Pace International Law Review

Volume 23
Issue 1 *Winter 2011*

Article 2

January 2011

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Recommended Citation
Colin R.G. Murray, *The Ripple Effect: Guantánamo Bay in the United Kingdom's Courts*, 23 Pace Int'l L. Rev. 15 (2011)
Available at: http://digitalcommons.pace.edu/pilr/vol23/iss1/2

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THE RIPPLE EFFECT: GUANTÁNAMO BAY IN THE UNITED KINGDOM'S COURTS

Colin R. G. Murray *

KEY WORDS

Guantánamo Bay – British Detainees – Diplomatic Protection – Deprivation of Liberty – Inhuman and Degrading Treatment

ABSTRACT

The human rights abuses suffered by detainees held at Guantánamo Bay have dominated many of the cases before the United Kingdom's courts. The Human Rights Act of 1998, still relatively new to the statute book, played a central role in the detainees' arguments. The ultimate court decisions, however, often relegate such factors to the background of the case. This article examines why the deciding courts declined to develop the law of diplomatic protection on the basis of human rights concerns, and why such arguments continue to be employed by detainees. Furthermore, the article assesses why the English courts have shown greater receptiveness to arguments similarly grounded in accusations of inhuman and degrading treatment in relation to later cases involving former detainees challenging the role of the British Government in their detention.

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I. INTRODUCTION

In the decade since the Human Rights Act[1] came into force, incorporating the European Convention on Human Rights (ECHR)[2] into the domestic legal systems of the United Kingdom, the Convention rights rapidly came to eclipse more established domestic sources of individual rights against the state. Even before the Act came into force, Lord Hope, one of the most senior appellate judges in the English legal system, recognized that "the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary."[3] Few cases better illustrate the primacy of human rights discourse in English public law than those involving "detainees" held without trial by the United States government in the detention facility in Guantánamo Bay.[4]

After the United States invaded Afghanistan in October 2001, in the wake of the 9/11 attacks against the United States,[5] facilities needed to be found in which to hold and interrogate captured terrorist suspects.[6] The

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[1] Human Rights Act, 1998, c. 42 (Eng.). The Act became enforceable on October 2, 2000.

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

[3] R v. Director of Public Prosecutions, ex parte Kebilene, [2000] 2 A.C. 326, 374-75.

[4] As Joseph Margulies points out, the term "detainee" was adopted by President George W. Bush's Administration primarily as a means of avoiding suggestions that captured individuals were prisoners of war under the terms of the Third Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. *See* JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 255 n.3 (2006). My use of this term in this article is not intended to add any weight to this description of the individuals held at Guantánamo Bay, but rather accords to the standard practice of the United Kingdom's courts in cases concerning these individuals. *See also* Press Release, White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), http://dspace.wrlc.org/-doc/bitstream/2041/63447/00208.pdf.

[5] Whilst the initial detainees held at Guantánamo Bay were captured in Afghanistan, as the "war on terror" developed individuals were seized in countries across the world. As Rosa Brooks recognized, this represented a breakdown of "[t]he distinction between zones of war and zones of peace-between spatial areas in which the law of armed conflict governs and spatial areas in which "ordinary" domestic law and international agreements govern." Rosa E. Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 721 (2004). The global scope of the "war on terror" was emphasized by the disparate locations where British citizens held at Guantánamo Bay were captured. *See At-a-glance: Guantanamo Bay Britons*, BBC NEWS, Mar. 9, 2004, http://-news.bbc.co.uk/2/hi/uk_news/3089395.stm.

[6] Ray Murphy affirms that under Article 17 of the Third Geneva Convention such interrogation would be lawful even if the United States' Government recognized captured individuals as prisoners of war. However, Article 14(4) of the Convention prohibits phys-

temporary Camp X-ray, a part of Guantánamo Bay's Naval Base initially constructed to house Cuban and Haitian asylum seekers,[7] was chosen to receive these detainees in light of a Department of Justice assurance that the site could be considered to fall outside the jurisdiction of the United States' courts.[8] In January 2002, the first detainees arrived. By April, all detainees had been relocated to the permanent high-security structures of Camp Delta, which had been hastily erected in the first few months of 2002.[9]

In the United Kingdom, reaction to the establishment of these Camps was initially muted. Ministers assured Parliament that detainees (including British citizens and resident foreign nationals) "are being treated in line with international humanitarian norms, in conditions in which security is paramount."[10] A ground swell of dissatisfaction only began to develop with the realization that the United States Government intended to hold these detainees for an extended period without trial or judicial scrutiny.[11] In July 2003 the British Government dispatched Lord Goldsmith, then the Attorney General, to express reservations regarding the treatment of British detainees, and in particular, concerning the proposed system of Military Commissions.[12] Whilst Lord Goldsmith did se-

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ical or psychological maltreatment of prisoners. *See* Ray Murphy, *Prisoner of War Status and the Question of the Guantanamo Bay Detainees*, 3 HUM. RTS. L. REV. 257, 273 (2003).

[7] *See* A historical look at Guantanamo Bay and the Northeast Gate, JOINT TASKFORCE GUANTANAMO http://www.jtfgtmo.southcom.mil/community/history.html (last visited Feb. 24, 2010).

[8] *See* FOREIGN AFFAIRS COMMITTEE, VISIT TO GUANTÁNAMO BAY, 2006-7, H.C. 44, at 86, *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf. Arguments that detainees would therefore not be able to instigate habeas corpus claims subsequently failed before the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004), a case which involved British citizens Asif Iqbal and Shafiq Rasul and Australian citizen David Hicks, and which affirmed that the US District Court for the District of Colombia did have jurisdiction to hear *habeas corpus* cases brought by foreign national detainees held at Guantánamo Bay.

[9] The Washington Post maintains a database of the names, nationalities and current status of the 779 individuals who have at any point been held in the camps established at Guantánamo Bay. As of January 2009, 198 detainees remain at Camp Delta. *See* The Washington Post, Names of the Detained, http://projects.washingtonpost.com/guantanamo/search/ (last visited Jan. 10, 2010).

[10] 378 PARL. DEB., H.C. (6th ser.) (2002) 623.

[11] *See* Vikram Dodd, *Waite: US at Guantanamo acts like my Beirut captors*, GUARDIAN, Mar. 5, 2004, http://www.guardian.co.uk/uk/2004/mar/05/humanrights.world.

