IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,	)	
Plaintiffs,	)	
v.	)	**No. CV 02-0828 (CKK)**
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

REPLY TO OPPOSITION TO PLAINTIFFS' MOTION
TO COMPEL RESPONSIVE PLEADING AND RETURN FORTHWITH

The government argues that it "fully complied" with this Court's Order of July 23, 2004, directing it to file, among other things, "a written response to the Petitioners' underlying petitions for writs of habeas corpus * * *." Respondents' Opposition to Petitioners' Motion to Compel Responsive Pleading and Return Forthwith ("Opp."), pp. 1, 5. Citing certain remarks by the Court during the telephone conference of July 23, 2004, the government argues that, by this Order, the Court intended to relieve it of the responsibility of filing a "comprehensive" response to plaintiffs' underlying petitions and to require it exclusively to address counsel access issues. *Id*., pp. 7-8. Furthermore, the government argues that, because it is involved in conducting "Combatant Status Review Tribunals" ("CSRTs") for all detainees at Guantanamo Bay, compelling it file a responsive pleading and make a return "explaining the reason for each petitioner's apprehension and justifying continued detention" at the present time would cause its "resource burdens" to "reach crisis levels." *Id.*, p. 11. Accordingly, the government urges that only Judge Green, who is coordinating the 13 Guantanamo Bay cases, should rule on this matter.

However, the government's interpretation of the Court's Order of Jul 23, 2004, is wrong. The Court should order the government to file a responsive pleading and return right now.

1. To be sure, the Court's remarks during the telephone conference of July 23, 2004, and its Order of the same date focused primarily on the government's responsibility to address counsel access issues. But the Court's remarks and the plain language of the Order make clear that the Court *also* commanded the government to file a *"a written response to the Petitioners' underlying petitions for writs of habeas corpus …* (emphasis added)," and that it meant exactly what it said.

At the outset of the telephone conference, the Court drew a clear distinction between the procedures the government was developing for counsel access to the detainees at Guantanamo Bay, which by then plaintiffs and the Court had been awaiting for weeks, and a response to plaintiffs' underlying petitions for writs of habeas corpus. Thus, after inquiring about the status of those procedures, the Court asked government counsel: "All right, and if you were required to give a response to the present petitions, I take it your response *would include* this kind of information (emphasis added)?" Transcript of Proceedings, July 23, 2004 ("Tr."), p. 7. When government counsel expressed uncertainty about the Court's question, the Court repeated: "At this point what we have is the petitions for writs were filed originally. The government then filed a motion to dismiss for lack of jurisdiction. I don't believe in either this case or the other case that I have, that there was any actual response to the petitions themselves." *Id.* After government counsel acknowledged that fact, the Court continued: "If you did *a merits response,* presumably you would be providing this kind of information, since at least at this point the petitions focused primarily on access since, without access, they can't move to the next steps that you would ordinarily have with a habeas (emphasis added)." *Id.* It is apparent from these remarks the Court was thinking the government should file a merits response that would focus on counsel access issues but that would deal with other merits issues as well.

Other remarks by the Court and counsel reflect the same understanding. Government counsel observed that, quite apart from access, the amended complaint in the present case and the petition in *Rasul v. Bush*, Civil Action No. 02-299 (CKK) raised "other claims for relief and a variety of legal theories, [and] that if we were to file a comprehensive return or answer on the merits of the petition, that would likely need to be addressed in addition to the issues about access to counsel." Tr., p. 8. Specifically, government counsel said he thought that "the relief was quite broad and included the potential order of release of the detainees * * * ." *Id.* It was in response to this concern that the government would have to file a "comprehensive" response addressing relief issues, including release, that the Court said: "We can deal with that at a later point." *Id.* To emphasize that the Court did not expect the government to respond yet to the ultimate issue of relief, the Court added: "And in both cases, I believe – and I'm just generalizing – there is not at this point a request for relief * * * . So, I'm assuming an *initial response* of some sort would be around the access so the lawyers can get to see these individuals, but I don't think we need to decide that at this point (emphasis added)." *Id.*, pp. 8-9.

Later in the telephone conference the Court again spoke about the need for a response to plaintiffs' underlying petition for writs of habeas corpus. The Court observed: "I know in some other cases involving detainees that have been filed more recently, that, although some of them – it's not clear exactly when – but *the government has been given 20 days to make responses* (emphasis added)." Tr., pp. 24-25. When plaintiffs' counsel pointed out that, in another detainee case, Judge Walton had scheduled a hearing for July 27, 2004, on a motion for an order to show cause, the Court said: "Certainly, if the government is going to be responding more quickly, then you can get a response in for me." *Id.*, pp. 25-26.

