

M.K.B. v. Warden

On Nov. 4, 2003, the Supreme Court ordered Solicitor General Theodore Olson, on behalf of the Justice Department, to file a reply brief responding to the *habeas corpus* petition of Mohamed Kamel Bellahouel, an Algerian who was detained in Florida by the federal government following the terrorist attacks of Sept. 11, 2001 in *M.K.B. v. Warden* (No. 03-6747).

Should the Supreme Court grant review, it will consider whether the federal district court and the U.S. Court of Appeals (11th Cir.) abused their discretion in closing Bellahouel's proceedings to the press and public and sealing the courts' records. These courts also ordered their clerks to record the case under a secret filing system that kept the case off the public dockets. Lawyers involved in the case have been ordered not to comment, further blocking the press and public from knowing that the proceedings ever occurred.

Bellahouel's case and name came to light only because of a docketing error by the Eleventh Circuit. Dan Christensen, a reporter for the *Miami Daily Business Review*, broke the story in March of 2003.

Bellahouel was released in March 2002 on \$10,000 bond after being held for five months at the Federal Correctional Institute in south Florida. While working as a waiter, Bellahouel allegedly served meals to two of the September 11 hijackers. Bellahouel is married to an American, but faces deportation because his student visa expired. He denies any involvement in terrorism, but is also barred from discussing the details of his case.

Bellahouel's case is a *habeas corpus* appeal protesting his detention, and seeks to force the government to justify his detention. He is represented by Federal Public Defender Kathleen Williams and her chief of appeals, Paul Rashkind.

A heavily redacted version of Bellahouel's petition for review to the Supreme Court was released to the public. Bellahouel challenges the decisions of Miami-based U.S. District Judge Paul C. Huck and the Atlanta-based 11th Circuit's decisions to hold secret proceedings without explanation. The petition states that the courts decided to hold the secret proceedings of their own accord, and not at the request of government attorneys.

Solicitor General Olson had told the Supreme Court that he did not plan to respond to Bellahouel's petition. The Court, however, has directed him to do so. Should the Supreme Court decide to hear *M.K.B. v. Warden*, its decision could

control the government's use of secret judicial hearings to protect national security. In reviewing the constitutionality of the government's actions against Bellahouel, the Court would necessarily examine the public's right to know government information.

The Solicitor General's brief was due to the Court on December 3. Under Court rules, however, the high court granted a 30-day extension, pushing the deadline back to January 2004. According to the *Associated Press*, Solicitor General Theodore Olson told justices in a one-paragraph filing submitted on Jan. 5 that "this matter pertains to information that is required to be kept under seal."

On January 2, as the *Bulletin* was going to press, the Reporters Committee for Freedom of the Press (RCFP) filed a motion on behalf of a coalition of news and legal organizations to intervene in the case, including groups such as the American Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, New York Times Co., CNN, Gannett Co., Inc., and Knight Ridder, Inc. Although such motions normally occur at a lower court level, the RCFP stated that secrecy in the case prevented such action from happening earlier.

"Because of the exceptional secrecy surrounding this case, [the coalition members] were unaware of its very existence when it was being litigated in the district court, and were therefore unable to move to protect their interests by intervening there," the motion states.

If the motion is granted, it would mean that the coalition would be added as actual parties to the case. The motion is available online at www.rcfp.org/news/documents/20040102-mkbvwarden.pdf.

In a press release on the RCFP Web site, director Lucy Dalglish is quoted as saying, "A free and open society cannot tolerate hiding federal court proceedings from public view." The press release is available online at www.rcfp.org/news/releases/view.cgi?2004_01_02_mkbvward.txt.

— Thomas Corbett
Silha Research Assistant

— Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor