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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAHMOAD ABDAH, et al.,

Petitioners,

v.

BARACK H. OBAMA, et al,

Respondents.

Civil Action No. 04-1254 (HHK)

MEMORANDUM OPINION

Uthman Abdul Rahim Mohammed Uthman (ISN 27), a Yemeni citizen, was seized by Pakistani authorities in October 2001 and has been held by the United States at the naval base detention facility in Guantanamo Bay, Cuba since January 2002. Uthman contends he is unlawfully detained and has accordingly filed a petition for a writ of habeas corpus. Respondents in this case, President Barack H. Obama and other high-level officials in the United States Government, argue that Uthman is lawfully detained and should remain in U.S. custody. Both parties have filed cross-motions for judgment on the record and appeared before this Court for hearings on those motions on January 27 and 28 and February 1, 2, and 3, 2010. Upon consideration of the motions and oral presentations of the parties as well as the record of this case, the Court concludes that respondents have not demonstrated that the detention of Petitioner Uthman is justified. Therefore, Uthman's petition shall be granted.

I. LEGAL STANDARDS

A. Scope of the Government's Detention Authority

The Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat.

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224 (2001), provides that the President may “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.” Pub. L. 107-40, § 2(a), 115 Stat. at 224. Although the U.S. Supreme Court has held that the District Court for the District of Columbia has jurisdiction over petitions for writs of habeas corpus brought by detainees held at Guantanamo Bay pursuant to the AUMF, *see Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008); *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004), it has provided “scant guidance” as to whom respondents may lawfully detain under the statute, *Al-Bihani v. Obama*, 590 F.3d 866, 870 (D.C. Cir. 2010) (noting that the Supreme Court has “consciously le[ft] the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion” (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004) (plurality opinion of O’Connor, J.); *Boumediene*, 128 S. Ct. at 2276)).

In the absence of controlling law on this matter, the Court shall rely on the reasoning of other Judges of this Court who have thoroughly and thoughtfully addressed the question of by what standard to evaluate the lawfulness of the detention of the individuals held at Guantanamo Bay. Accordingly, as Judge Bates ruled in *Hamli v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009), the government may detain “those who are ‘part of’ the ‘Taliban or al Qaida forces,’” *id.* at 69-70,¹ and as Judge Walton ruled in *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009), “[t]he

¹ “It is not in dispute that Al Qaeda is the organization responsible for September 11,” *Al-Bihani*, 590 F.3d at 873, and is therefore among the entities to which the AUMF refers.

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key question is whether an individual 'receive[s] and execute[s] orders' from the enemy force's combat apparatus," *id.* at 69 (alterations in original).²

B. Burden of Proof

As stated in the Amended Case Management Order that governs this case, "[t]he government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful." *In re Guantanamo Bay Litig.*, Misc. No. 08-442, CMO § II.A (Nov. 6, 2008). Accordingly, Uthman need not prove that he is unlawfully detained; rather, respondents must produce "evidence which as a whole shows that the fact sought to be proved," that Uthman was part of Al Qaeda, "is more probable than not." *United States v. Mathis*, 216 F.3d 18, 28 (D.C. Cir. 2000) (quoting *United States v. Montague*, 40 F.3d 1251, 1255 & n.2 (D.C. Cir. 1994)); *see also Al-Bihani*, 590 F.3d at 878 (rejecting Guantanamo Bay detainee's argument that use of the preponderance of the evidence standard in his habeas case was unconstitutional). If respondents fail to meet this burden, the Court must grant Uthman's petition and order his release.

C. Evidentiary Issues

The Court notes at the outset two issues regarding the evidence in this case.

First, as explained in an order entered in this case on August 26, 2009 [#606], the Court has permitted the admission of hearsay evidence but considers at this merits stage the accuracy, reliability, and credibility of all of the evidence presented to support the parties' arguments. This approach is consistent with a directive from the D.C. Circuit. *See Al Bihani*, 590 F.3d at 879

² There are, of course, unresolved questions about the scope of the government's detention authority, but this case does not require the Court to address any of them.

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("[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits."). The Court's assessment of the weight properly accorded to particular pieces of evidence appears throughout this memorandum opinion.

Second, the nature of the evidence before the Court is atypical of evidence usually presented in federal actions. Respondents have offered a variety of types of documents produced and used by government intelligence agencies that are not the direct statements of the individuals whose personal knowledge they reflect. Several of the crucial pieces of evidence in this case are Form 40s ("FM40s"), Intelligence Information Reports ("IIRs"), Summary Interrogation Reports ("SIRs"), Field Documents ("FD-302s"), and Telegraphic Disseminations ("TDs"). FM40s are records of investigation activities, here witness interviews, conducted by the Criminal Investigation Task Force ("CITF"), a federal law enforcement agency. The FM40s before the Court are summaries of interrogations of detainees; each is the interrogator's formal transcription of her notes rather than a verbatim account of the detainee's statements. IIRs are Department of Defense documents for recording human intelligence.³ SIRs are summaries of interrogations conducted under the auspices of the Department of Defense; an SIR differs from an IIR, which might contain the same substantive information, because an SIR also includes details about the circumstances of the interrogation session itself. FD-302s are forms completed by FBI agents summarizing interviews. TDs are CIA reports containing human intelligence. The Court also heard from one live witness, a CITF investigator, whose testimony is described below.

³ Human intelligence, or HUMINT, is "information derived from a person(s)." Joint Exhibit 1 at 1.


II. ANALYSIS

The parties agree about some basic facts. Petitioner Uthman, who has been designated ISN 27, is from Aden, Yemen. He attended the Furqan Institute, a religious high school, in Taiz, Yemen from approximately 1996 to 1999. He was approximately twenty years old in December 2001 when he was seized by Pakistani authorities in or near Parachinar, Pakistan. He has been held in U.S. custody in Guantanamo Bay, Cuba since January 2002.

