Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

In the
United States Court of Appeals
for the
District of Columbia Circuit

JAMAL KIYEMBA, ET AL.,

Petitioners-Appellees,

v.

BARACK H. OBAMA, ET AL.,

Respondents-Appellants.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PETITIONERS' MOTION TO GOVERN AND FOR REMAND

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Pursuant to Fed. R. App. P. 27, Circuit Rule 41(b), and the Court's Internal Operating Procedure VIII.E, Petitioners move for an order governing the Court's review of this matter on remand, and for remand to the District Court.

The Court decided this appeal on February 18, 2009. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). Petitioners filed a petition for a writ of *certiorari* in the Supreme Court of the United States on April 3, 2009, which was granted on October 20, 2009, 558 U.S. __ (2009). In early February 2010, the parties reported to the Supreme Court that two Petitioners had received an offer of resettlement in Switzerland.[1] Two days after Petitioners Arkin Mahmud and Bahtiyar Mahnut received the Swiss offer, the Executive suggested in its merits briefing that the Supreme Court dismiss the *certiorari* petition as improvidently granted because after the petition was filed the other five incarcerated Petitioners had received offers of resettlement, which were later withdrawn, from the Republic of Palau and a second unidentified country.

The Supreme Court declined to accept the suggestion, which would have left *Kiyemba* to stand as precedent, and on March 1, 2010 instead vacated *Kiyemba*. Noting a "change in the underlying facts [that] may affect the legal issues presented," the Supreme Court remanded the case here, directing that this Court "determine, in the first instance, what further proceedings in [this] court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Id.*

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[1] No date of transfer has been announced, and Petitioners Arkin Mahmud and Bahtiyar Mahnut remain imprisoned at Guantánamo.

In order fully and promptly to dispose of this case "in light of the new developments," this Court should remand it to the District Court, with instructions to make an appropriate evidentiary record of those developments, including the facts and circumstances surrounding the options, if any, currently available to the Petitioners for release other than from the court house. Based upon its factual findings, that court should grant relief consistent with *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229, 2271 (2008) (district court has power to "enter appropriate orders for relief, including, if necessary an order directing the prisoner's release").

As grounds for this motion, Petitioners say:

A. Remand To The District Court Is Appropriate.

1. The Supreme Court's *per curiam* opinion notes that changed circumstances are the grounds for its dismissal of *certiorari* and vacatur of *Kiyemba*. A record must be made of what exactly those circumstances are.

2. All of the developments at issue occurred after the petition for *certiorari* was filed, and thus by definition there could be no developed record. Currently, there is no record to speak of, other than short letters submitted to the Supreme Court by counsel. Those letters do not contain, among other things, the terms of the Palau offer or the meaning of the "temporary relocation" contemplated thereby.

3. Today there is no factual record at all concerning the identity of the second country, the terms of its offer, whether a binding offer was ever actually made, and if so, what became of it. There is no record as to when, if ever, two

Petitioners will actually be released in Switzerland. Accordingly a factual record is necessary before any court could determine whether an order directing the prisoners' release is "necessary." *Boumediene*, 128 S. Ct. at 2271.

4. There is also no record of whether there is any current alternative form of release available to five petitioners. If the Executive's position is that they have consigned themselves to life imprisonment, such a dramatic position ought at least to have the benefit of a fully developed record, and briefing addressing those specific facts. This Court is not institutionally suited or equipped to such engage in fact finding in the first instance. *See, e.g., Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. . . . [I]t should not simply have made factual findings on its own."); *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006) (remanding to district court to allow both parties to develop complete record where parties agreed that question presented by case had changed).

5. Accordingly, a prompt remand should be made to the District Court. *See* 28 U.S.C. § 2106. At hearing on remand, the District Court could determine the facts surrounding purported offers of resettlement abroad. Finding an appropriate, real, and immediate resettlement option, the court might not need to order U.S. release. What ever the finding below, the court would have power to enter such order "as law and justice require." 28 U.S.C. § 2243. At all events, the court would be bound to follow *Boumediene*'s holding and give effective relief.

128 S. Ct. at 2269 ("the writ must be effective").

B. It Would Be Inappropriate To Reinstate *Kiyemba*.

6. As we and various *amici* argued to the Supreme Court, we respectfully submit that *Kiyemba* was wrongly decided because it violates *Boumediene*'s holding, Article III and the Suspension Clause. Nevertheless, separate and apart from these arguments, in light of the Supreme Court's directive it would be a mistake to reinstate *Kiyemba* without appropriate factual inquiry, on the theory that factual developments concerning the development of alternatives, or of potential alternatives, are immaterial.

7. This Court should not treat lightly the fact that the Supreme Court made a point of vacating *Kiyemba*, even after all parties agreed the case is not moot and not appropriate for *vacatur* under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The Supreme Court was invited to dismiss its review of the petition as improvidently granted—a mechanism that would have left *Kiyemba* in place as precedent. It did not do so.

8. The stated grounds for the Supreme Court's action were new facts, which, as it said, "*may* affect the legal issues presented." The new facts quite obviously must be developed. For example, there is no information in the record that would allow this or any other court to discern the conditions placed upon the purported offers of resettlement, when and why they were later withdrawn, or why they did not lead to release.

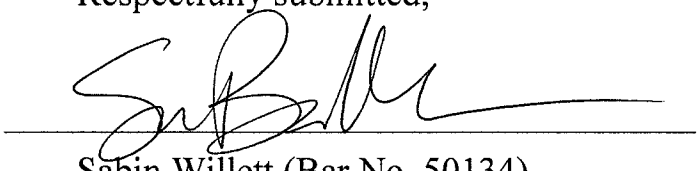
9. The Supreme Court's remand and *vacatur* leave open the possibility that the case may become moot or be decided in the District Court on narrower

grounds than those presented by the original *Kiyemba* appeal. Either outcome would avoid the necessity of deciding a difficult constitutional question, and is therefore favored.

WHEREFORE, for the purpose of governing further proceedings in this appeal, this Court should order that the matter be remanded to the District Court, with instructions that it promptly develop the factual record, and issue such orders as are necessary to make the writ effective, including, if necessary, entry of appropriate orders for relief, and that the Petitioners be granted such other and further relief as law and justice require.

March 4, 2010

Respectfully submitted,



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