

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ, ET AL,

Petitioner,

vs.

CA No. 05-1506
Washington, DC
Thursday September 3, 2009
2:05 p.m.

~~(SECRET)~~

BARACK OBAMA, ET AL.,

Respondent

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROSEMARY M. COLLYER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner: SCOTT S. BARKER, Esquire
Holland & Hart LLP
555 17th Street Suite 3200
Denver, CO 80202

For the Respondent: JOHN LOHRER, ESQUIRE
DANIEL BARISH, Esquire
U.S. Department of Justice
20 Massachusetts Ave., NW
Washington, DC 20350

Court Reporter: Crystal M. Pilgrim, RPR
Official Court Reporter
U.S. Courthouse, Room 4704
333 Constitution Avenue, NW
Washington, DC 20001

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

COPY

1 THE DEPUTY CLERK: Civil action 05-1506 Shafiq et al
2 versus Barack Obama et al. Scott Barker for the plaintiff.
3 John Lohrer and Daniel Barish for the defense.

4 THE COURT: Good afternoon everybody.

5 We're here because I have spent a lot of time trying
6 to figure out this record and come to some conclusions on what
7 to do with the petition for habeas relief that's in front of
8 me.

9 The first thing I want to do is to identify the
10 petitioner. The caption says Shafiq something, that's not his
11 actual name. His counsel identify him as Sufyian Barhoumi,
12 S-u-f-y-i-a-n, capital B-a-r-h-o-u-m-i and call him
13 Mr. Barhoumi. But when he appeared before the administrative
14 review board in January of 2008, he agreed that his name was
15 Barhoumi Sufyian and they referred to him as Mr. Sufyian.

16 Now, I don't know that there's any confusion as to the
17 actual person we're talking about, but it seems to me that it
18 would be a good place to start if I had his name right.

19 Could counsel just come forward and tell me what his name
20 really is.

21 MR. BARKER: Well, Your Honor, we -- Scott Barker on
22 behalf of the petitioner. We do believe that his name is
23 Sufyian Barhoumi also identified by his ISN number which is
24 694.

25 THE COURT: That's the way to do it 694, but it's so

1 impersonal.

2 MR. BARKER: It is impersonal, Your Honor, but that's
3 the answer to your question.

4 THE COURT: Thank you very much, sir. All right,
5 Mr. Barhoumi is an Algerian held by the United States at
6 Guantanamo Bay. He petitions for writ of habeas corpus to
7 obtain his release.

8 The United States argues that he is the terrorist
9 identified as Ubaydah who went to [REDACTED] safe house where
10 Abu Zubaydah was living to train other terrorists to build
11 explosive devices and that he is legally detained.

12 The petitioner seeks further discovery, but at the same
13 time both sides have filed cross motions from judgment on the
14 record.

15 The President was authorized to use force in Afghanistan
16 by the authorization of military force which was Public Law
17 107-04 adopted in 2001 after the events of 911, '01. It states
18 that the President is authorized to use all necessary and
19 appropriate force against those nations, organizations or
20 persons he determines planned, authorized, committed or aided
21 the terrorist attacks that occurred on September 11, 2001 or
22 harbored such organizations or persons in order to prevent any
23 future acts of international terrorism against the United
24 States by such nations, organizations or persons.

25 And the government has proposed a description of its

1 detention authority as the President has the authority to
2 detain persons that the President determines planned,
3 authorized, committed or aided the terrorist attacks that
4 occurred on September 11, 2001 and persons who harbored those
5 responsible for those attacks.

6 The President also has the authority to detain persons who
7 were part of or substantially supported, Taliban or al Qaida
8 forces or associated forces that are engaged in hostilities
9 against the United States or its coalition partners, including
10 any person who has committed a belligerent act or has directly
11 supported hostilities in aid of such enemy armed forces.

