

Murray Fogler

## RED TAPE AND FOOT DRAGGING

I volunteered in early 2005 to take on the representation of a prisoner. Through no effort of my own, he was released to his home country in December 2007. So I took on another case after that.

I have not been directly involved in the grand issues that have reached our Supreme Court. My two cases would hardly merit separate mention. But the government's behavior preceding my two trips to GTMO may help illustrate the petty ways it has interfered in the collective ability of the habeas lawyers to represent their clients.

### The Next Friend Catch-22

My first client, Salim Adem (ISN 710), a Sudanese national, was arrested in Pakistan at his home. His name was one of several listed in a letter written by another prisoner named Bisher Al-Rawi, an English-speaker who was represented by Brent Mickum. Brent had apparently asked his client to find out if other prisoners wanted representation.

Because there was no evidence of Adem's desire for a lawyer other than the Al-Rawi letter, I filed a habeas petition for him, listing Al-Rawi as his next friend. After the typical delay for security clearance, my co-counsel (Rachel Clingman of Fulbright & Jaworksi) and I began making plans to visit our client. We were astonished to learn that the government would not approve our visit. It said we had no proof that Adem wanted us to be his lawyers.

Of course, the only way we could get the requisite proof was to visit Adem at GTMO. The existing protective order specifically provided that a lawyer got two visits to secure written authorization of representation. The government took the position, however, that some initial proof of authority was required before we could visit.

We filed a motion to compel the visit. Like all procedural matters, it ended up before Magistrate Judge Kay. He set a hearing, but instead of acting as a judge, he attempted to “mediate” our dispute. The government had no interest in compromise. We re-urged our motion. After a few more weeks, Judge Kay issued a lengthy opinion, granting our motion, ordering the government to let us go.

With Kay’s order in hand, we made plans for our trip. But the government was not ready to give up. It appealed Kay’s order to the district court and refused to process our request. We delayed our trip again, but requested permission to travel on May 1, 2006, leaving on a Monday morning. The Friday before our flight, Judge Richard Roberts, affirmed Kay’s order, writing a strong opinion of his own. Our clearance papers were faxed at eight p.m. that Friday night.

Thanks to the government’s red tape and foot dragging, it had taken us over eight months to get permission to see our client. When we finally saw him, he had changed his mind. He no longer wanted a lawyer. He was bitter and stubborn and would not give us written authorization to permit us to represent.

Unbeknownst to us, his ARB had months earlier recommended his release. We did not know that when we saw him. Though we were frustrated in our efforts to represent Adem, at least he made it home.

### The Interpreter Flap

My second client is Bashir Ghalaab (ISN 175), an Algerian, also arrested in Pakistan. Another prisoner, Sami Al-Hajj, listed Bashier as someone who wanted a lawyer in a form Al-Hajj gave to his own lawyer.

This time, I got no guff from the government about needing proof of authority to represent Bashir, at least as far as arranging a trip to visit him. (At this point, I could only file a DTA

petition, as the *Boumedienne* decision had not come down from the Supreme Court, so the government would not let me see any classified information about him.) I had seen on the listserv that Clive Stafford Smith would be in GTMO around Memorial Day 2008 with Felice Bezri, one of the most experienced Arabic interpreters, so I made plans to be there at the same time so as to share Felice.

Clive's plans changed, so I began communicating with Felice directly to arrange his trip. A week before we were scheduled to leave, the listserv was abuzz with news that another long-time Arabic interpreter, Ashraf Michael, had his clearance revoked by the government. I began peppering the DOJ lawyers with questions about Felice's clearance, asking why we had received our clearances. Two days before the Memorial Day holiday weekend, I was advised that Felice was no longer cleared to go to GTMO. No reason was given. Ashraf and Felice had each been to GTMO over 100 times.

Scrambling, I received a recommendation to try Amjad Tarsin, a law student at Michigan, who had interpreted for several counsel in GTMO. Amazingly, he was willing on short notice to go with me. I submitted his information to the DOJ lawyers, but after a couple of days no clearances had come. The day before we were to leave for GTMO, the government revoked Amjad's clearance, too. Still no reason given. I thought my trip was sunk.

Not expecting any positive result, I reached out to one more interpreter, Masud Husnain. He had just returned from GTMO the previous day. Would he be willing to drop everything and leave the next morning for GTMO, subject to getting clearances? Yes! But he doubted the DOJ could process the clearance papers in the two or three hours we had before the close of business.

I will give some credit to the Court Security Office and Andrew Warden of the DOJ here. They busted their tail to process the papers to get clearance for me and Masud to travel. The clearances were emailed to me just before I left for the airport for GTMO.

Masud met me in the Fort Lauderdale airport, smiling, as I came to know, he always does. We had a very satisfying trip to GTMO. My client Bashir was elated to see me. He talked at full speed throughout the interview day. He wants me to represent him.

The point of this narrative is to illustrate that it was not simply the big-picture roadblocks that the government has used to jam the legal process. Everyone knows the government's position on right to counsel in general for the GTMO prisoners, on habeas rights, etc. But in numerous small ways, too, the government has made life difficult for habeas counsel. My experiences, as related here, are not dramatic, nor are they unique. They were just part of the government's overall plan to delay any court review of the prisoners' detention.

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