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USA: Federal judge rules that three Bagram detainees can challenge their detention in US court

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On 2 April 2009, a US federal judge ruled that three detainees held in the US airbase in Bagram in Afghanistan can challenge the lawfulness of their detention in US District Court. The ruling is narrow and leaves numerous questions open – not least what will happen to the majority of the more than 500 detainees currently held in indefinite detention in Bagram – but it is nonetheless a positive first step towards application of the rule of law to the Bagram detention facility. The new administration – which has until now adopted its predecessor’s position on the Bagram detentions – has not yet said whether it will appeal the ruling.

Pending before Judge John Bates on the US District Court for the District of Columbia are habeas corpus petitions filed on behalf of four detainees who have been held in US custody without charge or trial in Bagram for more than six years: Haji Wazir, an Afghan national; Redha al-Najar, a Tunisian national; and Yemeni nationals Fadi al Maqaleh and Amin al Bakri. Their petitions seek to challenge the lawfulness of their detention in light of the US Supreme Court’s June 2008 ruling in *Boumediene v. Bush* that detainees held in US custody in the US Naval Base at Guantánamo Bay in Cuba have this right. The US government had sought to have the petitions of the Bagram detainees dismissed on the grounds that the District Court did not have jurisdiction to consider them.

In its *Boumediene* ruling, the Supreme Court had said that “the costs of delay can no longer be borne by those who are held in custody”, and that the detainees were entitled to a “prompt” habeas corpus hearing. This observation, Judge Bates, said “is equally powerful here”. He suggested that the Supreme Court had clearly been at least partially motivated “by the prospect of indefinite Executive detention without judicial oversight”. Applying the *Boumediene* ruling to these Bagram detentions, Judge Bates concluded that “detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time – here, over six years – without adequate process may invoke... the privilege of habeas corpus”. Judge Bates found that three of the four detainees were in that category – Redha al-Najar, Fadi al Maqaleh and Amin al Bakri. He denied the government’s motion to dismiss the habeas corpus petitions in their cases. In the case of Afghan national Haji Wazir, he delayed his decision, instead asking for further briefing from the parties by 7 May 2009.

In his 53-page opinion, Judge Bates concluded that the four men were “virtually identical” to the Guantánamo detainees considered by the US Supreme Court in its *Boumediene* ruling. Firstly, they are non-US nationals “apprehended in foreign lands far from the United States and brought to yet another country for detention”. According to the habeas corpus petitions, Haji Wazir was taken into custody in Dubai, United Arab Emirates in 2002, before being transferred to Bagram via Qatar. Amin al Bakri was seized in Thailand, abducted on 30

December 2002 as he was on the way to Bangkok airport to fly home after a short business trip in Thailand. Redha al-Najar was arrested at his home in Karachi in Pakistan in or around May 2002. Fadi al Maqaleh's habeas corpus petition alleges that he was not in Afghanistan at the time he was taken into custody in or around 2003, but the Bagram authorities have asserted that he was detained in Afghanistan (for the purposes of his decision, Judge Bates assumed the detainees' allegations of where they were captured to be true).

Secondly, Judge Bates noted, the four detainees, like their Guantánamo counterparts, had been labelled as "enemy combatants". In Guantánamo, this status was subjected to review by the Combatant Status Review Tribunal (CSRT). Judge Bates noted that in Bagram, such review was conducted by the Unlawful Enemy Combatant Review Board (UECRB), a process he said was "plainly less sophisticated and more error-prone" than even the flawed CSRT scheme. Judge Bates said that he was not determining how extensive a process would need to be to preclude these Bagram detainees from having the right to habeas corpus under the US Constitution – "it suffices to recognize that the UECRB process at Bagram falls well short of what the Supreme Court found inadequate at Guantánamo".

Thirdly, according to Judge Bates, the "objective degree of control" that the USA operates over the Bagram air base is "very high" and "not appreciably different" to that operated by the USA at Guantánamo. Amnesty International particularly welcomes the judge's finding on this question of the USA's effective control over the detainees. As the organization has repeatedly pointed out, the notion that a government can deny rights to those in places under its jurisdiction or effective control, that it would guarantee to those on its sovereign territory, would allow a government unilaterally to strip individuals of the human rights and protections due them under international law. Article 2.1 of the International Covenant on Civil and Political Rights (ICCPR) provides that the scope of this treaty's application should extend to "all individuals within its territory and subject to its jurisdiction". The International Court of Justice has found that this provision "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." The UN Human Rights Committee, overseeing implementation of the ICCPR, has similarly said that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party."¹

Finally, Judge Bates said that while the practical difficulties of providing habeas corpus in these cases might be greater than in the case of the Guantánamo detainees – because Bagram "is located in an active theater of war" – such obstacles were not as great as the government claimed and "certainly are not insurmountable". He said that technological advances – such as "real-time video-conferencing" – could provide "a workable substitute" for a detainee's in-court appearance.