12 In light of those authorities and proclaimed authority,
13 the government says that it has the right to hold Mr. Barhoumi.
14 It bears the burden; that is, the government bears the burden
15 of proving by a preponderance of the evidence that the
16 petitioner's detention is lawful.

17 Because these Guantanamo proceedings are unique and
18 difficult, I have decided to receive and consider all of the
19 evidence offered by both sides, but have assessed it item by
20 item for consistency; the conditions in which the statements
21 were made and the documents found. The personal knowledge of
22 the declarant and the levels of hearsay. I have given the
23 evidence the weight I think it deserves.

24 Now in terms of findings of fact, some facts come straight
25 from Mr. Barhoumi's own statements questioned at Guantanamo

1 Bay. [REDACTED]
2 [REDACTED] Additional facts come from [REDACTED]
3 [REDACTED] And those are the sources from which
4 the Court draws its conclusions. The petitioner has sought
5 more discovery as to the background of statements provided by
6 ISN 1458, that's Benny Mohammed and -- hold on, and the second
7 person who provided a statement of some kind.

8 The Court while taking those statements into evidence has
9 not given them a whole lot of weight because statements by
10 Mr. Barhoumi himself and statements from the other [REDACTED] that
11 I referenced are sufficient for the Court to make its
12 determinations and specifically in summary.

13 Although the dates are not entirely consistent, the travel
14 pattern is. And the travel pattern of Mr. Barhoumi as he
15 describes it, [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 And so the Court finds that by the preponderance of the
23 evidence, the government has shown that Mr. Barhoumi can be
24 detained and that his petition should be denied.

25 More specifically, in March of '99 Mr. Barhoumi traveled

1 with a false passport and airline ticket from Great Britain to
2 Karachi, Pakistan then to Peshawar, Pakistan then finally to
3 Jalalabad, Pakistan. Mr. Barhoumi agreed with these facts at
4 his ARB.

5 In 1999 he trained at camp between Jalalabad and Kabul.
6 He went to Afghanistan, so he says, and I don't have any reason
7 to doubt him, to train to go to Chechnya to defend Muslims in
8 that country. This was after all 1999.

9 While practicing mine diffusion, that is the removal of
10 buried mines, Mr. Barhoumi lost four fingers. In the
11 September, October, 1999 to March 2000 time period he trained
12 at the Khalden camp, K-h-a-l-d-e-n, in Khowst, Afghanistan,
13 K-h-o-w-s-t.

14 In March of 2000, he stayed at guest houses in Kabul and
15 Kandahar. In June of 2000, he again returned to a guesthouse
16 in Kabul. In November of 2000, he was at a guesthouse in
17 Kabul. In the winter of 2000 he went to a camp in Khowst. Now
18 it was -- he was asked if he didn't go to that camp to train
19 others? And he responded at his 2008 ARB, I went there to
20 receive training, not to be a trainer.

21 But that tells us that he was if not training others,
22 being trained in warfare in the winter of 2000. From June to
23 September of 2001, he reports that he was in guesthouses in
24 Kabul, Kandahar and Jalalabad.

25 And then as he says when the fighting started, it was a

1 mess. He went from house to house. In other words, he moved
2 around regularly to remain, in my opinion, hidden. He then
3 says that he traveled to Pakistan quote, "where everyone was
4 taken to a different spot", close quote, with the help of the
5 Pakistanis.