Uthman's activities between his schooling and seizure are in dispute and are the focus of this case. In sum, respondents argue that Uthman traveled to Afghanistan to join Al Qaeda, and once there, he trained to be a fighter, fought against forces seeking to overturn the Taliban's regime, and became a bodyguard for Usama bin Laden. Uthman contends that he went to Afghanistan to teach the Quran to children and was not part of Al Qaeda.

At the Court's request, the parties identified five contested issues of fact before the merits hearing commenced and structured their presentations to address each issue in turn during that hearing. This opinion similarly addresses each issue in turn, and it then considers the reliable evidence as a whole to explain the Court's conclusion that respondents have failed to demonstrate by a preponderance of the evidence that Uthman was part of Al Qaeda.

A. Issue One: Whether Uthman Served as a Bodyguard For or Was Part of the Security Detail of Usama Bin Laden

Respondents' primary argument in this case is that Uthman acted as a bodyguard for Usama bin Laden. The evidence they present in support of this contention fails to convince the Court that it is more likely than not that Uthman was a bodyguard.

1. Statements of Hajj (ISN 1457) and Kazimi (ISN 1453)

Respondents' most important pieces of evidence regarding this issue are FM40s reporting

statements of two other detainees currently held at Guantanamo Bay. In light of the abusive circumstances of the detention of these men and serious questions about the accuracy of their identifications of Uthman, the Court finds these statements to be unreliable and will not consider them in evaluating whether the detention of Uthman is lawful.

The statements are quite damning on their faces. Sharqwi Abdu Ali Al-Hajj, identified as ISN 1457, is a member of Al Qaeda often called, among other aliases, Riyadh the Facilitator. Respondents presented evidence, in an FM40, that Hajj identified a photograph of Uthman as "Hudaifa al Adani," a name respondents contend Uthman used as an alias, and stated that Uthman "became a bodyguard for [Usama bin Laden] a couple of months prior to the September 11, 2001 attacks." Joint Exhibit ("JE") 29 at 4. Hajj also stated that in traveling within Afghanistan just after September 11, 2001, he encountered "Hudaifa al Adani," one of several Usama bin Laden guards, at a particular location near a meeting Usama bin Laden attended. JE 70 at 5.⁴

Sanad Yislam Ali Al Kazimi, ISN 1453, is also a member of Al Qaeda. An FM40 summarizing an interrogation of Kazimi indicates that he stated that a picture of Uthman "looks like Hudaifa Al Yemeni" and stated that "he heard" Uthman became a bodyguard for Usama bin Laden. JE 28 at 5.

i. Torture

The Court will not rely on the statements of Hajj or Kazimi because there is un rebutted evidence in the record that, at the time of the interrogations at which they made the statements,

⁴ The relevant FM40 is split into two parts: JE 29 is the first part and JE 70 is the second.

both men had recently been tortured.

a. Evidence of torture

Uthman has submitted to the Court a declaration of Kristin B. Wilhelm, an attorney who represents Hajj, summarizing Hajj's description to her of his treatment while in custody. The declaration states that while held in Jordan, Hajj "was regularly beaten and threatened with electrocution and molestation," and he eventually "manufactured facts" and confessed to his interrogators' allegations "in order to make the torture stop." JE 142 at 2. After transfer to a secret CIA-run prison in Kabul, Afghanistan, Hajj was reportedly "kept in complete darkness and was subject to continuous loud music." *Id.* at 3.

Uthman has also submitted a declaration of Martha Rayner, a Professor at Fordham University Law School who represents Kazimi, regarding Kazimi's description of his treatment in detention. Rayner reports that while Kazimi was held in the United Arab Emirates, his interrogators beat him; held him naked and shackled in a dark, cold cell; dropped him into cold water while his hands and legs were bound; and sexually abused him. Kazimi told Rayner that eventually "[h]e made up his mind to say 'Yes' to anything the interrogators said to avoid further torture." JE 145 ¶ 13. According to Rayner's declaration, Kazimi was relocated to a prison run by the CIA where he was always in darkness and where he was hooded, given injections, beaten, hit with electric cables, suspended from above, made to be naked, and subjected to continuous loud music. Kazimi reported trying to kill himself on three occasions. He told Rayner that he realized "he could mitigate the torture by telling the interrogators what they wanted to hear." *Id.* ¶ 34. Next, Kazimi was moved to a U.S. detention facility in Bagram, Afghanistan, where, he told Rayner, he was isolated, shackled, "psychologically tortured and traumatized by guards'

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desecration of the Koran” and interrogated “day and night, and very frequently.” *Id.* ¶ 37.

Kazimi told Rayner “[h]e tried very hard to tell the interrogators at Bagram what he had been forced to tell the interrogators in the [United Arab Emirates] and the Dark Prison [run by the CIA], so they would not hurt him.” *Id.* ¶ 42.

b. Failure to rebut

Respondents replied to these declarations by presenting as a witness Special Agent Marin Larson, a criminal investigator for the Naval Criminal Investigative Service who worked for CITF from October 2003 to March 2005, but her testimony fails to effectively rebut the evidence of abuse of Hajj and Kazimi. Larson conducted interviews of Hajj and Kazimi in June 2004 at the Air Force Base in Bagram, Afghanistan at which both men were then held, as well as later that year in Guantanamo Bay. The FM40s that report each man’s identification of a photograph of Uthman as Hudaifa, an Usama bin Laden bodyguard, are her summaries of the Bagram interviews. *See* JE 28 at 1; JE 29 at 1.⁵ Her testimony added to the record persuasive evidence that Larson herself did not mistreat Hajj or Kazimi and that she did not observe any torture, or even any signs of abuse in the demeanor or physical state of either man, while she was with them. But Larson has no knowledge of the circumstances of either detainee’s confinement before his arrival at Bagram and quite limited knowledge of his treatment there. She testified that she met with each man in an interrogation room on several days for approximately four hours at a time. She did not see Hajj or Kazimi other than during those four-hour sessions and she did not inquire of them, or anyone else, as to their treatment in the various prisons in which

⁵ The FM40s resulting from the interviews of Hajj and Kazimi that Larson conducted at Guantanamo Bay after those men were transferred there are part of the record before the Court, but they do not contain any information about, or possibly about, Uthman.