[12] *See* Press Release, Foreign and Commonwealth Office, Attorney General to visit Washington to discuss Guantanamo Bay Detainees (Jul. 18, 2003), *available at* http://www.fco.gov.uk/resources/en/press-release/2003/08/-fco_npr_180703_attgenguantanamo.

cure a concession that British detainees would not be subject to the death penalty,[13] this "quiet diplomacy"[14] could not continue once Lord Steyn brought the British judiciary's abhorrence of the detentions at Camp Delta to the public's attention in his 2003 Mann Lecture.[15] He declared that "[t]he purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors."[16] Moreover, he challenged the British Government "to make plain publicly and unambiguously our condemnation of the utter lawlessness at Guantanamo Bay."[17] In the aftermath of this devastating critique, the then Foreign Secretary Jack Straw was obliged to publically announce the United Kingdom's opposition to the Military Commission process, on the basis that it "would not provide the process that we would afford British nationals."[18]

In 2005, the House of Lords[19] heard a case concerning whether the British Government could rely upon evidence procured by torture conducted in a third state and in which the United Kingdom was not complicit.[20] Maintaining the judicial pressure with regard to Guantánamo, Lord Hope observed in his judgment that some of the practices authorized at Camp Delta "would shock the conscience if they were ever to be authorized for use in our own country."[21] In light of this sustained criticism, and despite carefully choosing his words in repeated descriptions of Guantánamo Bay as "an anomaly that has to be dealt with sooner or later",[22] in March 2006, then Prime Minister Tony Blair finally bowed to pressure and asserted that it "would be better that it is closed."[23]

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[13] As Lord Steyn archly observes, such differential treatment of British detainees would have been openly discriminatory; "This gives a new dimension to the concept of 'most favoured nation' treatment in international law. How could it be morally defensible to discriminate in this way between individual prisoners?" Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 9 (2004).

[14] Baroness Scotland preferred to characterize these efforts as "robust diplomacy" in parliamentary debates. 658 PARL. DEB., H.L. (6th ser.) (2004) 128.

[15] Steyn, *supra* note 13.

[16] *Id.* at 8.

[17] *Id.* at 15.

[18] 418 PARL. DEB., H.C. (6th ser.) (2004) 142.

[19] At this time the Appellate Committee of the House of Lords was the highest domestic court in the English legal system. In October 2009, the jurisdiction of the House of Lords was transferred to the newly constituted United Kingdom Supreme Court under Constitutional Reform Act 2005. *See* Constitutional Reform Act, 2005, c. 4, § 40 (Eng.).

[20] A v. Sec'y of State for the Home Dep't, [2005] UKHL 71 (Eng.).

[21] *Id.* [126].

[22] LIAISON COMMITTEE REPORT, 2005-6, H.C. 709-I, *available at* http://-www.publications.parliament.uk/pa/cm200506/cmselect/cmliaisn/709/5112201.htm.

[23] Tony Blair, Prime Minister, Monthly Press Conference (Mar. 16, 2006) (transcript

This article examines the importance of cases before the United Kingdom's courts in influencing this longstanding judicial and executive opposition to the United States' practice in Guantánamo Bay. These cases show the impact of the detentions in Guantánamo Bay rippling through the English legal system. The key issue is the varying effectiveness of the decision by the detainees' legal representatives to focus their arguments upon allegations that the United States' authorities had engaged in human rights abuses against their clients. Arguments by counsel regarding the maltreatment of these detainees not only amplified the English judiciary's deep disquiet surrounding Guantánamo, bringing it to the attention of the general public, but the prevailing public opinion fed back into the tenor of the decisions of the courts.

The first substantive section of this article examines the decisions in *Abbasi v. Secretary of State*[24] and *Al Rawi v. Secretary of State*,[25] in which, respectively, the representatives of detained British citizens[26] and foreign nationals ordinarily resident within the United Kingdom[27] argued that the British Government was obliged to exercise diplomatic protection by petitioning the United States for their release. The next section is devoted to *Secretary of State v. Hicks*,[28] in which detained Australian citizen David Hicks argued that the courts should require the British Government to recognize his claim for British citizenship, in the belief that the British Government would make more active efforts on his behalf than the Australian Government had hitherto been willing to make.[29] Thereafter, the final section examines ongoing litigation in *Binyan Mohamed v. Secretary of State*[30] and *Al Rawi v. Security Service*,[31] where

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available at *PM's Monthly Press Conference March 2006,* THE NATIONAL ARCHIVES, http://www.number10.gov.uk/Page9212 (last visited March 16, 2011)).

[24] R v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] EWCA (Civ) 1598 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/20-02/1598.html [hereinafter *Abbasi*].

[25] R v. Sec'y of State for Foreign & Commonwealth Affairs, [2006] EWCA (Civ) 1279 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/20-06/1279.html [hereinafter *Al Rawi*].

[26] *See Abbasi*, [2002] EWCA (Civ) 1598 [1] (Eng.).

[27] *See Al Rawi*, [2006] EWCA (Civ) 1279 [1] (Eng.).

[28] Sec'y of State for the Home Dep't v. Hicks, [2006] EWCA (Civ) 400 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2006/400.html [hereinafter *Hicks*].

[29] *Id.* [1].

[30] R v. Sec'y of State for Foreign & Commonwealth Affairs, [2009] EWHC (Admin) 2549 (Eng.), *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2009/2549.html. [hereinafter *Mohamed*].

[31] Al Rawi v. Security Serv., [2009] EWHC (QB) 2959 (Eng.), *available at*

the claimants seek to expose the role played by the British Government in their detention.[32] These cases continue to place the British Government in the invidious position of opposing the claims of individuals adversely affected by a detention regime which it had repudiated in order to uphold its stated security policy and its international support for the United States.

II. PLEADING FOR DIPLOMATIC PROTECTION

Feroz Abbasi, a British citizen, was captured by United States forces during "Operation Enduring Freedom," the military operations that drove the Taliban from power in Afghanistan.[33] In January 2002, Abbasi was among the first prisoners to be transported to Guantánamo Bay. With her son being detained arbitrarily, without access to a lawyer or judicial process, Mrs. Abbasi instituted judicial review proceedings before the English courts, arguing that they should compel the Foreign and Commonwealth Office (FCO) to exert diplomatic pressure upon the United States to remedy this situation.[34] The Court of Appeal condensed the submissions of Abbasi's legal representative, Nicolas Blake, QC, to the argument that:

> Mr. Abbasi was subject to a violation by the United States of one of his fundamental human rights and that, in these circumstances, the Foreign Secretary owed him a duty under English public law to take positive steps to redress the position, or at least to give a reasoned response to his request for assistance.[35]

In assessing whether the treatment of British detainees in Camp Delta engaged the United Kingdom's responsibilities under the ECHR, the Court of Appeal first considered the principle established in *Bertrand Russell Peace Foundation v. United Kingdom*.[36] In this case, the European Commission of Human Rights rejected arguments that, "the Con-

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http://www.bailii.org/ew/cases/EWHC/QB/2009/2959.html.

[32] *Id.* [7].