6 We know what happened was that [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

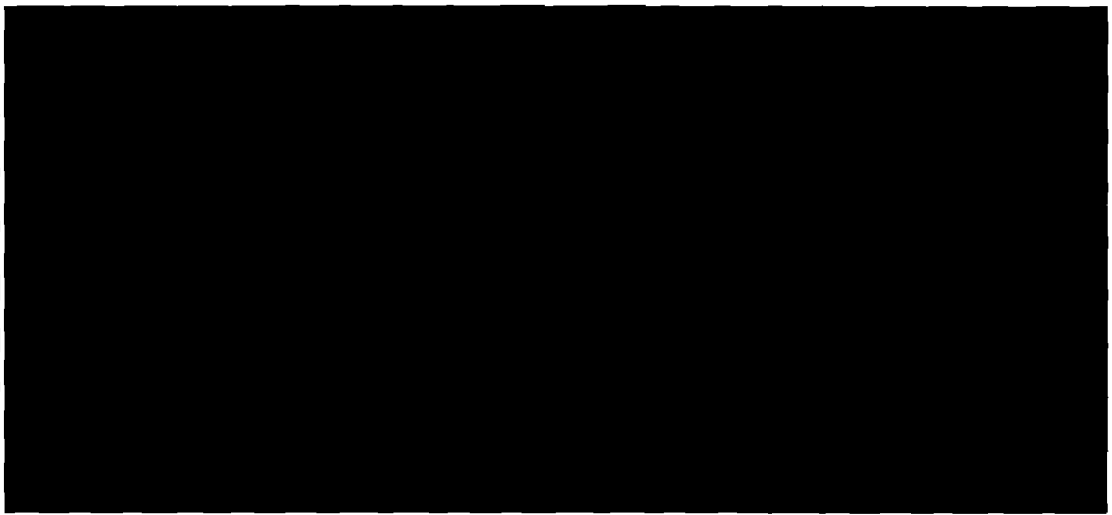
16 Now Mr. Barhoumi says that he left through the mountains
17 and went into Waziristan, Pakistan. Waziristan when you look
18 at it on a map is near Tora Bora. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Now to go to a few other things. It's on January 4th,
23 that, well, let me back up. It was on [REDACTED]

24 [REDACTED]
25 [REDACTED]

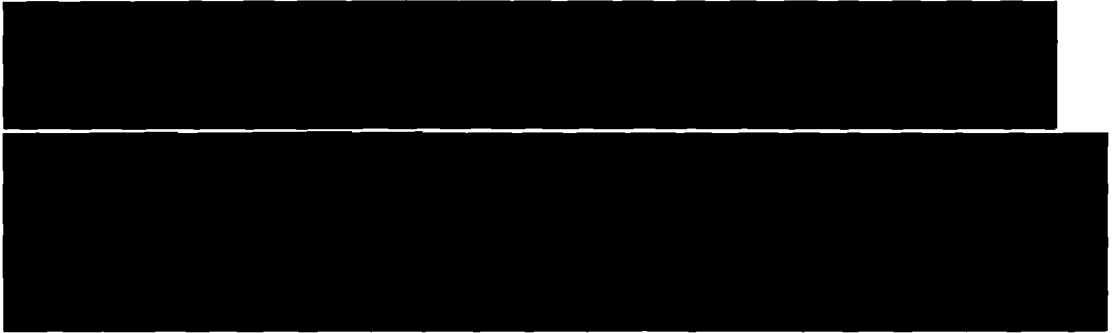
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



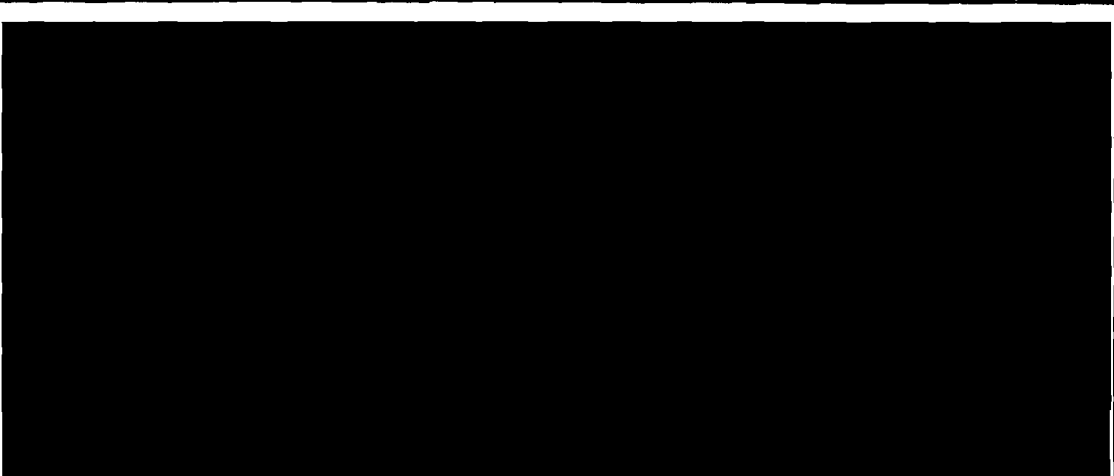
Mr. Barhoumi says that he left the mountains and went to Waziristan. Then in December of 2001 he was in Lahore, Pakistan. Then he went to Faisalabad where he was for about ten days and he was arrested, except he wasn't arrested until March 28th. So there's a huge gap of time. I think he did those things, but I don't think he did them when he says he did them.



