2005/0461

IN THE COURT OF APPEAL

In the matter of a claim for judicial review

BETWEEN

THE QUEEN
on the application of
MAZIN JUMAA GATTEH AL SKEINI
& OTHERS

Claimants

v.
SECRETARY OF STATE FOR DEFENCE

Defendant

INTERVENTION SUBMISSION

BY

THE REDRESS TRUST & THE AIRE CENTRE

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1. The Redress Trust and the AIRE (Advice on Individual Rights in Europe) Centre seek permission to present these written submissions to the Court at the forthcoming appeal. Permission is sought for a written intervention only. The Redress Trust was granted permission to present written submissions before the Administrative Court below.

The Proposed Intervenors

2. The Redress Trust ('REDRESS') is an international non-governmental organisation ('NGO') with a mandate to assist torture survivors to seek justice and reparations.

3. REDRESS regularly takes up cases on behalf of individual survivors and has wide experience with interventions before national and international courts and tribunals. At the domestic level, REDRESS assists lawyers representing survivors of torture seeking some form of remedy such as civil damages, criminal prosecutions or other forms of reparation including public apologies. At the international level, REDRESS represents individuals who are challenging the effectiveness of domestic remedies for torture and other forms of ill-treatment, including the scope and consequences of the prohibition of torture in domestic law, the State's obligation to investigate allegations, prosecute and punish perpetrators, as well as the obligation to afford adequate reparations to the victims.[1]

4. REDRESS, together with Amnesty International, The Medical Foundation for the Care of Victims of Torture and The Association of the Families of Disappeared Prisoners, was granted permission to intervene before the United Kingdom House of Lords in the matter of *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*[2]. Recently, REDRESS intervened in the matter of the *Prosecutor v. Morris Kallon*[3] at the Special Court for Sierra Leone on the applicability of the Lomé Accord amnesty to the Court's jurisdiction in light of the obligation of States to prosecute serious crimes under international law. REDRESS was also granted interested party status in the United Kingdom Court of Appeal (Civil Division) on appeal from the Queen's Bench Division of the High Court of Justice in the matter of *Ronald Jones v. The Ministry of Interior of Saudi Arabia and Lt. Col. Abdul Aziz*[4], on the legal status of the prohibition of torture and the applicable

[1] REDRESS recently represented a British national against the State of Philippines before the UN Human Rights Committee. The Applicant alleged that his conviction and time in death row amounted to a violation of art 7 of the International Covenant on Civil and Political Rights and that contrary to the Covenant obligation under art 2, no effective civil remedies were available in domestic law since it was not possible to sue the State (see *Albert Wilson v. Philippines*, Communication No. 868/1999, U.N. Doc.CCPR/C/79/D/868/1999 (2003)).

[2] [1998] 3 WLR 1456

[3] SCSL-2004-15-AR72 (E)

[4] CA ref: A2003/2155

remedies, as well as intervenor standing before the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*.[5]

5. The AIRE Centre provides direct legal representation in applications to the European Court of Human Rights ('ECtHR') and has been involved in more than 60 cases in 12 jurisdictions. A number of these cases concerned applicants who were threatened by expulsion to countries where they might have faced torture, inhuman or degrading treatment. The organisation also provides training for judges, public officials, lawyers and human rights NGOs across the 46 member states of the Council of Europe. This has included training at ELENA/ECRE courses and training for the International Association of Refugee Law Judges.

Primary Submissions

6. This case raises the question of the Government's resolve to investigate, and where sufficient evidence exists, to prosecute fundamental human rights violations and, in turn, the public perception that it is seen to be doing so. Equally, this case concerns the fundamental right of victims and their families to know what has happened as part of a public process and the duty of the State to afford adequate and effective remedies and reparation.

7. The United Kingdom Government publicly pledged to the people of Iraq that in the event of military action, it would 'support the Iraqi people in their desire for … an Iraq which respects fundamental human rights, including freedom of thought, conscience and religion and the dignity of family life, and whose people live free from repression and the fear of arbitrary arrest.'[6] Yet the

[5] See www.ararcommission.ca/eng/ruling01.pdf

[6] Vision for Iraq and the Iraqi People: A Paper Published by the UK Government, 16 March 2003, available at http://www.number-10.gov.uk/output/page3280.asp.