[33] Ahmed Rashid provides a thorough overview of Operation Enduring Freedom and its aftermath, especially with regard to the efforts of the United States to capture members of Al Qaeda. *See* AHMED RASHID, DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA (2008).

[34] This summary of facts is drawn from the judgment in *Abbasi*. *See Abbasi*, [2002] EWCA (Civ) 1598 [3]-[8] (Eng.).

[35] *Id.* [25]. Article 5 of the ECHR provides that "everyone has the right to liberty and security of person." ECHR, *supra* note 2.

[36] Bertrand Russell Peace Found. v. United Kingdom, App. No. 7597/76, 14 Eur. Comm'n H.R. Dec. & Rep. 117 (1978).

vention can … be interpreted so as to give rise to any obligation on the Contracting Parties to secure that non-contracting states, acting within their own jurisdiction, respect the rights and freedoms guaranteed by the Convention."[37] Furthermore, the European Court of Human Rights has confirmed that even the absolute prohibition of torture under the ECHR[38] does not oblige contracting states which are not causally connected to such treatment to provide any civil remedy for individuals subjected to torture by a third state.[39] In light of these authorities Lord Phillips, giving the judgment of the Court of Appeal, emphasized the following facts: "The United States Government is not before the court, and no order of this court would be binding upon it. Conversely, the United Kingdom Government, which, through the Secretaries of State is the respondent to these proceedings, has no direct responsibility for the detention."[40]

The Court of Appeal therefore concluded that, "we do not consider that the European Convention on Human Rights and the Human Rights Act afford any support to the contention that the Foreign Secretary owes Mr. Abbasi a duty to exercise diplomacy on his behalf."[41] Nevertheless, the Court did consider the impact of the Government's policy statements regarding diplomatic assistance,[42] as these "indicate a clear acceptance by the government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice."[43] Whilst he acknowledged that these statements "contain no more than a commitment 'to consider' making representations, which will be triggered by the "belief" that there is a breach of the international obliga-

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[37] *Id.* at 124.

[38] Article 3 of the ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." ECHR, *supra* note 2, art. 3.

[39] *See* Al-Adsani v. United Kingdom, App. No. 35763/97, 34 Eur. Ct. H.R. 11, ¶¶ 38-41 (2002).

[40] *Abbasi*, [2002] EWCA (Civ) 1598 [67] (Eng.).

[41] *Id.* [79].

[42] Most significantly, the ministerial policy statement in JAMES CRAWFORD, THE BRITISH YEARBOOK OF INTERNATIONAL LAW 1999:SEVENTIETH YEAR OF ISSUE VOLUME 70 526, 528 (2001):

> At present we consider making representations if, when all legal remedies have been exhausted, the British national and their lawyer have evidence of a miscarriage or denial of justice. We are extending this to cases where fundamental violations of the British national's human rights had demonstrably altered the course of justice. In such cases, we would consider supporting their request for an appeal to any official human rights body in the country concerned, and subsequently giving advice on how to take their cases to relevant international human rights mechanisms.

[43] *Abbasi*, [2002] EWCA (Civ) 1598 [92] (Eng.).

tions,"[44] Lord Phillips employed them as the basis of a legitimate expectation on the part of the British citizens that the Government will act in accordance with this stated policy:

> [The FCO] has indicated … what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation.[45]

The Court of Appeal's recognition that the government's pronouncements could constrain its discretion allowed it to review the use of the "prerogative power" to afford diplomatic protection.[46] Lord Phillips' cautious tone nonetheless underlines the precariousness of the Court of Appeal's jurisdiction in this field. Whilst the prerogative was accepted as being generally reviewable in the *CCSU* case,[47] in that decision Lord Fraser had emphasized that "[m]any of the most important prerogative powers … are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts."[48]

The *Abbasi* decision, in advancing judicial review into the arena of diplomatic relations, seemingly trespassed into the 'forbidden'[49] area of foreign policy matters which had so concerned Lord Fraser. In reality, not all foreign policy matters are closed to the United Kingdom's courts. Judges rapidly circumscribed this barrier to judicial review, with Lord Justice Richards conceding extra-judicially that "recent cases show that the forbidden areas of foreign policy and the like are much narrower than one might have thought, and that the *CCSU* case has opened up very considerable scope for judicial review in these fields."[50]

One key decision is *ex parte Everett*, in which Lord Justice Taylor asserted that the provision of passports was not an unreviewable question of 'high policy', but rather "a matter of administrative decision, affecting

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[44] *Id.*

[45] *Id.* [106].

[46] Blackburn explains that, "[t]he Crown 'Prerogative' . . . is the term used to describe the network of inherent common law powers, privileges and immunities of the Crown which have existed since time immemorial and exist by virtue of past de facto judicial recognition. R. Blackburn, Monarchy and the Personal Prerogatives, [2004] Pub. L. 546, 547-48 (Eng.).

[47] Council for Civil Serv. Union v. Minister for the Civil Serv., [1985] A.C. 374, (appeal taken from Eng.).

[48] *Id.* at 398.

[49] *Abbasi*, [2002] EWCA (Civ) 1598 [106] (Eng.).

[50] Lord Justice Richards, Gray's Inn Reading at Gresham College: The International Dimension of Judicial Review (Jun. 7, 2006), *available at* http://www.judiciary.gov.uk/publications_media/speeches/2006/sp070606.htm.

the rights of individuals and their freedom of travel."[51] This distinction was seized upon by Lord Phillips in recognizing Abbasi's procedural legitimate expectations;

> The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be "considered", and that in that consideration all relevant factors will be thrown into the balance.[52]

The Court of Appeal thus accepted that it was for the Foreign Secretary to decide whether to assist a citizen facing abuses of process overseas,[53] but refused to allow the Minister to make this decision "unless and until he has formed some judgment as to the gravity of the miscarriage."[54] This position can be compared to the recognition by the United States Supreme Court that where the United States' Government expressed concerns that a case might undermine aspects of foreign policy the Court would, on a case-by-case basis, assess whether the gravity of such concerns warranted the dismissal of the law suit.[55] In the instant case, however, the British Government had not been inactive with regards to Abbasi's request. Not only had the request been considered, but FCO officials confirmed to the court that "the British detainees are the subject of discussions between this country and the United States both at Secretary of State and lower official levels."[56] The court accepted that such activity on Abbasi's behalf was sufficient to fulfill his legitimate expectations and refused to require that specific representations should be made to the United States Government.[57]

A year after the decision in *Abbasi*, political pressure, rather than a court order, compelled then Prime Minister Tony Blair to broach the subject of the return of British citizens held at Camp Delta in discussions with President George W. Bush while in London.[58] By January 2005,

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[51] R. v. Sec'y of State for Foreign and Commonwealth Affairs, ex parte Everett [1988] EWCA (Civ) 7 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/1988/7.html.