Indeed, Judge Bates pointed out that in these cases any such practical barriers "are largely of the Executive's choosing" given that all four detainees claimed to have been captured outside of Afghanistan, and "the only reason" they were in "an active theater of war" is because the US government "brought them there". Judge Bates added:

"It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which [the government] correctly maintain[s] is in a theater of war. It is quite

¹ For references, see USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, 18 February 2009, <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>

another thing to apprehend people in foreign countries – far from any Afghan battlefield – and then bring them to a theater of war, where the Constitution arguably may not reach. Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene* – the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely” (emphasis in original).

However, Judge Bates then turned to an analysis that effectively focused on questions of US-Afghan relations rather than the human rights of individuals held under the exclusive control of the USA. This focus led to the prospect of Haji Wazir and other Afghan nationals in US custody in Bagram being left without effective access to any court for the foreseeable future. Judge Bates noted that in its *Boumediene* ruling, the Supreme Court had raised the possibility that granting habeas corpus jurisdiction over cases of detainees held on the sovereign territory of another country could cause “friction with the host government”. In the Guantánamo cases, however, the Supreme Court found that this was not an issue, given that “no Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there... [T]he United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.”

Judge Bates concluded that in relation to Bagram, however, “there is a real possibility of friction with the Afghan government with respect to Afghan detainees”. He continued:

“If a US court were to order the release of an Afghan detainee, the prime destination for such release would be Afghanistan – the country of that detainee’s citizenship and detention. Such unilateral releases of Bagram detainees by the United States could easily upset the delicate diplomatic balance the United States has struck with the host government... [F]or detainees who are Afghan citizens, the possibility of friction with the host country cannot be discounted and constitutes a significant practical obstacle to habeas review.”

Applying this thinking, Judge Bates concluded that in the case of Haji Wazir, his Afghan nationality – and the consequent “possibility of friction with Afghanistan” – precluded the detainee from invoking a constitutional right to challenge the lawfulness of his detention in a habeas corpus petition in US court. Judge Bates said that he was “not persuaded” by other arguments that had been put forward by lawyers for the detainees that there was any other route for Haji Wazir to obtain habeas corpus review in the US courts. However, he delayed his ruling on Haji Wazir’s case until he had heard further arguments on separate questions of US law from the parties.

As of March 2009, there were approximately 550 detainees held in Bagram, according to the International Committee of the Red Cross (ICRC), the only international organization with access to detainees in Bagram. According to the ICRC, “most of the detainees are Afghans captured by the US-led coalition in southern and eastern Afghanistan.” Given the continuing denial to Bagram detainees of any effective access to Afghan courts (courts which in any event fall well short of international standards for independence, objectivity and fairness), Judge Bates’s ruling would appear to leave those Afghan nationals whom the US military authorities decide to continue to hold, with no place to go to challenge their detention.

To deprive Afghan nationals of their right to judicial review and remedy in this way would amount to discrimination under international law. Article 2.1 of the ICCPR requires the state

party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind” including on the basis of national origin. Two of the rights recognized in the ICCPR are the right of anyone deprived of their liberty to be able to challenge the lawfulness of their detention in a court and the right to an effective remedy for violations of rights under the treaty. The UN Human Rights Committee has underlined that these two key rights are among those which cannot be diminished even in times of public emergency that threatens the life of the nation.

Judge Bates emphasized that his decision was “narrowly drawn” to the cases of the four detainees before him, part of a “limited subset” of the wider Bagram detainee population. The US government must now broaden the protections it provides for all the Bagram detainees. In the absence of the possibility in Afghanistan for detainees to challenge the lawfulness of their detention in an independent and impartial court, the USA must provide that opportunity in the US courts. All detainees must have access to legal counsel, and to be able to obtain an effective remedy for any human rights violations committed against them in detention.

For further information, see:

USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, 18 February 2009, <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>

USA: Urgent need for transparency on Bagram detentions, 6 March 2009, <http://www.amnesty.org/en/library/info/AMR51/031/2009/en>

USA: Administration opts for secrecy on Bagram detainee details, 12 March 2009, <http://www.amnesty.org/en/library/info/AMR51/034/2009/en>

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