Finally, after taking a short break, the Court announced "that by noon this coming Friday [July 30, 2004] the government will file *three things* (emphasis added). Tr., p. 34. First, the Court said the government "will file in writing all these procedures, whatever the procedures are for access * * *." *Id.* Second, the Court said the government "would indicate in writing in terms of how – the specific different ones in terms of monitoring, if there's anything else that's discrete, is being applied to each detainee." *Id.*, p. 35. "Three, *I would ask that you file a response to the habeas petition* (emphasis added)." *Id.* To make sure the government understood that this "response to the habeas petition" had to deal with issues other than access but did not have to deal with release at this point, the Court said: "Now, *most of it*, you will read it, you will see that the *primary issue* that was set out was access *by family*, the attorneys, et cetera, and certainly in the proceedings, although it was in the context of jurisdiction, at that point they were not asking for release. Presumably *that will come* (emphasis added)." *Id.*

These remarks by the Court and counsel reinforce the plain meaning of the Court's Order of July 23, 2004. The Order says that the third filing the government was required to make by noon on July 30, 2004 was "a written response to the Petitioners' underlying petitions for writs of habeas corpus, specifically addressing, among other things, the legal merits of the Government's entitlement to monitor any Petitioners' conversations with counsel." Plainly, the "written response to the Petitioners' underling petitions for writs of habeas corpus" was supposed to address the monitoring issue "among other things." The "other things" were the totality of plaintiffs' allegations and claims in the underlying petitions, except for the ultimate question of release. Because the first and second filings were to deal with the procedures for counsel access to the Kuwaiti Detainees, the third filing obviously was to deal with something else. Otherwise, it would have been entirely redundant.

It is also clear from the government's filing on July 30, 2004, that the government *knew* this filing did *not* constitute a response to plaintiffs' underlying petitions for writs of habeas corpus. In it the government said that "the access provided by the military will allow counsel to meet with the detainees, and counsel may then wish to convert their next-friend petition into a direct petition or otherwise amend their petition. *Respondent would respond to any such amended petition at an appropriate juncture* (emphasis added)." Response to Complaint in Accordance with Court's Order of July 25, 2004, pp. 30-31 n. 14. The Court's Order of July 23, 2004, did not authorize the government unilaterally to postpone its response to plaintiffs' underlying petitions for writs of habeas corpus until they are amended in the future.

In sum, the government was ordered by the Court on July 23, 2004, to file a written response to plaintiffs' underlying petitions for writs of habeas corpus by noon on July 30, 2004. Although, as the government contends (Opp., pp. 7-8), this Order may not have obligated the government to file a "comprehensive return" or a "complete factual return to the petition-complaint," it surely obligated the government to file *some* merits response to plaintiffs' underlying petitions for writs of habeas corpus. Yet, the government did not do so and it still has not done so. The Court should order the government to file a responsive pleading to plaintiffs' amended complaint and a return to plaintiffs' application for writs of habeas corpus forthwith.[1]

2. Based on its misconstruction of the Order of July 23, 2004, the government argues that its failure to answer plaintiffs' amended complaint does not violate Fed. R. Civ. P. 12(a)(4),

[1] The government criticizes plaintiffs for not raising this issue at the hearing of August 16, 2004, and notes that the Court did not discuss it either. Opp., pp. 6, 8. But as the government acknowledges, the Court advised the parties at the beginning of that hearing that, although "there are a number of issues that have been raised," the Court was "going to focus on what I view as the principal ones, which is the monitoring of attorney/client discussions * * *." Transcript of Proceedings, August 16, 2004, p. 5. As a result, both the Court and the parties' counsel focused on those issues at the hearing. No inference may be drawn from this, one way or another, about the Court's view on the government's failure to respond as ordered to plaintiffs' underlying petitions for writs of habeas corpus.

calling for the service of a responsive pleading "within 10 days after denial of a motion to dismiss" unless "a different time is fixed by court order," and that its failure to make a return to plaintiffs' application for writs of habeas corpus does not violate 28 U.S.C. § 2243, calling for the making of a return "within three days [of being so ordered], unless for good cause additional time, not exceeding twenty days, is allowed." Opp., pp. 9-11. According to the government, the Order of July 23, 2004, implemented the provision in Rule 12(a)(4) authorizing the Court to fix a time "different" from ten days to respond to plaintiffs' amended complaint, and it also implemented Rule 4 of The Rules Governing Section 2254 Cases in the United States District Courts authorizing the Court to fix the time for the filing of an answer or other pleading. *Id.*