[52] *Abbasi*, [2002] EWCA (Civ) 1598 [99] (Eng.).

[53] Lord Phillips accepted that international law places no obligation upon states "to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State." *Id.* [69].

[54] *Id.* [100].

[55] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

[56] *Abbasi*, [2002] EWCA (Civ) 1598 [107] (Eng).

[57] *Id.*

[58] Sarah Baxter, *Guantanamo Bay Britons set for Christmas return*, TIMESONLINE

these representations had helped to secure the release of all British citizens.[59] At this time, however, no representations were made in relation to Guantánamo detainees who, whilst not British citizens, had been granted leave to remain in the United Kingdom prior to their detention.[60] This differentiated treatment was explained on the basis that "the Government [is] not in a position to provide diplomatic protection or consular assistance to foreign nationals."[61]

Undaunted, three refugees, who prior to their detention had been accepted as permanent residents of the United Kingdom, launched a judicial review of the government's failure to make representations on their behalf. Bisher Al Rawi, an Iraqi national, came to the United Kingdom in 1983, whilst Jamil El Banna, a Jordanian national, arrived just over a decade later in 1994. They were detained upon entry to the Gambia in November 2002, on the basis of suspected links to international terrorism. In early 2003, Gambian officials transferred these individuals into the control of the American military. The third claimant, Omar Deghayes, a Libyan national, was detained by the Pakistani authorities in April 2002, before being handed over to United States forces. The United States declared the three men to be enemy combatants and all were subsequently transferred to Guantánamo Bay, where they were detained and interrogated.[62]

With the possibility of these men seeking protection from the countries that they had fled as refugees providing cold comfort in the cells of Guantánamo, they argued that the British Government's refusal to assist them, when it had successfully petitioned for the release of British citizens, constituted discrimination on the basis of nationality.[63] Moreover, whereas the claim in *Abbasi* focused on arbitrary detention, the claimants

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(London), Nov. 30, 2003, http://www.timesonline.co.uk/tol/-news/world/article1030164.ece.

[59] 429 PARL. DEB., H.C. (6th ser.) (2005) 173. On January 25, 2005, Feroz Abbasi was, amongst the last four British detainees (together with Martin Mubanga, Richard Belmar, and Moazzam Begg) to be transferred by the United States authorities to the custody of the United Kingdom. *Id.*

[60] This status is provided for under Immigration Act, 1971, c. 77 § 3(1)(b) (Eng.), under which a foreign national "may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period." Where an individual has indefinite leave to remain in the United Kingdom her status is roughly equivalent to individuals who are Lawful Permanent Residents of the United States ("green card" holders).

[61] 685 PARL. DEB., H.L. (5th ser.) (2006) 992.

[62] This summary of facts is drawn from the first instance judgment in the Al Rawi case, R. v. Sec'y of State for Foreign and Commonwealth Affairs [2006] EWHC (Admin) 972, [3]-[13] (Eng.) [hereinafter *Al Rawi* (Divisional Court)].

[63] Race Relations Act, 1976, c. 74, §§ 1(1)(a), 19B(1) (Eng.).

in *Al Rawi* argued that their case was more compelling on the basis of their allegations that they had suffered torture at the hands of the United States authorities.[64]

In the Court of Appeal, Lord Justice Laws considered that whether the British Government's policy of drawing a distinction between British citizens and permanent residents in the provision of diplomatic protection amounted to discrimination depended upon an exploration of *why* such contrasting treatment had occurred,[65]

> [I]t may be said there are two possible answers: (1) because they were not British nationals - as the appellants say; (2) because they were not persons whom the United Kingdom was by the rules of international law entitled to protect by means of a State to State claim - as the respondents say. Each answer is in a sense true. By what principle do we decide between them?[66]

Answering this question turned upon an assessment of whether nationals and resident foreign nationals where actually 'materially different'[67] groups for the purpose of diplomatic protection, permitting differential treatment under the Race Relations Act:

> The national and the non-national are in truth in materially different cases one from the other for the purpose of the exercise of the right of diplomatic protection by means of State to State claims. … The non-nationals have been treated differently from the nationals not because of their race (nationality) but because one group is entitled to diplomatic protection and the other is not.[68]

Lord Justice Laws therefore ruled that the claimants would have to establish that the Foreign Secretary's decision to deny foreign nationals diplomatic protection "is frankly perverse," an endeavor which was "manifestly unachievable"[69] on the basis of arguments that they had been subjected to inhuman and degrading treatment. The Court of Appeal accepted, as it had in *Abbasi*, that regardless of the gravity of the infringement of an individual's human rights, "the ECHR contains no requirement that a signatory State should take up the complaints of any individual within its territory touching the acts of another sovereign

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[64] *See Al Rawi*, [2006] EWCA (Civ) 1279 (Eng.), [16].

[65] *See* R. v. Immigration Officer, Prague Airport [2004] UKHL 55, (Eng.) (establishing the basis for this test).

[66] *Al Rawi*, [2006] EWCA (Civ) 1279 (Eng.), [75].

[67] Race Relations Act, 1976, c. 74, § 3(4) (Eng.).

[68] *See Al Rawi*, [2006] EWCA (Civ) 1279, [78] (Eng.).

[69] *Id.* [141].

State."[70] As the Divisional Court, which first heard the claim, inevitably asserted, "the powerful submissions made on behalf of the claimants founder, perhaps uncomfortably and unsatisfactorily, on the rock which prevented the *Abbasi* claim from succeeding."[71] As in *Abbasi*, such arguments failed to address the British government's contention that the United Kingdom owed no duty to provide diplomatic protection to the world at large.[72] Therefore, whilst Lord Justice Laws did accept that "[t]he prisoners at Guantánamo Bay, some of them at least, have suffered grave privations,[73] this acknowledgement was worth little when British government did not dispute that the detainees had been 'subjected at least to inhuman and degrading treatment,"[74] but the claimants could not link the British government to those abuses.

The rejection of the appeal by British resident detainees in *Al Rawi* closed the legal avenues by which they could pursue diplomatic protection. Over the course of the next year, however, with political pressure on the British government to act on the detainees' behalf mounting as a result of the attention brought to their plight by this case,[75] Sadat Sayeed foresaw that "their fate will be determined by the outcome of ongoing Anglo-US diplomacy."[76] The focus of these cases upon the detainees' treatment, a strategy which delivered "strong arguments in the context of political debate,"[77] goes a long way towards explaining this change in the British Government's position. As Philippe Sands, QC, once junior counsel in *Abbasi*, explains with regard to that case:

> The Court's judgment added great authority to those who were relying on international law to challenge the conditions of the Guantánamo detainees. … To a significant extent the judgement of the Court of Appeal has set the tone for British public opinion on the issue of Guantánamo.[78]

The most prominent example of the impact of the claims was Lord Steyn's famous excoriation of Guantánamo Bay as "a legal black hole,"[79]

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[70] *Id.* [102].

