.” 128 S. Ct. at 2275.

Conclusion

Because the government has not demonstrated good cause for relief, its motion should be denied. Further, because of the exceptional circumstances of Petitioner Barre’s case, this Court should grant an exception to the sequencing ordered on June 11, 2008 and expedite the processing of Petitioner Barre’s factual return and the subsequent habeas hearing. This Court should order Respondents to allow Petitioner Barre to use the DTA record as a factual return or file within a short time frame a motion to amend that return if such amendment is warranted.

Dated: New York, New York
September 8, 2008

Respectfully submitted,

Counsel for Petitioner:

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2008, I caused the foregoing Opposition to Motion for Partial Relief and Cross-Motion for an Exception to Sequencing Based on Exceptional Circumstances to be filed and served on counsel listed below by causing an original and two copies to be delivered to the Court Security Office via overnight mail.

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