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they were held.

Respondents also ask the Court to disregard Wilhelm and Raynor's declarations because they are not direct, sworn statements of the detainees themselves.⁶ The Court shall not do so. As noted above, the nature of these proceedings is unique, and the Court is forced to rely on evidence that would normally not be accorded weight in the legal system. Respondents themselves ask the Court to detain Uthman on the basis of hearsay. Without a reason to doubt the veracity of the declarations, the Court cannot ignore them.

c. Legal analysis

Uthman asserts that the proximity in time between the torture Hajj and Kamizi described and their interrogations by Larson, however cordial, renders their statements unreliable. In general, "resort to coercive tactics by an interrogator renders the information less likely to be true." *Mohammed v. Obama*, 2009 WL 4884194, at *23 (D.D.C. Dec. 16, 2009) (citing *Linkletter v. Walker*, 381 U.S. 618, 638 (1965)). To determine admissibility in analogous situations criminal cases, courts assess the voluntariness of statements made after the application of coercive techniques based on a totality of the circumstances test. *Id.* (citing *United States v. Karake*, 443 F. Supp. 2d 8, 87 (D.D.C. 2006)); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances."). Judges of this Court have adopted this test in the cases of other Guantanamo Bay detainees seeking release. *See, e.g.*,

⁶ In addition, respondents object to the unauthenticated statements regarding abuse that appear in a third document containing evidence of torture, which Uthman presents as the translation of a letter written by Hajj. *See* JE 144. Because there is other, unrebutted evidence of torture in the record, the Court need not resolve the question of whether to take this exhibit into consideration.



Mohammed, 2009 WL 4884194, at *23; *Anam v. Obama*, — F. Supp. 2d —, 2010 WL 58965, at *4 (D.D.C. Jan. 6, 2010). The test calls for considering, *inter alia*, “the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators.” *Mohammed*, 2009 WL 4884194, at *23 (quoting *Oregon v. Elstad*, 470 U.S. 298,

Respondents do not argue that the alleged torture of Hajj and Kazimi is sufficiently attenuated from the interviews at which they gave the relevant statements to support a conclusion that despite the coercion, the statements are nonetheless reliable.⁷ The interviews on which the relevant FM40s are based occurred in Bagram, where torture of Hajj was ongoing and where Kazimi had arrived directly from the CIA prison, at which he was tortured, only about a month earlier. See JE 145 ¶ 36 (stating that ISN 1453 was transported to Bagram “on or around May 16, 2004”); JE 28 at 1 (noting June 14, 2004 as the “date of investigative activity”). Therefore, the Court concludes that there has been no “break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before.” *Clewis v. Texas*, 386 U.S. 707, 710 (1967). Accordingly, the Court will not treat Hajj and Kazimi’s statements as true.

ii. Reliability of identification

Furthermore, there are serious questions as to whether Hajj and Kazimi’s statements, even if considered outside the context of the coercion that limits their value, constitute significant

⁷ Respondents do offer reasons the statements appear to be reliable. Specifically, they refer to (1) Special Agent Larson’s testimony that she believed Hajj and Kazimi were truthful in response to her questions and (2) Kazimi’s statement in an interview with Larson at Guantanamo Bay in November 2004 that he was unfairly accused of more charges than other detainees because he had been truthful with interrogators. GE 8 at 2. But these indicia of reliability do not outweigh the reasons to infer, based on the coercive circumstances so close in time to the interrogation, that they are unreliable.

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evidence that Uthman was a part of Al Qaeda. Specifically, the assertions that “Hudaifa” was a bodyguard for Usama bin Laden are only relevant if “Hudaifa” is an alias for Uthman.

According to the Defense Intelligence Agency, members of Al Qaeda use aliases, often referred to as kunyas, to “conceal[] the individual’s identity” and “as a security, denial and deception measure.” JE 2 (Decl. of Rafael Sanchez-Carrasquillo) at 2. Therefore, it would not be surprising that, were Uthman a former bodyguard for Usama bin Laden, he had an alias by which Al Qaeda fighters knew him. But respondents have not demonstrated a link between Uthman and the name “Hudaifa.”⁸

The only evidence respondents offer to corroborate their contention that Uthman used Hudaifa as an alias appears in a TD, dated December 15, 2001, which the Court is bound to disregard. In this report, Uthman’s name appears in what is apparently a list—the other names that presumably appear are redacted—of Al Qaeda members from Yemen “believed to be in Afghanistan.” JE 64 at 2, 4. The entry reads: “Uthman Abd Al-Rahim Muhammad Uthman, AKA Huthayfa Al-Adani variant Hudayfah Al-Adani.” *Id.* at 4 (extraneous punctuation omitted).⁹

Whatever probative value this evidence might have were Uthman able to test its

⁸ “Hudaifa al Adani,” the name Hajj used when shown the photograph of Uthman, means Hudaifa from Aden. JE 2 at 7. “Hudaifa Al Yemeni,” the name in the FM40 of Kazimi’s interview, means Hudaifa from Yemen. *Id.* at 12. Because Uthman is from Aden, which is in Yemen, these descriptors are appropriate to him, but they do not alone constitute an identification. Many people, including many suspected or admitted Al Qaeda members about whom there is evidence in the record currently before the Court, are from Aden, Yemen.

⁹ In this and several other intelligence reports quoted in this opinion, the text appears in all capital letters. For ease of reading, the Court reproduces the quoted text in lowercase.