[71] *Al Rawi* (Divisional Court), [2006] EWHC (Admin) 972, [96] (Eng.).

[72] *Al Rawi*, [2006] EWCA (Civ) 1279,[102] (Eng.).

[73] *Id.* [3].

[74] *Id.*

[75] *See* Vikram Dodd, *Tortuous path out of prison for Guantánamo 3*, GUARDIAN, Dec. 20, 2007, http://www.guardian.co.uk/uk/2007/dec/20/usa.world.

[76] Sadat Sayeed, *Guantanamo Bay – Five Years On*, 21 J. IMMIGR. ASYLUM & NAT'LITY L. REV. 109, 121 (2007).

[77] *Al Rawi* (Divisional Court), [2006] EWHC (Admin) 972, [89] (Eng.).

[78] Philippe Sands, *The "Political" and the "Legal:" Comments of Professor Tushnet's Paper*, 3 INT'L J. L. IN CONTEXT 319, 322 (2007).

[79] Steyn, *supra* note 13, at 1.

which can be traced directly to the submissions of counsel for the claimants in *Abbasi*, Mr. Nicholas Blake QC.[80] Furthermore, the Divisional Court's decision in *Al Rawi* even prompted Parliament's Joint Committee on Human Rights to review the cooperation of the United Kingdom's security service with the United States.[81] Therefore, despite the courts' refusal to intervene, the claimants' assertions of arbitrary detention and torture became embedded in the public consciousness in the United Kingdom. In August 2007, an eventual effort on the part of the British government in response to this mounting public pressure,[82] coupled with the eagerness of the Bush Administration to lessen the burden of Camp Delta, ultimately resulted in the release of most of the United Kingdom residents, including all of the claimants who had called upon the United Kingdom's protection in *Al Rawi*.[83]

If the legal representatives for Abbasi and Al Rawi can be accused of playing to the gallery, Lord Phillips' judgment in *Abbasi* attempted the more audacious feat of influencing the Federal courts of the United States,[84] which were at the time, engaged in hearing *Rasul* v. *Bush*,[85] the conjoined *habeas corpus* actions involving British citizens. Nonetheless, as Matthew Happold asserts, "[f]or a transnational judicial conversation to happen ... there needs be at least two parties to the discussion,"[86] and the lack of reference to *Abbasi* in the *habeas corpus* judgments of either the District of Columbia Circuit Court of Appeals[87] or Supreme Court seemingly supports contention that these overtures fell on deaf ears. Lord Phillip's judgment was, however, brought to the attention of the Supreme Court in several *amici curiae* briefs,[88] which focused in particu-

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[80] *See Abbasi*, [2002] EWCA (Civ) 1598, [22] (Eng.).

[81] *See* JOINT COMMITTEE ON HUMAN RIGHTS, NINETEENTH REPORT, THE UN CONVENTION AGAINST TORTURE (UNCAT) REPORT, 2005-6, H.L. 185-I, H.C. 701-I, ¶ 57 (U.K.).

[82] *See* Press Release, Foreign and Commonwealth Office, Guantanamo Bay: Former UK Residents (Aug. 6, 2007), http://www.fco.gov.uk/resources/en/press-release/2007/08/fco_hp_npr_070807_guantbayukres (last visited Mar. 1, 2010).

[83] Jamie Doward, *Guantanamo Britons could now face control orders*, THE OBSERVER, Dec. 9, 2007, *available at* http://www.guardian.co.uk/uk/2007/dec/09/guantanamo.usa/print.

[84] *See* T. Poole, *Harnessing the Power of the Past? Lord Hoffmann and the Belmarsh Detainees Case*, 32 J.L. & SOC'Y 534, 550 (2005).

[85] Rasul v. Bush, 542 U.S. 466 (2004).

[86] Matthew Happold, *The Detention of Al-Qaeda Suspects at Guantanamo Bay: United Kingdom Perspectives*, 4 HUM. RTS. L. REV. 57, 68 (2004).

[87] Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

[88] See, in particular, the briefs submitted by the Bar Human Rights Committee, 17-20, *available at* http://www.barhumanrights.org.uk/docs/ami-cus_brief.pdf (last visited

lar upon his acknowledgement that "[t]he United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus."[89] This language is paralleled in the majority opinion by Justice Stevens and it is conceivable that it may have influenced the court's extensive consideration of eighteenth century English authorities.[90]

III. AN UNEXPECTED CLAIM OF CITIZENSHIP

The British government's success in securing the release of British detainees had an unexpected side-effect. It prompted fellow detainee David Hicks to apply for British citizenship. Hicks, an Australian citizen, was seized by Northern Alliance forces in Afghanistan in December 2001 and transferred to Guantánamo Bay a month later. In the two years preceding his capture, Hicks had, by his own admission, "undergone extensive general and terrorist training, at camps with links to or belonging to Al Qaida'," activities which, according to the then Home Secretary Charles Clarke, were "seriously prejudicial to the vital interests of the United Kingdom and which demonstrate disaffection with Her Majesty and the United Kingdom."[91]

In light of Hicks' conduct, the Australian Government had not actively pursued his repatriation with the United States. After nearly four years in Guantánamo he was to be tried before a military commission on a number of charges,[92] including allegations that he was responsible for translating training manuals into English.[93] He therefore sought to quali-

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Jan. 10, 2010), and by the Bipartisan Coalition of National and International Non-Governmental Organizations, 26 *available at* http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload-500/81/AmiciCuriae_Bipartisan_Coalition_National_International_%20Non_Govt_Org.pdf (last visited Mar. 1, 2010).

[89] *Abbasi*, [2002] EWCA (Civ) 1598, [59] (Eng.).

[90] *See Rasul*, 542 U.S. at 482.

[91] Letter from the Secretary of State to David Hicks (Dec. 5, 2005) (reproduced in *Hicks*, [2006] EWCA (Civ) 400, [5] (Eng.).

[92] The then Australian Prime Minister, John Howard, declared at a Press Conference at the Pentagon that, "Australia is satisfied that the military commission process in relation to David Hicks, as he is the one Australian held in Guantanamo Bay, will provide a proper measure of justice." United States Department of Defense, Secretary Rumsfeld Media Availability with Australian Prime Minister John Howard, Jan. 10, 2010, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3182.

[93] These proceedings were, at the time of Hick's case before the English courts, suspended pending the United States Supreme Court's decision in *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006). In June 2006, the Supreme Court ruled that the Military Commissions, as established on the order of President George W. Bush violated international law and

fy for British citizenship, on the basis of his mother's birth in the United Kingdom,[94] in the expectation that he would be treated in the same way as the nine British citizens who had been released and who had not faced charges when they returned to the United Kingdom.

