



R (on the application of Al Rawi and Ors.) v. Secretary of State for Foreign and Commonwealth Affairs

[2006] EWHC 972 (Admin)

Country: United Kingdom

Region: Europe

Year: 2006

Court: Supreme Court of Judicature, Queen's Bench Division, Divisional Court

Health Topics: Diet and nutrition, Mental health, Prisons, Public safety, Violence

Human Rights: Freedom from discrimination, Freedom from torture and cruel, inhuman or degrading treatment, Right to due process/fair trial, Right to liberty and security of person

Facts

The claimants were three men detained in Guantanamo Bay prison and their families. None of the claimants were British nationals, but each had been a long-term resident of the United Kingdom and two had family members who were UK citizens. Two of the claimants were refugees who has received asylum in the UK.

Whilst in detention, the claimants had all allegedly been subjected to torture and other inhuman and degrading treatment, contrary to the Convention against Torture. The UK government had expressed concern over interrogation techniques used at Guantanamo and the United States's attempts to redefine "torture". The UK government had made its desire that Guantanamo be closed as soon as possible known to the US government in the course of their diplomatic relations.

The claimants sought a declaration that the Foreign Secretary had a duty to make a formal and unequivocal request to the US for their release and return to the UK. The Foreign Secretary had made such requests before for British Nationals, and the claimants wished to be given equal treatment. They argued that the threat of torture made their case exceptional.

The Foreign Secretary argued that it had no duty to make a formal request for the return of non-citizens, that it could not do so because of domestic and international law, and that to do so would be ineffective and counterproductive for UK-US diplomatic relations.

Decision and Reasoning

The Court found in favor of the defendants. On the issue of whether the claimants should be treated as British nationals, it held that the UK had no duty in either domestic or international law to accord the same rights to the claimants as British nationals. The UK had a clear policy not to extend consular protection for non-citizens. Even if the claimants were British nationals, the defendant would still not be under any positive duty to make the order desired by the claimants. The Court determined that, although there were some proposals that refugees out to be able to avail themselves of the diplomatic protection of the State which has granted them asylum, such proposals had not yet been incorporated into international law. The Court also noted that that the UK had raised the issue of the claimants' detention on the Ministerial level on humanitarian grounds, though such request was not in the form demanded by the claimants.

On the issue of what obligations were created by torture or the risk of torture, the Court held that when torture was suspected, a state's only obligation was to declare the torture unlawful and to cooperate with other states to bring it to an end. Torture did not create a positive duty for the UK to make any representations to the US with regards to the claimants. The fact that they had been tortured merely meant that the UK was obligated to cooperate with the US to bring about the eventual closing of Guantanamo Bay prison.

In terms of the distress and psychological damage suffered by the claimants' families, the Court held that the evidence did not show that this distress was a result of the defendant's actions. While the Court found that the claimants' families' rights under the European Convention on Human Rights might have been violated, it was the US, not the UK, who was the perpetrator of this violation.

Finally, the Court held that, even if the claimants were treated as British nationals, and the risk of torture did

create positive obligations for the defendant, it did not have the competence in matters of foreign policy to require the defendant to make the order desired by the claimants. The Court determined that, while diplomatic intervention was not immune from judicial scrutiny, the Foreign Office had very wide discretion. The Court concluded that judicial interference could only be justified if a clear duty in domestic or international law had been identified, and no such duty had been identified in this case. This conclusion was guided by the Court's belief that, since the decision to make a formal request on behalf of the detainees would inevitably impact foreign policy, it simply did not have the means to make a proper evaluation as to whether it could require the defendants to so decide.

Decision Excerpts

It follows, in our judgment, that the first defendant was entitled to conclude that it had no duty either in domestic or international law to accord the same rights to the three claimants as non-nationals as to nationals such as Mr. Abbasi. The first defendant has a discretion as to whether, and if so, how to make representations on behalf of these claimants but against the background that they do not have the same claim as nationals to any international law right of the State to make the representations on their behalf." Paragraph 65.

Even if, therefore, torture or a real risk of torture were established on the evidence, that would impose no duty on the United Kingdom Government to do other than cooperate with other States to bring to an end through lawful means the circumstances giving rise to that situation. International law imposes no further duty on an individual State to intervene. The European Convention on Human Rights does not assist the claimants in this respect. Paragraph 70.

It seems to us that whatever view the court were to take as to the stance so far taken by the first defendant, it could not require the first defendant to make a formal request. That would be an interference in the relationship between sovereign states which could only be justified if a clear duty in domestic or international law had been identified; for the reasons that we have already given, there is no such duty in the present case. Paragraph 90.