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credibility, because of the insufficient information about the source of the report, the Court will not consider it. The D.C. Circuit has made clear that hearsay evidence “must be presented in a form, or with sufficient additional information, that permits [the factfinder] to assess its reliability.” *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008). Here, the document contains limited information about its source; after “Source:” the TD reads “A Yemeni Government,” and what follows is redacted. JE 64 at 2. Therefore, the Court does not have “knowledge as to the circumstances under which the source obtained the information.” *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008) (concluding that “the information in the classified intelligence report[] relating to the credibility and reliability of the source . . . is *not* sufficient for the purposes for which a habeas court must now evaluate it” where “the Court has no knowledge as to the circumstances under which the source obtained the information” on which respondents rely); *see also Anam*, 2010 WL 58965, at *8 (declining to rely on an intelligence report of which “[t]he source (or sources) . . . is unknown” and another that “lacks any indicia of reliability”). Because the Court cannot evaluate whether the information in document is credible, it will not rely on it.

Moreover, it is not clear that the name by which Kazimi referred to the photograph of Uthman was consistent with an identification of Uthman. Respondents produced a copy of the photograph Larson showed to Kazimi during her interview with him; on the back of that photo, Kazimi wrote a line of text in Arabic. GE 2. At some point after the interview, someone wrote a translation of that line in English just beneath it, which reads: “He is Arab, and Looks Like Huthaifa Al-Anzi.” *Id.* Uthman obtained a declaration of a professional translator who stated that the line of Arabic reads: “Shafai Adani looks like Khuthaifa Al Anzi.” PE 4 (Declaration of

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Masud Hasnain).¹⁰ Whatever the significance of the inconsistencies in translations on Kazimi's intended meaning and the accuracy of Larson's recording of Kazimi's statements, both English versions of the text indicate that Kazimi wrote "Al Anzi." Al Anzi, according to an undisputed definition from Wikipedia, "is an ancient and prolific Arab tribe, originating in the Hadhramaut region of Yemen." PE 5. There is no evidence in the record that Uthman has any connection to this tribe or has used an alias that includes this reference. The Court therefore cannot conclude that Kazimi recognized Uthman from the photograph or was talking about Uthman when he said Hudaifa Al Anzi was a bodyguard for Usama bin Laden.¹¹

2. Other evidence

i. Statement of Bukhari (ISN 493)

Respondents offer as additional evidence that Uthman was a bodyguard for Usama bin Laden another statement, this one recorded in an SIR resulting from an interrogation of Abd Al Hakim Abd Al Karim Amin Bukhari, ISN 493. Bukhari stated that Uthman "was a member of the Usama bin Laden . . . security detail." JE 77 at 2.

The Court finds this evidence unpersuasive for two reasons. First, it is not clear that Bukhari's statement is based on personal knowledge. Bukhari stated in testimony before the Combatant Status Review Tribunal that he was only in Afghanistan for ten days after the

¹⁰ Respondents have not rebutted this alternative translation.

¹¹ Uthman places great weight on the statement in the FM40 of Kazimi's interrogation that the photograph "looks like Hudaifa." JE 28 at 5. He reasons that the assertion that an individual "looks like" a particular person falls short of being an identification. Although this language certainly does not assist respondents in making their case, it is not clear to the Court whether it compromises the identification. In any event, because the Court will not consider the statement as weighing against Uthman's petition for the reasons explained above, resolution of this issue is unnecessary.

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September 11 attacks and that before then, he had been in Saudi Arabia. JE 149 at 8. If this information is correct, Bukhari could not have observed Uthman acting as a bodyguard in Afghanistan before September 11. In reply to this logic, respondents point to an IIR containing intelligence the Department of Defense received from Bukhari; Bukhari described a speech Usama bin Laden gave in Kandahar, Afghanistan “approximately three months before 9/11.” JE 150 at 1. Respondents infer that Bukhari’s presence at this speech means he and Uthman were in Kandahar at the same time. Even accepting that inference as true, there is no evidence in the record that the two men were at the same speech, in the same building, or ever even saw each other in Kandahar.¹² Without more information as to how Bukhari came to believe that Uthman was part of Usama bin Laden’s security detail, the Court cannot evaluate the credibility of the statement and therefore cannot rely on it. *See Boumediene*, 579 F. Supp. 2d at 197; *Anam*, 2010 WL 58965, at *8.

Furthermore, Bukhari has psychological problems that diminish substantially the weight the Court will give to his statements. While in U.S. custody, Bukhari “became psychotic” and even attempted suicide, apparently as a result of his detention and interrogations, and a psychologist who studied Bukhari’s records concluded that his “mental condition was such as to render unreliable reports to authorities that he may have made about other detainees.” JE 152

¹² It is clear, however, that Uthman and Bukhari had both been detained at Guantanamo Bay for several years by April 5, 2007, the date on which Bukhari provided the information contained in the SIR on which respondents rely, *see* JE 77 at 1; JE 152 at 1 (noting that Bukhari first sought treatment from Guantanamo’s Behavioral Health Care Services in October 2002), so—although the Court draws no conclusions from this possibility—Bukhari could have encountered or heard about Uthman there.

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(Letter of Dr. Daryl Matthews) at 3.¹³ Because of the serious doubt this information creates about the credibility of Bukhari's statements, for this reason, too, the Court will not rely on his incrimination of Uthman.

ii. Opportunity to become a bodyguard

Respondents have presented a variety of other statements to support the proposition that Uthman had the necessary contacts to become a bodyguard for Usama bin Laden. Specifically, they point to evidence that Uthman was friendly with, and/or attended the Furqan Institute in Taiz at approximately the same time as, other men now detained at Guantanamo Bay who have admitted to or are accused of being members of Al Qaeda. *See, e.g.*, JE 31 at 1 (reporting that ISN 31 stated that he attended the Furqan Institute); GE 3 at 1 (reporting that ISN 31 stated that he is "very proud of being an [Usama bin Laden] bodyguard"); JE 11 at 1 (reporting that Uthman stated he traveled from Afghanistan to Pakistan with, *inter alia*, ISN [REDACTED]). These contacts are relevant, respondents assert, because according to Hajj, "those who were bodyguards would try to get people they knew, or people who were from their hometown, to be bodyguards," JE 29 at 4, so one of these men may have recommended Uthman.