In response, the then Home Secretary informed Hicks that he would, using his powers under the British Nationality Act of 1981, immediately revoke any citizenship that he was obliged to grant,[95] on the basis that Hicks' actions had been "seriously prejudicial to the vital interests of the UK."[96] The power to revoke citizenship on this basis, however, was not enacted until a 2002 amendment to the Act,[97] post-dating Hicks' activities in Pakistan and Afghanistan. Therefore, the original wording of section 40 of the British Nationality Act of 1981 still applied, and this required the Home Secretary to establish that Hicks had "shown himself by act or speech to be disloyal or disaffected towards Her Majesty"[98] before he could be deprived of his citizenship.

The conditions in which Hicks was being held again loomed large in the case. In perhaps the most reserved language used by a British judge in describing Camp Delta, Mr. Justice Collins recognized the importance of expediting the case on the basis that "the claimant is held in what are no doubt far from pleasant conditions."[99] The case, however, turned on the substantive question of whether Hicks' activities before he was granted citizenship could form the basis of a justification for revoking it, with the British Government contending that "[d]isloyalty and disaffection may be shown without allegiance as a citizen being owed."[100]

Both the High Court and the Court of Appeal accepted that Hicks had a right to be registered as a British citizen and rejected the government's argument that citizenship thereby granted could be revoked due to

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the law of the United States. Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002). This ruling prompted Congress to pass the Military Commissions Act 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[94] British Nationality Act, 1981, c. 61, § 4C (Eng.), inserted into the Act by the Nationality, Asylum and Immigration Act, 2002, c. 13, § 13(1) (Eng.).

[95] Letter from the Secretary of State to David Hicks (Nov. 9, 2005) (reproduced in *Hicks*, [2006] EWCA (Civ) 400, [3] (Eng.).

[96] British Nationality Act, 1981, c. 61, § 40(2)(a) (Eng.).

[97] Nationality, Asylum and Immigration Act, 2002, c. 41, § 4(1) (Eng.).

[98] British Nationality Act, 1981, c. 61, § 40(3)(a) (Eng.).

[99] R. v. Sec'y of State for the Home Depart. [2005] EWHC (Admin) 2818, [1] (Eng.).

[100] *Hicks*, [2006] EWCA (Civ) 400, [23] (Eng.).

disaffection and disloyalty evidenced by his past actions.[101] According to Pill LJ,

> [T]he word "disaffected" as well as the word "disloyal" requires an attitude of mind towards an entity to which allegiance is owed, or at least to which the person belongs or is attached. . . . To be disaffected is to be estranged in affection towards an entity to which one owes allegiance or with which one has at least a relationship. The word is not apt to cover, in relation to the United Kingdom, an outsider, whether a German general during the 1st World War, or an Australian in Afghanistan in 1990.[102]

As a result of this ruling, Hicks had to be registered as a British citizen, with citizenship being granted on July 7, 2006. In the preceding months, however, the British government had worked assiduously to secure the passage through Parliament of the Immigration, Asylum and Nationality Act of 2006. This Act permitted the removal of citizenship from dual nationals, such as Hicks, on the broad basis that "the Secretary of State is satisfied that deprivation is conducive to the public good."[103] Basing this new power to deprive citizenship on the Home Secretary's subjective opinion of the threat posed by an individual allowed John Reid, Charles Clarke's successor as Home Secretary, to take account of Hick's conduct prior to his receiving citizenship.

This measure constitutes the most egregious displays of "personalized" legislation to be enacted in the United Kingdom in recent years,[104] having received its Royal Assent more than three months after the High Court had ruled in Hicks' favor and having only come into force in June 2006. Given that legislation already provided for the revocation of citizenship of any dual national who could be shown, since 2002, to have acted in a manner "seriously prejudicial" to the United Kingdom's vital interests,[105] Hicks can be seen as virtually the only individual against whom such extended powers were necessary. Such machinations were of doubtful worth when it is considered that in his judgment, Lord Justice Pill had taken great care to acknowledge that Hicks enjoyed much weaker links to the United Kingdom than other British-citizen detainees, and

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[101] *Id.* [37].

[102] *Id.* [32].

[103] British Nationality Act, 1981, c. 61, § 40(2) (Eng.), *amended by* Immigration, Asylum and Nationality Act, 2006, c. 13, § 56 (Eng.).

[104] One of the few comparable pieces of legislation passed by the United Kingdom's Parliament is the so-called "get-Scargill" provision, now contained in the Trade Union and Labour Relations (Consolidation) Act, 1992, c. 52, § 46 (Eng.), which was enacted specifically to prevent the flamboyant trade union leader Arthur Scargill from being appointed as Life President of the National Union of Mineworkers.

[105] *See* Nationality, Asylum and Immigration Act, 2002, c. 41, § 4(1) (Eng.).

therefore that "the Secretary of State, in the exercise of his discretion, is entitled to distinguish between the respondent and other British citizens at Guantanamo Bay."[106] Had the Government followed this course of action, Hick's claims would at least have received proper consideration, even if they were ultimately rejected. Instead, a matter of hours after Hicks was granted British citizenship, the status was revoked using the new statutory powers.[107]

The *Hicks* case highlights the paradox inherent in the approach of Tony Blair's Administration to Guantánamo Bay. Ministers may have been willing to criticize the operation of Camp Delta to a domestic audience, and the government was eventually moved to tackle domestic criticism by pursuing the release of both British citizens and residents. However, the Government has eschewed actions which would embarrass other governments, even to the point of drafting the specific "get-Hicks" provision to defeat his citizenship claims. Klein and Barry note that "[i]n stripping Hicks of his British nationality and refusing to take action on his behalf, it is arguable that the United Kingdom has shown some deference to the position of Australia in its treatment of Hicks."[108] Nonetheless, as they go on to argue, Hicks' dual nationality "could have been viewed as an increased opportunity to protect Hicks's human rights, rather than as another reason to deny assistance."[109]

Charges were brought against Hicks under the revised Military Commission process in February 2007,[110] but his high-profile battle for citizenship in the English courts highlighted just how little the Australian government had done on his behalf. Amid intense public pressure in Australia, the convening authority appointed under the United States Military Commissions Act of 2006, Judge Susan Crawford, accepted a pre-trial agreement with Hick's lawyers. He was allowed to serve the remaining months of his sentence in an Australian prison.[111]

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[106] *Hicks*, [2006] EWCA (Civ) 400, [50] (Eng.).

[107] *See* Vikram Dodd, *Reid revoked citizenship of Guantánamo detainee*, GUARDIAN, Jan. 11, 2007, http://www.guardian.co.uk/uk/2007/jan/11/world.politics.

