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Focus

Court of Appeal (civil division)

The Queen on the application of Abbasi & Anor (claimants) –and- Secretary of State for

Foreign and Commonwealth Affairs & Secretary of State for the Home Department

6 November 2002

[2002] EWCA Civ. 1598

Para 64: “in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a ‘legal black-hole’”.

Para 69: “It is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State.”

**No way out of the legal black-hole:
The decision of the UK Court of Appeal in the Abbasi Case**

On November 6, 2002, a Court of Appeal of the United Kingdom dismissed the action for judicial review made by Feroz Ali Abbasi that the Foreign and Commonwealth Office (FCO) made representations on his behalf to the United States government regarding his detention in Guantanamo Bay. It is clear from the proceedings that the remedy sought by the claimant was not of a direct nature, i.e. his release or his indictment before an American court.

As unfortunate as this decision may be, it should be noted that the Court strongly expressed its concern as to the indefinite detention of Abbasi in territory over which the US has exclusive control with no opportunity to challenge the legitimacy of his detention before a tribunal. After reviewing British and American jurisprudence pertaining to imprisonment, the Court declares that the claimant is detained in a “legal black-hole” (para. 64), in apparent contravention of fundamental principles of law.

The first question to be answered was whether the action taken by a foreign sovereign State is justiciable in a British court. After establishing that, in appropriate circumstances English courts may gauge the conformity of foreign laws with international law, the Court of Appeal also stresses that where it is blatant that fundamental human rights have been violated. The court can also review the legitimacy of the actions taken by a foreign State.

The second question relates to whether the Secretary of State’s conduct is justiciable. After asserting that there is no duty under international law for a State to intervene by diplomatic means to protect a citizen whose rights have been violated in another country, the Court of Appeal turns to the claim that the UK’s actions are justiciable under the European Convention on Human Rights (ECHR). Both the *Al-Adsani v. UK* and *Bankovic and Others v. Belgium and Others* jurisprudence show that although the concept of jurisdiction under Article 1 of the ECHR is territorial, it can exceptionally apply to cases where an act committed within the territory of a State party can cause an individual to suffer violations of his rights in a foreign State. Since Abbasi is not on British territory and no British act led to Abbasi’s predicament, the Court of Appeal dismisses the claim founded on the ECHR. In this regard the Court has correctly applied the ECHR jurisprudence. An extension of the principles enunciated by the Court would in fact lead to State responsibility by proxy, i.e. State A would be liable for acts committed by State B on the territory of State B against nationals of State A.

On the other hand, the Court underlined that there is room for judicial review if a British citizen, whose fundamental rights have been violated, has been refused diplomatic assistance. What is meant is that the FCO is obliged to consider making representations but, after having carefully taken into account other factors, is allowed to refuse to make such representations. As it is clear that the FCO has looked into the case of Abbasi, the Court of Appeal dismissed the case on this ground too.

Additional grounds for refusing the applicant’s claim are that both the Inter-American Commission on Human Rights and American domestic courts have taken up the matter and the last word has not yet been spoken. However, having regard to the legal reasoning of American courts as well as the dry answer of the US to the Inter-American Commission of Human Rights there are serious doubts as to whether Abbasi will indeed be given a trial.

Responsibility

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