This evidence, even if accepted as true, does not demonstrate that Uthman was a bodyguard for Usama bin Laden. It might assist in corroborating or explaining other evidence of

¹³ Respondents have presented to the Court the report of a different psychiatrist who concluded that Bukhari "did not have a psychiatric condition that would impact his ability to recall or convey past events." GE 4 (Report of Dr. Argelio Lopez-Roca) at 4. The report also stated, however, that Bukhari's "unstable personality style" and "malingered psychiatric symptoms" made him "more likely" than a member of the general population "to be dishonest in the future," although no more likely to lie than a member of the "incarcerated population, in which personality disorders and manipulative behaviors are much more frequent." *Id.* This information does not call into meaningful dispute the reasons to be wary of relying on Bukhari's statements.

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such a fact were there indications in the record from reliable sources supporting the proposition. But, as explained, there are not. The ability to become a bodyguard is simply not proof, even under the preponderance of the evidence standard, that Uthman actually took the opportunity. In sum, because respondents have not presented evidence on which the Court can rely to demonstrate that, more likely than not, Uthman was a bodyguard for Usama bin Laden, the Court cannot find that Uthman is lawfully detained on that basis.

B. Issue Two: Whether Uthman's Seizure Near the Site of the Battle of Tora Bora is Incriminatory

By his own admission, Uthman was seized¹⁴ on December 15, 2001 in or near¹⁵ Parachinar, Pakistan. JE 10 at 3; JE 13 at 2-3. Uthman was with a group of approximately thirty other men, a few of whom he knew from Yemen. JE 10 at 3; JE 13 at 2. He may have been led from Afghanistan to the Pakistani border by Afghani guides. JE 13 at 2.

Respondents argue that these circumstances—in particular, Uthman's location and the identities of some of his fellow travelers—are evidence of his affiliation with Al Qaeda. Respondents question why Uthman would choose to stay in Afghanistan after September 11, 2001 if he were not involved in Al Qaeda. They assert that Uthman's proximity at the time of his

¹⁴ Although respondents contend that Uthman was captured, Uthman asserts he was taken into custody upon approaching Pakistani police to ask to be brought to a Yemeni embassy. JE 10 at 3 (reporting that Uthman asserted he turned himself in to Pakistani authorities); JE 13 at 2 (reporting that Uthman stated he "told the police that he wanted to go to the Yemeni embassy"). The Court will not attempt to resolve this issue because it has no bearing on the outcome of this case.

¹⁵ The exact location is not clear from the record. Respondents seem to assume that Uthman was in the city of Parachinar, but some evidence suggests he was somewhere at the border of Afghanistan and Pakistan in the vicinity of Parachinar. *See, e.g.*, JE 16 at 2 (reporting statement of another detainee who was seized with Uthman that the men were taken into Pakistani custody at a town at the border).

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capture to the site of an ongoing battle and a known location of Usama bin Laden, a cave complex called Tora Bora¹⁶ strongly suggests he was coming from the complex.¹⁷ Additionally, at least some of the men with whom Uthman traveled—in particular, the ones he knew—were admitted, or at least alleged, Al Qaeda members, some of whom were likely coming from Tora Bora. *See* JE 10 at 3 (noting that Uthman said he left Afghanistan with men respondents identify as ISNs [REDACTED] and [REDACTED]; JE 13 at 2 (same); JE 93 at 9 (reporting that ISN [REDACTED] admitted to accompanying Usama bin Laden to Tora Bora); JE 29 at 4, 5 (reporting that Hajj stated that ISN 31 was an Usama bin Laden bodyguard who went to Tora Bora in late 2001 and that ISN 32 attended an Al Qaeda training camp).

Uthman rejoins first that respondents have presented no direct evidence that Uthman was at Tora Bora. Second, he argues that insofar as respondents have identified circumstantial evidence suggesting that he was present at the battle there, the inferences necessary to so conclude assume the truth of the allegation that Uthman was a bodyguard for Usama bin Laden. Third, despite reiterating that the burden is on respondents to prove their case rather than for Uthman to prove anything, he argues that the information from other detainees is consistent with

¹⁶ Parachinar is approximately twelve miles from Tora Bora. *See* JE 90 at 1.

¹⁷ After the September 11 attacks, Al Qaeda fighters went to Tora Bora, which is in eastern Afghanistan, “to make a last stand in their fight against the United States and its allies.” JE 63 (Decl. of Joseph Conway) at 1-2. Tora Bora was the target of air strikes, the “most intense” of which occurred from December 10 through 17, 2001. *Id.* at 2. As the battle went on, many fighters escaped the cave complex; “[i]n some cases, local Afghan guides helped Arab fighters out of Tora Bora and into Pakistan.” *Id.* at 3. The Defense Intelligence Agency reports that “approximately 300 current or former Guantanamo Bay detainees participated in the fighting at Tora Bora” and that “[m]any detainees successfully fled to Pakistan after the battle, only to be captured by Pakistani authorities and turned over to the U.S.” *Id.* In addition, because the call for fighters to join Usama bin Laden at Tora Bora was “widely known,” “few, if any noncombatants would have been in the vicinity during this time.” *Id.* at 4.