[108] Natalie Klein & Lise Barry, *A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality*, 13 AUSTL. J. HUM. RTS. 1, 13 (2007).

[109] *Id.* at 14.

[110] *See* Press Release, Alexander Downer, Minister of Foreign Affairs & Phillip Ruddock, Attorney General, David Hicks: charges outlined (Feb. 3, 2007), *available at* http://www.foreignminister.gov.au/releases/2007/joint_ruddock_hicks.html.

[111] *See* Scott Horton, *The Plea Bargain of David Hicks*, HARPER'S MAG., Apr. 2, 2007, *available at* http://www.harpers.org/archive/2007/04/horton-plea-bargain-hicks.

IV. REVEALING A JOINT CRIMINAL ENTERPRISE?

At the end of George W. Bush's presidency, only two former British residents remained in detention at Guantánamo. In the case of one of the men, Shaker Aamer, the United States expressed such serious objections to his release that in December 2007 the Foreign Secretary had to acknowledge that "we are no longer in active discussions regarding his transfer to the UK."[112] The other detainee, Binyan Mohamed, an Ethiopian national, had been granted exceptional leave to remain in the United Kingdom in 2000. Held in United States custody since his arrest in Pakistan on April 10, 2002, Mohamed alleges that he was subjected to repeated torture. On May 28, 2008, he was charged under the Military Commissions Act of 2006 with offences relating to his alleged involvement in planning terrorist attacks, particularly the so-called "dirty bomb plot," against the United States.[113]

Whilst the British Government pressed for Mohamed's release alongside the other British residents,[114] it refused to make public potentially exculpatory evidence and accounts of his treatment received through intelligence sharing with the United States Government.[115] This assertion of "public interest immunity," a doctrine in the United Kingdom's public law which is intended to maintain the secrecy of important documents, particularly where there are security implications in their release, was initially upheld by the Divisional Court.[116] Indeed, the first

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[112] David Miliband, MP, Secretary of State for Foreign and Commonwealth Affairs, 469 PARL. DEB., H.C. (6th ser.) (2007) 56WS. The Government has since confirmed that the request for Aamer's release still stands. *See* Ivan Lewis, MP, Minister of State for Foreign and Commonwealth Affairs, 497 PARL. DEB., H.C. (6th ser.) (2009) 31W.

[113] This summary of facts is drawn from the judgment in R. v. Sec'y of State for Foreign and Commonwealth Affairs, [2008] EWHC (Admin) 2048, [5]-[8] (Eng.).

[114] Indeed, the Divisional Court noted, "the very real efforts made by the Foreign Secretary to assist [Mohamed]." *Id.* [55].

[115] The Divisional Court quoted at length from a letter between the British government and Mohamed's legal team which explained the nature of the material held by the government; "The Government has previously said to you ... that it had no information to confirm Binyan Mohamed's account of his detention following his arrest in Pakistan or his allegations of mistreatment while in detention. In the light of your correspondence and the related judicial review proceedings, all the various branches of the Government have recently undertaken a further review of the material held on their files. In the course of this review, some limited additional material was discovered. While this material may not have a bearing on the charges preferred against Binyan Mohamed, and may not be definitive, it is possible that it could be considered to be exculpatory or might otherwise be relevant under [the Military Commissions Act] and the accompanying provisions of the Manual for Military Commissions." *Id.* [47].

[116] R v. Sec'y of State for Foreign & Commonwealth Affairs [2009] EWHC (Admin) 152, [107] (Eng.), *available at* http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2009/152.html.

judgment in *Mohamed* was much more reticent about the claimant's assertions of ill treatment than previous courts had been when deciding upon cases involving Guantánamo detainees. Lord Justice Thomas noted that "we are satisfied that there is only the slenderest evidence independent of [Mohamed] to support his case of torture or cruel, inhuman or degrading treatment by the United States authorities."[117]

This acknowledgement that the protected documents included some evidence supporting Mohamed's claims that he had been tortured remained significant. On the basis of closed evidence presented by a member of the United Kingdom's Security Services, Witness B, the Divisional Court accepted that "[t]he [Security Services] continued to facilitate the interviewing of [Mohamed] by providing information and questions … in the knowledge of what had been reported to them in relation to the conditions of his detention and treatment," and they continued to do so "when they must also have appreciated that he was not in a United States facility and that the facility in which he was being detained and questioned was that of a foreign government."[118] Lord Justice Thomas concluded that "the relationship of the United Kingdom Government to the United States authorities in connection with [Mohamed] was far beyond that of a bystander or witness to the alleged wrongdoing."[119]

Several judgments later, Mohamed still did have access to the documents that he originally sought.[120] New fuel was provided for the litigation in January 2009 when Judge Susan Crawford, the Convening Authority for Military Commissions, revealed in an interview that she had refused to refer the charges against Mohammed al-Qahtani, a Saudi national held at Guantánamo Bay, to a military commission on the basis that he had been tortured.[121]

Placing emphasis on Judge Crawford's comments,[122] the judges

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[117] *Id.* [102].

[118] See *Id.* [88].

[119] *Id.*

[120] Thorough analysis of the British Government's Public Interest Immunity claim and the redaction of passages from the High Court's judgments, in light of concerns that the release of such information would jeopardize the intelligence sharing between the United Kingdom and the United States, is beyond the scope of this article. The basis of such a claim by the British Government can be found in Viscount Simon LC's conclusion that, "*documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld*." Duncan v. Cammell Laird & Co., [1942] A.C. 624, 636, (Eng).

[121] Bob Woodward, *Detainee Tortured, Says U.S. Official: Trial Overseer Cites "Abusive" Methods Against 9/11 Suspect*, WASH. POST, Jan. 14, 2009, at A1.

[122] *See Mohamed*, [2009] EWHC (Admin) 152, [12] (Eng.).

hearing *Mohamed* continued to reflect the "deep concern"[123] for the treatment of Guantánamo detainees which had prevailed in the courts since Abbasi. In their fourth judgment in the case, delivered just prior to Mohamed's release, they asserted the importance of making this evidence public given the subject matter it concerned,

> If the redacted passages containing a gist of what was reported by officials of the United States Government were made public that would enable more informed and accurate public debate to take place and Governments to be held to account. The fact that the issues raised relate to torture and cruel, inhuman or degrading treatment have a particular resonance …[124]

Moreover, they affirmed that some of the substance of the redacted paragraphs amounted to "a short summary of what was reported to the United Kingdom authorities by the officials of the United States Government as to what they say happened to [Mohamed] during his detention in Pakistan in April and May 2002."[125] Following the lead of the Court of Appeal judgment in *Abbasi*, the Divisional Court sought to extend its influence to decision makers in the United States. Emphasizing "the long history of the common law and democracy which we share with the United States", Lord Justice Thomas asserted that it was,

> [I]n our view difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters.[126]

Although these comments did not have their intended effect, in that the United States Government released no new information, the controversy generated by Divisional Court's decision directly contributed to Mohamed's release. The day after its fourth decision was issued, the British Government was obliged to acknowledge that "[w]e continue to press for Mr. Mohamed's return from Guantanamo as vigorously as before."[127] One week later, following renewed contact between senior officials in the wake of these comments, the British Government further confirmed that the United States Administration had agreed that "Mr. Mohamed's case should be treated as a priority."[128] Eleven days after

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[123] *Abbasi*, [2002] EWCA Civ. 1598 [107] (Eng.).