But nowhere in the Order of July 23, 2004, did the Court specify a "different" time for the filing of a response to plaintiffs' amended complaint other than July 30, 2004. And nowhere in that Order did the Court invoke Rule 4 of the habeas corpus rules or specify a time other than July 30, 2004, for the making of a return to plaintiffs' underlying petitions for writs of habeas corpus.[2] Therefore, the government was bound but failed to comply with Rule 12(a)(4) and 28 U.S.C. § 2243 by failing to answer plaintiffs' amended complaint and failing to make a return to plaintiffs' underlying petitions for writs of habeas corpus by July 30, 2004.

3. The notion that compelling the government to answer plaintiffs' amended complaint and make a return to their application for writs of habeas corpus will overtax the government's resources (Opp., pp. 3-4, 11-12) is absurd. After holding and interrogating the Kuwaiti Detainees for more than two and a half years, and after making individualized determinations

[2] The Rules Governing Section 2254 Cases in the United States District Courts, including Rule 4, apply in terms only to applications by persons (i) in custody pursuant to a judgment of a state court or (ii) in custody pursuant to a judgment of either a state or federal court who seek to challenge a future custody pursuant to the judgment of a state court. In all other cases these Rules "may be applied at the discretion of the United States district court." *See* Rule 1. This Court gave no indication in its Order of July 23, 2004, that it was exercising its discretion to apply Rule 4 of those Rules to the government's duty to respond to plaintiffs' underlying petitions for writs of habeas corpus.

about them for purposes of deciding whether they should be subject to monitoring when they meet with counsel, the government cannot legitimately claim it would be too burdensome for it to state the reasons (if any) for their detention. The government has the resources to answer the 42-numbered paragraphs of plaintiffs' amended complaint in 42 words, consisting of either "admit" or "deny." Similarly, the government has the resources to make a return to plaintiffs' application for writs of habeas corpus by saying, with respect to each of the Kuwaiti Detainees, something such as: "___ is being detained as an 'enemy combatant' because he was captured by U.S. forces under the command of ____ on _____ supporting Taliban forces in Afghanistan and engaged in a firefight against U.S. forces." *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2645 (plurality opinion of O'Connor, J.). It is irrelevant to the government's duty to answer plaintiffs' amended complaint and make a return to their underlying petitions for writs of habeas corpus that the government is conducting CSRTs at the present time.

Contrary to the government's suggestion (Opp., pp. 11-12), a ruling on this matter is appropriately made by Judge Kollar-Kotelly. Indeed, at the conference before Judge Green on August 27, 2004, attended by the parties in the 13 Guantanamo Bay cases, plaintiffs' counsel gave notice of plaintiffs' intention to file the present motion on the ground, among others, that the government had violated Judge Kollar-Kotelly's Order of July 23, 2004. As the government knows very well, Judge Green expressly advised plaintiffs' counsel that, if that was a ground for the motion, plaintiffs should present the motion to Judge Kollar-Kotelly.

In addition, as the government knows very well, in *O.K. v. Bush*, Civil Action No. 04-1136 (JDB), one of the 13 Guantanamo Bay cases Judge Green is coordinating, Judge Bates issued an order on September 1, 2004, directing the government to show cause by September 15, 2004, why petitioner's amended petition for the issuance of a writ of habeas corpus should not be

granted. *See* Attachment A. Judge Bates noted that he had consulted with Judge Green. Petitioner's amended petition in that case was filed on August 17, 2004, and his motion for an order to show cause was filed on August 26, 2004. In contrast, plaintiffs in the present case filed their amended complaint on July 8, 2002. If it is appropriate for Judge Bates to order the government to respond by September 15, 2004, to an amended petition first filed on August 17, 2004, it is appropriate for Judge Kollar-Kotelly to order the government to respond by July 30, 2004, and now forthwith, to an amended complaint filed more than two years ago.

For these reasons and the reasons given in plaintiffs' opening submission, the Court should grant plaintiffs' motion to compel the government to file a responsive pleading and make a return forthwith.

Respectfully submitted,

/s/ Neil H. Koslowe
Thomas B. Wilner (D.C. Bar #173807)
Neil H. Koslowe (D.C. Bar #361792)
Kristine A. Huskey (D.C. Bar #462979)
Jared A. Goldstein (D.C. Bar #478572

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 508-8000
Facsimile: (202) 508-8100
Attorneys for Plaintiffs

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