[REDACTED]

Uthman's assertion that he was in Khost, Afghanistan, rather than Tora Bora, before departing for Pakistan.¹⁸ For example, according to an FD-302, ISN [REDACTED] stated that he followed an Afghan guide to Khost—a city south of the mountains in which the Tora Bora cave complex is located and south of Parachinar, *see* JE 90—to begin the trip to Pakistan and met other travelers on the way to the border. JE 16 at 1. Another FD-302 reports that ISN [REDACTED] stated that he met a guide outside of Khost to go to Pakistan and met other travelers, including Uthman, there. JE 17 at 3.

The Court accepts respondents' evidence, which is largely based on and consistent with Uthman's own admissions, as true and will consider it in evaluating whether the evidence as a whole supports the continued detention of Uthman.

C. Issue Three: Whether Uthman Fought on the Front Lines and was Present at an Al Qaeda/Taliban Guesthouse in Kabul, Afghanistan

Respondents argue in further support of their contention that Uthman was part of Al Qaeda that (1) he fought with Al Qaeda members alongside the Taliban in Kabul, Afghanistan against forces trying to overturn the Taliban regime in that country and (2) he stayed at an Al Qaeda guesthouse in Kabul. As evidence of their first allegation, respondents point to a statement by Kazimi during an interview with Larson at Bagram that Uthman "was in Kabul on the front line." JE 28 at 5. An IIR also reports—perhaps based on Larson's interview—that Kazimi identified a picture of Uthman as "Hudayfah [Al-Adani]," who Kazimi "believe[d] was fighting on the front lines." JE 43 at 3. Another IIR reports that a different detainee, ISN 199, identified a photograph of Uthman as "Yasser Al-Madani (Yemeni)" and indicated that he was at

¹⁸ According to Uthman, after September 11, he went to the village of the man who was his translator while he was a tutor, located outside the city of Khost, to escape the bombing of Kabul. JE 103 (Decl. of Uthman) ¶ 12.

[REDACTED]

the "Omar Seif position," a location on the front lines, in Kabul. JE 44 at 2. Regarding the second allegation, respondents note that the IIR of which Kazimi is the source indicates that Kazimi stated he "last saw" Hodayfah at a guesthouse in Kabul in "early 2001." JE 43 at 3. In addition, an FD-302 indicates that Al Qaeda member [REDACTED] ISN [REDACTED] stated upon seeing a photograph of Uthman that "he saw this individual in Kabul at the Saudi Embassy House." JE 24 at 2.¹⁹ Respondents assert based on statements of other detainees that "Saudi Embassy House" refers to an Al Qaeda guesthouse, also known as the Azam guesthouse, that was once the home of a Saudi ambassador. *See* JE 67 at 4 (noting that Hajj told an interrogator that a guesthouse in Kabul "was located in the former Saudi Arabian ambassador's residence in Kabul" and "may have been called the Azzam Guesthouse"); JE 69 at 3 (reporting that another detainee stated that the Azam Guesthouse "had been the house of the Saudi ambassador"); JE 6 (Decl. of Dennis Joyner) at 2 (listing the Azam Guesthouse as one of several Al Qaeda guesthouses of which the Defense Intelligence Agency is aware in Kabul).

Uthman attacks each piece of evidence. As to Kazimi's statements, Uthman argues they are tainted by torture and therefore unreliable. He also argues that Kazimi does not explain how he came to "believe[]" Uthman was on the front lines, JE 43 at 3, rendering the information unreliable, and that Uthman asserts he was not in Kabul until March 2001, JE 10 at 2, which is inconsistent with Kazimi's having seen him there in "early" 2001, JE 43 at 3. As to the statement of ISN 199, Uthman argues the use of the name "Yasser" as well as "al-Madani,"

¹⁹ A copy of the photograph of Uthman that was apparently presented to Hamdan is also in the record. *See* JE 158. Someone, evidently the person who conducted Hamdan's interview, made a handwritten note just below the picture, which reads "Kabul Guest House Saudi Ambassador [sic]." *Id.* at 5.

[REDACTED]

which refers to someone from Medina, Saudi Arabia, demonstrate that the identification is inaccurate. Regarding Hamdan's statement, Uthman asserts that respondents' inference that "Saudi Embassy House" refers to an Al Qaeda guesthouse is unjustified.

The Court agrees with Uthman as to most of this evidence. As explained above, the Court cannot appropriately rely on the information of which Kazimi is the source, primarily because Kazimi's statements are not sufficiently attenuated from torture, of which there are un rebutted allegations in the record, by other interrogators. ISN 199's reference to "Yasser al-Madani" calls into serious question his identification of Uthman. Even assuming at respondents' suggestion that "al-Madani" is an erroneous transcription of "al-Adani," respondents have identified no indication anywhere in the record that Uthman used "Yasser" as an alias. Because there is so little reason to believe Uthman was a fighter in Kabul, the Court will not conclude it is more likely than not that this allegation is true.

Hamdan's statement, however, should not be entirely disregarded. Although it is not unquestionable proof that Uthman was present in an Al Qaeda guesthouse, it does provide some support for that contention.

D. Issue Four: Whether Uthman Attended an Al Qaeda Training Camp and Was Present at an Al Qaeda Guesthouse in Kandahar, Afghanistan

Respondents also contend that Uthman took part in Al Qaeda-sponsored activities in Kandahar, Afghanistan before going to Kabul, which, respondents reason, is consistent with and reinforcing of the proposition that Uthman was a bodyguard for Usama bin Laden.²⁰ Specifically,

²⁰ The Court notes that respondents also argue that the undisputed fact that Uthman did not have his passport when he was taken into Pakistani custody lends support to their assertion that he stayed at Al Qaeda guesthouses. They point to information from the Defense Intelligence Agency that taking the passports of visitors was standard practice at guesthouses in

[REDACTED]

they assert that he attended a training camp for Al Qaeda fighters and, as in Kabul, stayed at an Al Qaeda guesthouse. Respondents base their training camp allegation largely on an IIR reporting the contents of a “document issued by the Office of Mujahideen Affairs” that, according to the IIR, “lists over 150 Al-Qaeda members scheduled for tactics, artillery, security, snipers and anti-aircraft training.” JE 51 at 2.²¹ The name “Abu Huthayfah Al-‘Adani” appears in a list of individuals who were to attend a tactics class on March 24, 2001.²² *Id.* at 7.

