amnesty international

USA: Enough is enough

After more than 3,000 days in US military detention without charge, Guantánamo detainee's case sent back to District Court

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On 28 June 2010, the US Court of Appeals for the District of Columbia (DC) Circuit overturned a federal judge's ruling made over a year and a half earlier denying the habeas corpus petition brought by Guantánamo detainee Belkacem Bensayah. The Court of Appeals sent the case back to the District Court for review and further decision.

Enough is enough. Belkacem Bensayah has been in US custody without charge or trial for more than eight and a half years. His case illustrates how the USA has distorted, and continues to distort, principles of human rights and justice in the name of countering terrorism.

Amnesty International has long called upon the USA to immediately release any Guantánamo detainee whom it does not charge and bring to trial in an independent and impartial court in accordance with international fair trial standards. The organization notes that the USA has never shown any intention to prosecute Belkacem Bensayah, only to keep him in indefinite detention without charge.

From day one in US custody, Belkacem Bensayah should have been subject to international human rights law and principles of criminal law. It is now past day 3,000 of his detention.

The administration of President George W. Bush labelled Belkacem Bensayah an "enemy combatant" in what it characterized as a global "war" against international terrorism. It claimed the right to detain him under the President's authority as Commander in Chief of the Armed Forces and under the Authorization for Use of Military Force (AUMF), a broadly worded resolution passed by US Congress in the immediate wake of the attacks on 11 September 2001. The AUMF, revocation of which Amnesty International has called for, has been systematically exploited by the USA in committing violations of its international human rights obligations.[1]

Belkacem Bensayah was arrested along with five other men, far from any armed conflict, by civilian police on territory of an allied government – that of Bosnia and Herzegovina. The authorities there handed the six over to the USA in January 2002 despite a ruling by the Federation of Bosnia and Herzegovina (FBiH) Supreme Court that there was no basis for their detention and despite an order from the Human Rights Chamber of Bosnia and Herzegovina against their removal from the country. The US authorities then transferred the six to the US naval base in Guantánamo Bay, Cuba.

Nearly seven years later, on 20 November 2008, District Court Judge Richard Leon ordered the US government to release five of the six, all but Belkacem Bensayah.[2] The five have since been released.[3] The ruling was the first of its kind following the US Supreme Court's opinion in June 2008, *Boumediene v. Bush*, that the Guantánamo detainees had the right to a "prompt" habeas corpus hearing in District Court to challenge the lawfulness of their detention.

Lawyers for Belkacem Bensayah appealed Judge Leon's ruling to the US Court of Appeals for the DC Circuit. Since then there has been a change in US administration, but little substantive change in the USA's approach to the Guantánamo detentions, despite President Barack Obama's order to his

administration to resolve all the detentions and close the detention facility by 22 January 2010. Amnesty International considers that that now long-missed deadline for closure is a symptom of the failure of the US government – all three branches of it – to properly confront the detentions as an international human rights issue.[4]

The Obama administration has ceased using the term "enemy combatant" in its post-*Boumediene* litigation, but has not rejected the use of indefinite detention without charge or criminal trial of those it detains in this context. It claims the authority to do so exclusively under the AUMF, rather than inherent presidential power.[5] It has adhered to the notion of a global "war" against *al-Qa'ida* and associated groups.

Under rules developed in the District Court in DC following the *Boumediene* judgment, the government has a relatively low standard of proof to meet in order to win a Guantánamo habeas corpus case: it needed only to show "by a preponderance of the evidence" that the detainee in question was an "enemy combatant". The latter was 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".

The Bush administration contended that all six of the detainees transferred from Bosnia and Herzegovina were "enemy combatants" because it said they had planned to travel to Afghanistan in late 2001 in order to fight against US and allied forces there. Judge Leon found that the government had provided only a single document, which he held unreliable, to support this contention in the case of the five he ordered released, and ruled that "to allow enemy combatancy to rest on so thin a reed" would flout his obligation to protect the detainees from "the risk of erroneous detention".

However, he deemed the shreds of evidence substantial enough to render lawful Belkackem Bensayah's continued detention on the grounds that it showed his "support" for al-Qa'ida within the definition of "enemy combatant". In Bensayah's case, the administration had alleged that he was a member of *al-Qa'ida* and a travel facilitator for it. Judge Leon found that "the Government provides credible and reliable evidence linking Mr Bensayah to al-Qa'ida and, more specifically, to a senior al-Qa'ida facilitator". The name of the alleged senior al-Qa'ida facilitator was classified. The redacted name may be Abu Zubaydah, who was taken into US custody in Pakistan in the spring of 2002, subjected to torture and to four and a half years of enforced disappearance in CIA custody before being transferred in September 2006 to Guantánamo, where he remains detained today without charge or trial.[6] US lawyers representing Abu Zubaydah for the purposes of the habeas corpus hearing he has yet to receive more than two years after the *Boumediene* ruling, maintain that the Bush administration's characterizations of Zubaydah as a leading al-Qa'ida member were wrong and that the US authorities have gradually moved away from this contention.[7]

In any event, the detentions of Belkacem Bensayah and his five former co-detainees were built on shifting sands. A few days after the USA seized them in Bosnia and Herzegovina, President Bush referred to them in his State of the Union address as "terrorists who were plotting to bomb our embassy" in Sarajevo. The USA used the same allegation to seek to justify their detention without charge or trial for the subsequent six years that it managed to keep their cases from judicial review. When their cases came, post-*Boumediene*, to Judge Leon in the District Court, the US authorities dropped that accusation.