Secretary of State argues in the present case that Iraqi people - even when in British custody - are not entitled to the full protection of their most fundamental of human rights under Article 3 of the European Convention on Human Rights ('ECHR'): while he appears to concede jurisdiction of the ECHR in principle, he insists that there was no violation of the procedural obligation under Article 3 and he maintains that the Human Rights Act 1998 ('HRA') does not apply.

8. The proposed interveners submit that when Parliament enacted the HRA, it intended that the rights set out in Schedule 1 of that Act would be compatible with its treaty obligations under the European Convention on Human Rights: in other words, there was to be no gap between the scope of the ECHR and the scope of the HRA in terms of territorial effect. Indeed, the Government took this same position in its report to the United Nations Human Rights Committee in 1999, where it noted that:

> 'The United Kingdom considers that the [Human Rights]Act will provide an effective remedy in domestic courts for breaches of the [European] Convention.'[7]

9. Thus the Proposed Interveners agree with the arguments advanced by Mr. Al-Skeini and others in this case on the question of territoriality. Those arguments have been fully set out by them and the Proposed Interveners do not intend to reproduce them.

10. However, the Proposed Interveners would like to develop two discrete points that emerge from the skeleton arguments submitted to this Court, namely:

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[7] Human Rights Committee, Consideration of Reports submitted by States Parties Under Article 40 of the Convention, CCPR/C/UK/99/5 of 11 April 2000, available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.UK.99.5.En?Opendocument.

a. The importance of the particular remedies available under the ECHR/HRA, compared with those available under other international human rights instruments;

b. Why the extension of the territorial scope of the ECHR and other international treaties is consistent with international human rights law and serves an important public purpose.

<u>The Importance of Specific Remedies under the ECHR/HRA</u>

11. The Secretary of State for Defence ('SSD') submits [at 15 of his skeleton argument] that:

> '…..international humanitarian law provides a highly detailed legal framework, worked out and agreed by the international community, in which the conduct of contracting states which are involved in armed conflict and occupation is regulated, both at the international level and through the medium of contracting states' domestic legislation and administrative action.'

12. In asserting this, the SSD draws attention to the Fourth Geneva Convention 1949, Relative to the Protection of Civilian Persons in Time of War ('Geneva IV'); Additional Protocol I to the Geneva Convention, Relating to the Protection of Victims of International Armed Conflicts ('Geneva Protocol I'); the Hague Convention and Regulations 1907 ('the Hague Convention'); the UN Convention against Torture 1984 ('Torture Convention'); and the Rome Statute of the International Criminal Court ('the Rome Statute').

13. The SSD further states [at 20] that:

> '……in submitting that the ECHR does not apply to cases 1 to 5, and the HRA does not apply to cases 1 to 5 or 13, the SSD is not seeking to avoid legal responsibility or secure some form of legal immunity for British forces. The critical point is this: relevant international humanitarian law is tailored to regulate the conduct of states when occupying territory which is not their own; criminal law (including norms of customary international law) and tort law operate to impose specific obligations on British forces to refrain from committing acts which cause damage or injury to persons or property.'

14. The Proposed Intervenors submit that:

a. No other applicable international human rights instrument provides the rights to an investigation and an effective remedy in comparable terms to Articles 2 and 3 ECHR, in particular no other mechanism provides:

i. A mandatory duty on a State to facilitate an independent and impartial investigation into the alleged infringement, *enforceable* in domestic law;

ii. A mandatory duty on a State to provide compensation for proved infringements, *enforceable* in domestic law;

iii. A right for the victim to seek redress (cf a state discretion to prosecute)

b. The uniqueness of these features of the ECHR plays an important role in the development of international human rights law.

<u>Other International Law Obligations</u>

15. It is accepted that *in theory* the provisions of international humanitarian law referred to by the SSD impose a number of obligations on contracting states in times of war and occupation.

16. In respect of Geneva IV, Article 146 states:

> 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.'

17. The grave breaches, as outlined in Article 147, include: wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health.

18. Art. 2 of Geneva IV provides that:

> 'In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'

Art. 6 states that 'the present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.'