Uthman makes three arguments regarding the training roster. First, he argues that respondents have not shown that Hudaifa is a kunya Uthman used. Second, even had they so demonstrated, Uthman asserts that the inclusion of “Abu” in the name on the list distinguishes it from the name by which Kazimi and Hajj referred to the photograph of Uthman. Abu means “father of,” so the name immediately following it is normally the name of a man’s first-born child, not his own name. JE 2 at 2. Uthman reasons that even if a man with no children uses Abu in his kunya to conceal his identity, the name following Abu would not be the same name he uses to identify himself in another kunya. Third, he points to references in the record of this case to two other men who used the alias Abu Hudaifa. *See* JE 154 at 1 (listing as an alias for a suspected terrorist wanted by the FBI, Fahd Al-Quso, “Abu Huthaifah Al-Adani” and similar

part because doing so “gave . . . guesthouse administrators greater control over the trainees during training, as it prevented trainees from easily leaving with administrator knowledge or approval.” JE 6 at 3. Although respondents are correct that this information is consistent with a conclusion that Uthman stayed at an Al Qaeda guesthouse, it is not independent evidence of that theory.

²¹ The list “was recovered by U.S. Coalition Forces from an Al-Qaeda house in Kandahar.” JE 51 at 3.

²² The document uses the Islamic Calendar, but the parties agree the relevant date corresponds to this day on the Gregorian Calendar.

[REDACTED]

variants); JE 23 at 2 (noting that a detainee made reference during an interrogation to an individual called "[REDACTED]" who was a person of authority at a training camp).

The Court concludes that this evidence, although not necessarily unreliable, is not persuasive as to the contention respondents seek to support. As discussed above, there is no reliable evidence linking Uthman to the name Hudaifa. Therefore, the appearance of that name on the training list, especially without corroboration from any other source that Uthman might have been at a training camp, does not make it more likely than not that Uthman attended the tactics course. That Abu Hudaifa was an alias for other men, whether or not the particular men identified were likely to have attended this particular training, further weakens the proposition that the list itself can support respondents' allegation.

As to the guesthouse allegation, an SIR of an interrogation of Richard Dean Belmar, ISN 817, indicates that when shown a picture of Uthman, Belmar stated that he "may have been a lower amir," or leader, "in the Kandahar guest house." JE 36 at 2.²³ Respondents contend Belmar was referring to the al-Ansar Guesthouse, which the Defense Intelligence Agency indicates is also called the Kandahar Guesthouse and "had strong connections to al-Qaida." JE 6 at 2.²⁴

²³ To explain this allegation that Uthman was not just a guest at, but a lower leader of, a guesthouse, respondents infer that Uthman likely traveled to Afghanistan before 2001, when he asserts he arrived, JE 103 ¶¶ 6-8, such that he was able to train, fight in Kabul, rise to a position of some prominence at a guesthouse, and serve as a bodyguard during that year.

²⁴ Respondents also point to statements reportedly made by Kazimi and Hajj that, respectively, describe a Kandahar guesthouse and connect Uthman to Kandahar and another alleged Al Qaeda member there. See JE 43 at 3; JE 29 at 4. Because, as explained, the statements of these men are unreliable and because this information is too indirectly related to Uthman's activities to be probative of participation in Al Qaeda, the Court will not consider these statements in evaluating the merits of this fourth issue.

[REDACTED]

Again, Uthman attacks all of respondents' evidence. Uthman discounts the recollection of Belmar, who (1) was not Arab, (2) indicated by saying the photo "may have been" of an amir that he was unsure of his statement, and (3) was not in Kandahar at the same time as Uthman. See PE 7 at 3 (summarizing Belmar's statements before the Combatant Status Review Board in November 2004, including an admission that he "traveled from the United Kingdom to Kandahar, Afghanistan around July 2001"); JE 10 at 2 (reporting that Uthman asserted he left Yemen for Afghanistan in March 2001 and about a week after arriving in Kandahar went to Kabul).

The allegation that Uthman was an amir at an Al Qaeda guesthouse is not as easily dismissed as the training camp allegation. Because Belmar's statement is not a definitive identification, it is not strong evidence of Uthman's presence at such a guesthouse. But it is not so unreliable that the Court disregards it entirely.

E. Issue Five: Whether Uthman's Prior Associations, Travel Route to Afghanistan, and Other Circumstances Further Support that He Was Part of Al Qaeda.

Respondents present a variety of additional evidence and arguments to support their case, and Uthman responds to each point. First, respondents allege that Uthman went to school in Yemen with men who joined Al Qaeda. See, e.g., JE 65 at 3 (reporting in a TD that ISN 37 stated he was recruited to travel to Afghanistan by a teacher from the Furqan Institute and noting that the interrogator believed "[t]he Furqan Institute was something of a meeting and recruiting ground for jihadists in Yemen"); JE 21 at 3 (noting in an FD-302 of an interrogation of ISN [REDACTED] that the detainee stated he "first learned of jihad in Afghanistan at the Furqan Institute"). Uthman argues that giving weight to the undisputed fact that he attended a particular school in Yemen some alumni of which became involved in terrorism constitutes inappropriately

[REDACTED]

permitting respondents to prove guilt by association.