Nineteen months after Judge Leon's ruling – 19 more months of indefinite military detention for Belkacem Bensayah – a three-judge panel of the DC Circuit Court of Appeals issued its decision on his case. The public version of its ruling, with redactions, was issued on 1 July 2010. The Court of Appeals noted that since Judge Leon's ruling the US administration had dropped its reliance upon "a portion of the evidence that the 'senior al-Qaida facilitator' with whom Bensayah allegedly had contact was in fact a senior al Qaeda facilitator". The administration had also abandoned its argument that Belkacem Bensayah was lawfully detained because of the "support" he had provided to al-Qa'ida. This was the only basis on which Judge Leon had ruled Belkacem Bensayah's detention lawful. Because he found that the

government had shown the detainee's alleged "support" for al-Qa'ida, Judge Leon had not deemed it necessary to consider whether the detainee was "part of" that organization, as provided under the definition of "enemy combatant".

The Court of Appeals concluded that the evidence on which Judge Leon had decided that Belkacem Bensayah "supported" al-Qa'ida was insufficient to show that he was a "part of" the organization. It wrote that the details of al-Qa'ida's structure are "generally unknown", but that the organization "is thought to be somewhat amorphous". Because of this, the Court continued, determination of whether an individual is "part of" of al-Qa'ida "must be made on a case-by-case basis using a functional rather than a formal approach and by focusing on the actions of the individual in relation to the organization".

The Court noted that the US government had presented "no direct evidence of actual communication between Bensayah and any al Qaeda member, much less evidence suggesting Bensayah communicated with [redacted] or anyone else in order to facilitate travel by an al Qaeda member." It also agreed that Bensayah's past use of false travel documents – to which Bensayah has admitted – "is neither proof of involvement with terrorism nor evidence of facilitation of travel by others".

The Court of Appeals sent the case back to the District Court for it "to hear such evidence as the parties may submit" and to determine whether Belkacem Bensayah "was functionally part of al Qaeda". On remand, if the government is unable to show, by a preponderance of the evidence, that Belkacem Bensayah was part of al-Qa'ida, the District Court will have to order his release.

The fact that the US government appears not to have the evidence to sustain a judicial finding in its favour even under the relatively low burden of proof it has to meet in the Guantánamo habeas corpus cases would seem to suggest that it is not in a position to bring Belkacem Bensayah to criminal trial applying a higher standard of proof. Amnesty International repeats its call on the USA to immediately release him unless it promptly charges him with recognizable criminal offences for trial in US federal court.

It should not use continuing habeas corpus litigation to perpetuate his indefinite military detention a day longer.

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[1] See, for example, USA: Many words, no justice: Federal court divided on Ali al-Marri, mainland 'enemy combatant', 4 August 2008, http://www.amnesty.org/en/library/info/AMR51/087/2008/en.

[2] USA: Federal judge orders release of five of six Guantánamo detainees seized in Bosnia in 2002, 20 November 2008, http://www.amnesty.org/en/library/info/AMR51/141/2008/en.

[3] Mustafa Aït Idir, Boudella El Hadj and Nechla Mohamed were released from Guantánamo to Bosnia and Herzegovina on 16 December 2008. Lakhdar Boumediene and Saber Lahmar Mahfoud were released to France on 15 May 2009 and 30 November 2009 respectively.

[4] See USA: Still failing human rights in the name of global 'war', 20 January 2010, http://www.amnesty.org/en/library/info/AMR51/006/2010/en. Also, USA: Normalizing delay, perpetuating injustice, undermining the 'rules of the road', 23 June 2010, http://www.amnesty.org/en/library/info/AMR51/053/2010/en

[5] The Obama administration maintains that: "The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harboured those responsible for those attacks. The President also has the authority 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". See USA: Different label, same policy? Administration drops 'enemy combatant' label in Guantánamo litigation, but retains law of war framework for detentions, 16 March 2009, http://www.amnesty.org/en/library/info/AMR51/038/2009/en

[6] See appendix of 1 of USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after Boumediene, April 2009, http://www.amnesty.org/en/library/info/AMR51/050/2009/en

[7] Questions about the US government's allegations that Abu Zubaydah was a leading member of *al-Qa'ida* are raised not only by its failure to bring him to trial, but also by what his US lawyers have characterized as the government's "surreptitious but systematic purging of any mention or reference" to Abu Zubaydah from military commission charge sheets and 'factual returns' in habeas corpus proceedings of other detainees. In late 2005, for example, four Guantánamo detainees – Binyam Mohamed, Jabran Said al Qahtani, Sufyina Barhoumi and Ghassan al Sharbi – were charged for trial by military commission under the Military Order signed by President Bush in November 2001. Their charge sheets were littered with references to Abu Zubaydah, who had been arrested in late March 2002 in the same house in Faisalabad in Pakistan as Al Qahtani, Barhoumi and al Sharbi (Binyam Mohamed was arrested at Karachi airport in April 2002 and was released in the UK in 2009). Charges against the four detainees were dropped after the US Supreme Court ruled the military commission system unconstitutional in June 2006. In May 2008, the four men were re-charged for trial by military commission under the Military Commissions Act of 2006. This time the references to Abu Zubaydah had been removed from the charge sheets. For an indication of the US government's position, and how far it has backtracked from the original claims about Abu Zubaydah made during the Bush administration, see *Husayn v Gates*, Respondent's memorandum of points and authorities in opposition to petitioner's motion for discovery and petitioner's motion for sanctions, In the US District Court for the District of Columbia, 27 October 2009.