19. Geneva VI therefore applies to any conflict or occupation. Occupation is defined in Art. 42 of the Hague Convention in the following terms:

> 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

20. Part IV of Geneva Protocol I is specifically concerned with the protection of civilian populations. Civilian populations enjoy general protection from military operations and should not be the subject of attack. They are provided with 'fundamental guarantees' including protection from murder, torture, corporal punishment, mutilation and collective punishment (Art. 75). Geneva Protocol I additionally provides that Military commanders are required to prevent and report breaches of the Convention and 'where appropriate to initiate disciplinary or penal action against violations thereof' (Art. 87).

21. The SSD accepts that Geneva Protocol I is not strictly applicable in the instant case as the Protocol is formally applicable only as between Parties, and Iraq

has not ratified the Protocol. However, it is stated [at 12] that 'many of its provisions are declaratory of customary international law and even those which are not are frequently a guide to best practice in the implementation of the obligations arising out of Geneva IV.' The SSD does not state which provisions constitute customary international law. Further, it is not explained how, in the instant case, Protocol I has operated as a 'guide to best practice' for British forces serving in Iraq.

22. Geneva IV and Protocol I are incorporated into UK domestic law by virtue of the Geneva Conventions Act 1957 ('GCA'). Section 1(1) of the GCA makes it an offence to commit a 'grave breach' of the Conventions whether the offence is committed 'inside or outside the United Kingdom'. Further, s. 134 of the Criminal Justice Act 1988 makes it an offence for a public official to commit torture in the UK or elsewhere.

23. Significantly, however, both s. 1(A)(3) of the GCA and s. 134 of the Criminal Justice Act provide that proceedings for a Geneva Convention offence or the offence of torture cannot be instituted without the consent of the Attorney General. But, it is submitted, the requirement of the Attorney General's *fiat* substantially restricts the ability of a victim (or those acting on his or her behalf) to seek redress for a grave breach of Geneva IV, Protocol I or the crime of torture.

24. The SSD relies on the Hague Convention to establish that there is an effective right to compensation in international humanitarian law. Art. 3 of the Convention imposes an obligation to pay compensation, if appropriate, where there has been a breach of the Regulations.[8] But, in assessing the effectiveness

[8] Art. 3 of the Hague Convention states: 'a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.

of this obligation, it has to be noted that there are no cases reported in the UK of victims of breaches of international humanitarian law obtaining compensation by relying on Art. 3 of the Hague Convention.

25. In contrast the ECHR has very strong enforcement mechanisms. It provides for both state and individual applications before a specially formulated court, the ECtHR, whose judgment is binding upon the Convention states.[9] Further, there is substantial and well-developed case law that provides for a legally binding framework through which Convention states operate.

26. Similar problems of enforcement arise in relation to international *human rights* instruments. For example, the International Covenant on Civil and Political Rights ('ICCPR'), which specifically prohibits the arbitrary taking of life (Article 6), as well as torture (Article 7).[10]

27. Under the ICCPR, states parties are obliged to report regularly on their efforts to implement the substantive provisions of the Covenant (Article 40). These reports are then considered by the United Nations' Human Rights Committee ('HRC') withrepresentatives of the governments concerned. In addition, the ICCPR provides for procedures for examining complaints submitted by states parties (Article 41) or, in the framework of an Optional Protocol, by individuals. However, the UK has not ratified the Optional Protocol nor has it directly implemented the ICCPR into its domestic law.

[9] Under Article 52 of the Convention, Convention States 'undertake to abide by the decision of the Court in any case to which they are parties.'

[10] Article 6(1) provides that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. Article 7 states that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

The Importance of an Independent Investigation

28. The public importance of an independent investigation has been recognised by both domestic courts and international institutions charged with the upholding of human rights.

29. In R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653 Lord Bingham spoke of the purpose of the obligation as being:

> 'to ensure so far as is practicable that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who had lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.'[11]

30. This obligation was specifically recognised by the HRC in a recent resolution on impunity, E/CN.4/Res/2001/70 of 25 April 2001, paragraph 8, where it was noted that:

> '[The Commission on Human Rights] *Recognises that*, for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to participate in such a process.'

31. Further, principle 22(b) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law establishes the right to "*Verification of the facts and full and public disclosure of the truth* to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations" (E/CN.4/2005/ L.10/Add.11 (19 April 2005).

