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USA: Right to an effective remedy – Administration should release Guantánamo Uighurs into the USA now

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We express no opinion on whether the Executive Branch may ignore the immigration laws and release petitioners into the United States without the consent of Congress.

US Court of Appeals, *Kiyemba v. Obama*, 18 February 2009

On 18 February 2009, a US federal appeals court overturned a lower court ruling issued four months earlier ordering the release into the USA of 17 Uighurs held without charge at the US Naval Base in Guantánamo Bay, Cuba. The 17 men have been held in the base for more than seven years, with most of them cleared for release since 2003.

On 8 October 2008, Judge Ricardo Urbina of the District Court for the District of Columbia (DC) had ruled that the detention of the Uighurs was unlawful as “the Constitution prohibits indefinite detention without just cause”. The Bush administration had conceded that the Uighurs were not “enemy combatants” (even under its own definition of the concept), and had accepted that they could not be returned to their native China because they would face a serious risk of torture or execution there. However, it had been unable to find a country willing to accept them in more than four years of trying.

Noting that the USA’s “extensive diplomatic efforts” to find a third country solution had come to nothing, that the government was unable to point to any security risk posed by the Uighurs, and that there were individuals and organizations in the USA ready and willing to provide the Uighurs the support they would need after their release, Judge Urbina ordered that they be freed into the USA. However, keeping released Guantánamo detainees off the US mainland had emerged as one of the policy priorities of the previous administration in its final months, after the US Supreme Court ruled in June 2008 that the detainees had the constitutional right to challenge the lawfulness of their detentions in US District Court. The Bush administration duly appealed Judge Urbina’s order to the Court of Appeals for the DC Circuit.

In its decision on 18 February 2009, the Court of Appeals said that for more than a century, the US Supreme Court has, “without exception, sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms”. Under such precedent, the Court of Appeals said, “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien”. In the case of the 17 Uighurs, it continued, “the Executive Branch has determined not to allow them to enter the United States”. The question, then, was which law had “expressly authorized” Judge Urbina to set

aside this executive decision and order the Uighurs to be released into the USA. The Court of appeals found no such law.

It noted that Judge Urbina had invoked the principle “where there is a right, there is a remedy”. However, the Court of Appeals asserted that “we do not believe the maxim reflects federal statutory or constitutional law. Not every violation of a right yields a remedy, even when the right is constitutional”. It added that “whatever the force of this maxim, it cannot overcome established law that an alien who seeks admission to this country may not do so under any claim of right”.

Judge Urbina’s order to release the Uighurs into the USA, the Court of Appeals said, could not be justified on the grounds that he had habeas corpus jurisdiction: “Whatever the content of common law habeas corpus, we are certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy”. The Court of Appeals said that it had no reason to doubt that the government was continuing diplomatic efforts to find third country solutions, “nor do we have the power to require anything more”.

Whatever the rights and wrongs of the ruling under US law, the outcome perpetuates a “monstrous absurdity”, and the executive branch must now act to bring this shameful state of affairs to an end.¹ The 17 Uighurs are unlawfully held by the USA. At various times between 2003 and 2008, the Bush administration decided that each of them was not an “enemy combatant” and could be released. Having seized them in Pakistan and Afghanistan and flown them half way around the world, however, it could find no other country to take them. It presumably told the 100 countries it said it asked to do so that the men posed no security risk. It provided Judge Urbina with no evidence that the Uighurs would pose such a risk if released into the USA. Yet, for political reasons, the Bush administration refused to countenance the release of the Uighurs into the USA. The new administration must make a clear and decisive break from this indefensible stance.

Amnesty International has for weeks been urging the administration of President Barack Obama to release the Uighurs into the USA.² The organization regrets that after a month in office, the new administration has not yet taken this step.

These 17 men have been subjected to arbitrary and indefinite detention for years. Arbitrary detention is absolutely prohibited under international human rights law. The notion of arbitrariness, in accordance with the UN Human Rights Committee’s “constant jurisprudence”, is “not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law”. Detainee access to a court to challenge the lawfulness of detention and to be ordered released if that detention is deemed unlawful is a basic requirement of international human rights law and specifically required by article 9(4) of the International Covenant on Civil and Political

¹ USA: Indefinite detention by litigation: ‘Monstrous absurdity’ continues as Uighurs remain in Guantánamo, 12 November 2008, <http://www.amnesty.org/en/library/info/AMR51/136/2008/en>.

² See Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/013/2009/en>. And also USA: The promise of real change. President Obama’s executive orders on detentions and interrogations, 30 January 2009, <http://www.amnesty.org/en/library/info/AMR51/015/2009/en>.

Rights. At the same time, under international human rights law no-one may be denied effective remedy for violations of their human rights.

Immediately releasing the Uighur detainees into the USA would end the ongoing gross violation of their human rights entailed by their continued unlawful and indefinite detention even after the order for their release. This would not preclude the US authorities from continuing their diplomatic efforts to find a third country solution, but the current absence of that solution must not be used any longer as an excuse to deny these men the remedy they have sought and are owed – and were granted by Judge Ricardo Urbina.

In a footnote, the Court of Appeals said that it was expressing “no opinion on whether the Executive Branch may ignore the immigration laws and release petitioners into the United States without the consent of Congress.” Certainly under international law, neither a country’s domestic laws nor its structure of government may be invoked as justification for failure to comply with international legal obligations. All three branches must work – whether in collaboration or independently – to ensure full respect for international law at all times. The new administration can act to provide these men with the remedy that its predecessor denied them.

President Obama has ordered his administration to close the Guantánamo detention facility “as soon as practicable” by resolving the cases of all the detainees there. Too much time has already been spent by officials stressing the complexity of closing the facility. Here are 17 cases – seven per cent of the Guantánamo detainee population – that can be immediately resolved.

The administration should bring the Uighur detainees into the USA, and work to find lawful, fair, safe and lasting solutions in all their cases. To do so would have the added benefit of showing other governments, whose assistance the USA has sought and will again seek in resolving the Guantánamo detainee issue, that the USA is prepared to play its part in bringing an end to the Guantánamo detentions in a lawful manner, and “as soon as practicable”, as President Obama has ordered.

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See also:

USA: Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo, 7 October 2008, <http://www.amnesty.org/en/library/info/AMR51/110/2008/en>.

USA: Federal judge orders release of Uighurs held at Guantánamo, government appeals, 8 October 2008, <http://www.amnesty.org/en/library/info/AMR51/111/2008/en>.

USA: US Court of Appeals blocks release of Guantánamo Uighurs as government resorts to ‘scare tactics’, 10 October 2008, <http://www.amnesty.org/en/library/info/AMR51/113/2008/en>.

USA: Indefinite detention by litigation: ‘Monstrous absurdity’ continues as Uighurs remain in Guantánamo, 12 November 2008, <http://www.amnesty.org/en/library/info/AMR51/136/2008/en>.

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