A few days later he decided to leave when he felt danger and he realized that Afghanistan is finished.




1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



Excuse me everybody just a second. Since I can't use my normal typewriters, computer screens and everything, I have to do this very strangely.

(Pause.)

THE COURT: All right, thereafter after the 



And then 



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And these

[REDACTED]

[REDACTED] that Mr. Barhoumi is in Lahore by his own admission.

[REDACTED]

Now we know from Respondent's Exhibit 8 which is an interrogation of Mr. Barhoumi ISN 694, that he was known as Zubaydah when he stayed at safe houses. We know that he went to camp at Khowst and we know that he either trained or was training.

We know that he traveled to Waziristan. He says in the fall of 2001 and there would be no reason for him to go in the fall of 2001. He would have gone after the fighting started which is what he said which was later in the year.

In December, 2001 an unidentified person he says took him to Lahore and he went by the name Ubaydah at those

1 guesthouses as well. Then in February, 2002 he says he
2 traveled to Faisalabad and was there for ten days as I
3 mentioned before. That is exactly the route, it's just the
4 timing that's at issue here.

5 Now Mr. Barhoumi says that he is not now and never has
6 been a member of al Qaida. I have no reason not to believe
7 that.

8
9
10
11
12
13
14

15 From this the Court concludes that Mr. Barhoumi went to
16 Afghanistan for one purpose, morphed into a different purpose,
17 became a fighter against U.S. forces, fled Afghanistan only
18 when absolutely there was no way to do anything other than
19 that, went through the various asundry safe houses all over
20 Pakistan, then ended up in Faisalabad

21
22
23
24
25

They were in Lahore at that time. I'm sorry, they
were in Faisalabad. where he had been
in the interim between Lahore and Faisalabad, I don't know, but
and that's just about right timing for him

1 to be ten days in the house before he was arrested there.

2 I don't know what decision I would make were I on the
3 task force as to whether it is necessary to hold Mr. Barhoumi
4 any further for the safety of the United States. That's not my
5 authority or question. I don't think my ruling here should
6 effect that review or that determination.

7 My ruling is that Mr. Barhoumi was an affiliate, let's see
8 what the terminology actually is. That he was with an
9 associated force that was engaged in hostilities against the
10 United States or its coalition partners and therefore was
11 properly detained, which is the question that I need to answer.

12 As a result, the petitioner's petition for the writ of
13 habeas corpus will be denied. The government's motion for
14 judgment on the record will be granted. The discovery motion,
15 I think I've discussed already. All right, thank you
16 everybody.

17 MR. BARISH: Thank you.

18 THE COURT: And thank you Mr. Barker for all your
19 work. You have done credit to the United States of America,
20 sir.

21 MR. BARKER: Thank you, ma'am. I thank you for your
22 courtesies and the attention and diligence that you provided my
23 client, appreciate that.

24 THE COURT: Thank you, sir. Congratulations to you
25 too.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Certificate

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.


Crystal M. Pilgrim, RPR

9/8/09
Date