[11] At 672.

32. In respect of duties under the ICCPR, the HRC has emphasised the need for state parties to take effective steps to investigate killings[12]. In the Herrera Rubio case the HRC stated that:

> 'the Committee refers to its general comment No. 6(16) concerning article 6 of the Covenant, which provides, inter alia, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.'

33. Both the HRC and the United Nations Committee Against Torture ('CAT') have also stressed the need for investigation concerning allegations of torture, cruel, inhuman and degrading treatment[13].

Conclusions as to the uniqueness of the ECHR

34. As set out above, whilst other sources of international law stress the importance of an effective investigation, only the ECHR through the HRA offers a realistic and effective mechanism for redress for the alleged victims in this case. The development of the investigative obligation under the case law of the ECtHR serves both the interests of the victim, wider society and the rule of law. As Dinah Shelton notes:

> 'States do seem to take more seriously judicial bodies and the treaty commitments they have undertaken to abide by judgments in cases to which they are party. This may be due to a habit of compliance with judgments of domestic courts or a more serious pull of hard law; it may also be a tribute to the initially conservative and careful approach of the European Court of Human Rights which generated confidence among state parties.'[14]

Extra-Territoriality

35. It is submitted that there is nothing remarkable in the proposition that international human rights instruments apply outside the strict boundaries of the relevant country. In the recent matter of the '*Legal consequences of the construction of a wall in the occupied Palestinian territory*' before the ICJ,

[12] Baboeram et al v Suriname (146, 148-154/83) ; Herrera Rubio v Columbia (161/83) and Sanjuan Arevalo v Columbia (181/84).

[13] Herrera Rubio v Columbia (161/83) ; Halimi-Nedzibi v Austria (CAT 8/91) ; Blanco Abad v Spain (CAT 59/96) ; and Dzemajl et al v Yugoslavia (CAT 161/00).

[14] *Op Cit*. at 388.

Israel argued that whilst humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, human rights treaties were intended for the *protection of citizens from their own Government in times of peace* [emphasis added].

36. The ICJ held, however, that the ICCPR did apply outside the boundaries of Israel and within occupied Palestinian territory. In its reasoning the ICJ stated that:

> '109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.
>
> The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos* v. *Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero* v. *Uruguay*).'

37. The extra-territorial approach also serves an important public function. It is submitted that an increasing number of alleged human rights abuses by public officials of a state, especially members of its armed forces, are beyond that state's borders. Such alleged abuses are well documented by NGOs such as Amnesty International and Human Rights Watch. In a recent report by Human Rights Watch entitled 'Getting Away with it? Command Responsibility for the US Abuse of Detainees', it is stated that:

> '….the United States has been implicated in crimes against detainees across the world — in Afghanistan, Iraq, Guantánamo Bay, Cuba, and in secret detention centers, as well as in countries to which suspects have been rendered. At least 26 prisoners are said to have died in American custody in Iraq and Afghanistan since 2002 in what Army and Navy investigators have concluded or suspected were acts of criminal homicide. Overall, according to a compilation by the Associated Press, at least 108 people have died in U.S. custody in Afghanistan and Iraq.'[15]

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[15] http://www.hrw.org/reports/2005/us0405/4.htm#_Toc101408092. See also the International Commission of Jurists press release 'ICJ Calls for Independent Inquiry into Abuses and Arrest and Detention by Coalition Forces' www.icj.org/news.php3?id_article=3392&lang=en.

38. Accordingly, it is submitted that consistent with the rationale behind international human rights law, as recognised by international courts, the extra-territorial application of the ECHR would serve an important public purpose.

Conclusion

39. In conclusion, with regard to the question as to whether the ECHR/HRA applies to UK-occupied South-East Iraq, the Proposed Interveners submit that:

a. Contrary to the SSD's reasoning, no other applicable international human rights obligation provides the right to an investigation, *enforceable in domestic law*, in comparable terms to the ECHR;

b. The extra-territorial application of international human rights instruments is not novel and has been accepted by international courts; and

c. Such application serves an important public purpose consistent with international human rights law and the stated policy of the UK government towards the people of Iraq.

26th September 2005

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