Respondents also allege that Uthman received money for his trip to Afghanistan from Sheik Moqbil Al Wadi, an individual who encouraged jihad. *See* JE 30 (reporting that Uthman stated Al Wadi gave him one thousand dollars to fund his trip to Afghanistan); JE 21 at 4 (reporting that ISN [REDACTED] stated [REDACTED] told him that “it was a good thing for Muslims to go fight jihad”). Uthman contests, by pointing to statements by other detainees regarding [REDACTED] aversion to violence, that [REDACTED] promoted terrorism. *See, e.g.*, JE 19 at 1 (noting in an FD-302 of ISN [REDACTED] that ISN [REDACTED] found it “unbelievable that [REDACTED] has ties to Al Qaeda or other extremist groups”).

Respondents also attach significance to the fact that Uthman traveled from Yemen to Afghanistan along a route—a flight from Yemen to Karachi, Pakistan; a stay at a hotel in Karachi; a bus from Karachi to Quetta, Pakistan; a ride to Kandahar, Afghanistan—that Al Qaeda members also took. *See* JE 103 ¶¶ 6-7 (recounting Uthman’s trip); GE 7 at 1 (citing to interrogation reports of other alleged Al Qaeda members who described similar travel routes). Uthman asserts that travel to Afghanistan, which did not have a functioning international airport in 2001, required an indirect route, and proceeding on the same path as Al Qaeda members is not evidence of participation in Al Qaeda.

Uthman has not disputed the factual accuracy of most of these contentions,²⁵ instead

²⁵ The exception is respondents’ allegation that Al Wadi promoted terrorism. There is conflicting evidence in the record as to this point. Because even if the allegation is true, the Court concludes that Uthman’s detention is not justified, the Court will assume that respondents have met their burden of proof as to this fact rather than attempting to resolve the question.

[REDACTED]


arguing that they are not sufficient to demonstrate that he is lawfully detained.²⁶ The Court therefore accepts each of respondents' allegations as true and discusses their significance below.

G. Conclusion

In sum, the Court gives credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip to Afghanistan from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there.

Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. Although this information is consistent with the proposition that Uthman was a part of Al Qaeda, it is not proof of that allegation. As explained, the record does not contain reliable evidence that Uthman was a bodyguard for Usama bin Laden or fought for Al Qaeda. Certainly none of the facts respondents have demonstrated are true are direct evidence of fighting or otherwise "receiv[ing] and

²⁶ Respondents also argue that Uthman now offers an implausible alternative account of his activities in Afghanistan. The Court has considered the version of events Uthman describes and notes that some aspects of the story he tells are less than entirely believable. In particular, Uthman asserts he taught children in Afghanistan, but he does not know Pashtu, the primary language spoken in that country. But Uthman offers two explanations of this questionable detail: because the Arabic spoken in Yemen is "considered to be the closest to the classical language of the Quran," "knowledge of Yemeni Arabic is a bona fide job skill in the educational sector in . . . Afghanistan," JE 114 ¶ 16(f), and Uthman "depended on [a man who served as a translator for him] for communication," JE 103 ¶ 10. Overall, Uthman's account is not so incredible as to lead the Court, in weighing all the evidence before it, to conclude the respondents have met their ultimate burden of showing by a preponderance of the evidence that Uthman was part of Al Qaeda.

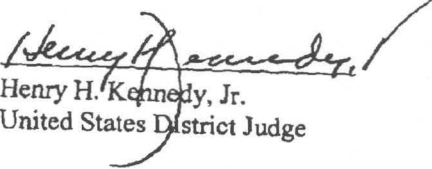

execut[ing] orders, *Gherebi*, 609 F. Supp. 2d at 69,²⁷ and they also do not, even together, paint an incriminating enough picture to demonstrate that the inferences respondents ask the Court to make are more likely accurate than not. Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections, are not alone enough to demonstrate that, more likely than not, Uthman was part of Al Qaeda. See *Ahmed v. Obama*, 613 F. Supp. 2d 51, 63-64 (D.D.C. 2009) (granting the habeas petition of a Guantanamo Bay detainee where the evidence that remained after excluding unreliable evidence amounted to “essentially a charge of guilt by association”).

Respondents have presented some evidence that, at first blush, is quite incriminating of Uthman and supportive of the position that he is lawfully detained. Upon close examination of that evidence, however, the Court finds that there is reason not to credit some of it at all and reason to conclude that what remains is not nearly as probative of respondents’ position as they assert. Therefore, the evidence against Uthman is not sufficient to carry respondents’ burden.

²⁷ The Court notes that the D.C. Circuit has suggested that evidence that a detainee “visited Al Qaeda guesthouses . . . would seem to overwhelmingly, if not definitively, justify the government’s detention” of that individual. *Al-Bihani*, 590 F.3d at 873 n.2. But this statement is dicta, and it appears in an opinion reviewing a case in which respondents presented significantly stronger evidence supporting the detention of the individual in question than they have here—including that the detainee had “accompanied and served a paramilitary group allied with the Taliban . . . which fought on the front lines against the Northern Alliance,” *id.* at 869—and noting explicitly that the Circuit Court did not rely on evidence regarding guesthouses in affirming denial of the petition, *id.* at 873 n.2. Furthermore, respondents have not argued that Uthman’s detention is justified based solely on his having been seen at Al Qaeda guesthouses. In addition, there is evidence in the record, albeit not specific to Al Qaeda guesthouses, that “[t]he fact that a young Yemeni stays at ‘guest houses’ while in . . . Afghanistan does not itself imply anything menacing or illicit” because it is common for such a man traveling abroad to seek economical, safe accommodations. JE 114 (Decl. of Dr. Sheila Carapico) ¶ 15. Moreover, there is no evidence before the Court that Uthman did anything more incriminatory than appear at Al Qaeda guesthouses. For these reasons, the Court sees no basis for detaining Uthman on the minimally incriminating facts before it.

III. CONCLUSION

For the foregoing reasons, Uthman's petition for a writ of habeas corpus shall be granted.
An appropriate order accompanies this memorandum opinion.


Henry H. Kennedy, Jr.
United States District Judge