[124] *See Mohamed*, [2009] EWHC (Admin) 152, [43] (Eng.).

[125] *Id.* [68].

[126] *Id.* [69].

[127] 707 PARL. DEB., H.L. (5th ser.) (2009) 805 (U.K.) (statement of Lord Malloch-Brown, Minister of State for Foreign and Commonwealth Affairs).

[128] *Id.* at WS102.

this statement, Binyan Mohamed was released.[129]

The case, however, continued after this dramatic turn of events,[130] with Binyan Mohamed's legal representatives seeking to expose evidence of the United Kingdom's collusion in the alleged torture, which took place whilst he was within the custody of the United States. The allegations brought to light by the case were so serious that the Attorney General has referred them to the Commissioner of the Metropolitan Police for a criminal investigation against Security Service personnel, which commenced in July 2009.[131] Furthermore, the Divisional Court's fifth judgment, in October 2009, has since ordered that the information contained in the redacted paragraphs of its earlier decision must be restored.[132] At the center of any future criminal action will be the conduct of Witness B, the member of the Security Services who interviewed Mohamed whilst he was detained in Karachi, Pakistan, under the control of the United States, after his arrest in April 2002. The investigation will focus on complicity in the offense of torture contained in the Criminal Justice Act of 1988.[133] English criminal law also establishes that it is an offence for a public official of the United Kingdom to act, whilst overseas, in a manner which would constitute an indictable offence if done in the United Kingdom.[134] Analyzing international authorities on what conduct constitutes complicity in relation to torture under the UN Torture Convention,[135] Parliament's joint Human Rights Committee recently asserted that:

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[129] 488 PARL. DEB., H.C. (6th ser.) (2009) 18WS (U.K.).

[130] Richard Norton-Taylor, Peter Walker & Robert Booth, *Binyam Mohamed Returns to Britain After Guantánamo Ordeal*, GUARDIAN, Feb. 23, 2009, http://www.guardian.co.uk/uk/2009/feb/23/binyam-moham-ed-guantanamo-plane-lands.

[131] *See* 709 PARL. DEB., H.L. (5th ser.) (2009) WS51 (U.K.).

[132] *Mohamed*, [2009] EWHC 2549 (Admin) 152, [108] (Eng.). At the time of this writing, this judgment was subject to appeal. A powerful panel of judges in the Court of Appeal, made up of the Lord Chief Justice of England and Wales, the Master of the Rolls and the President of the Queen's Bench Division, subsequently upheld the Divisional Court's decision to order disclosure in *R. v Sec'y of State for Foreign & Commonwealth Affairs*, [2010] EWCA (Civ) 65 (Eng.), *available at* http://-www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2010/65.html [hereinafter *Mohamed* (Court of Appeal)].

[133] Criminal Justice Act, 1988, c.33, § 134 (Eng.) asserts that "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

[134] Criminal Justice Act, 1948, c. 58, § 31 (Eng.).

[135] Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

> "[F]or the purposes of individual criminal responsibility for complicity in torture, "complicity" requires proof of three elements: (1) knowledge that torture is taking place, (2) a direct contribution by way of assistance that (3) has a substantial effect on the perpetration of the crime."[136]

This interpretation of the offense of torture would suggest that, in taking part in interviews and providing information for use in interrogations, officials such as Witness B would have been complicit in torture if they knew that such mistreatment of detainees was taking place. Even if criminal charges do not result, this does not preclude state responsibility for torture, should the publication of information required by the Divisional Court in Mohamed reveal the United Kingdom's collusion in activities is incompatible with the Article 3 ECHR prohibition of torture.[137] Indeed, had such evidence been available to the claimants in *Al Rawi*, the Court of Appeal could not have side-stepped questions concerning the extra-territorial effect of the ECHR.[138]

Whilst serving as British Prime Minister, Gordon Brown continued to argue that the ECHR does not include "a positive legal obligation to report or seek to prevent acts of torture carried out by other states abroad."[139] Nonetheless, it is clear that where a state is complicit in another state's torture of an individual, this will be actionable. The type of collusion which has been dealt with most frequently by the European Court of Human Rights has involved efforts by parties to the ECHR to extradite individuals to states where they were at risk of such treatment. In *Saadi v. Italy* the Court held that "[s]ince protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment."[140]

That the concept of state complicity in torture under the ECHR extends beyond extradition to a state which practices torture can be seen in other decisions, such as *Al Adsani*, where the claimant's action against the United Kingdom for failing to stop his torture by the Kuwaiti authori-

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[136] JOINT SELECT COMMITTEE ON HUMAN RIGHTS, TWENTY-THIRD REPORT: ALLEGATIONS OF UK COMPLICITY IN TORTURE, THE UN CONVENTION AGAINST TORTURE (UNCAT) REPORT, 2008-9, H.L. 152, H.C. 230, ¶ 35.

[137] The information disclosed by order of the Court of Appeal subsequent to the submission of this article established that the British Security Service continued to supply the US authorities with questions despite being aware of treatment of Binyan Mohamed that "could easily be contended to be at the very least cruel, inhuman and degrading treatment." *Mohamed* (Court of Appeal), [2010] EWCA (Civ) 65 (Eng.).

[138] *See Al Rawi*, [2006] EWCA (Civ) 1279, [102] (Eng.).

[139] JOINT SELECT COMMITTEE ON HUMAN RIGHTS, *supra* note 136, at 53.

[140] Saadi v. Italy, App. No. 37201/06, 49 Eur. H.R. Rep. 30, ¶ 138 (2009).

ties was rejected, but only because "[t]he applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had *any causal connection* with its occurrence."[141]

Moreover, the Canadian Federal Court of Appeal has recently ruled, in a case involving Canadian officials sharing with the United States' authorities the details of an interview with a Guantánamo detainee, that such activities amounted to a breach of the detainee's right to liberty under section 7 of the Canadian Charter of Rights and Freedoms.[142] Taken together these authorities indicate that the United Kingdom's involvement or collusion in the detention of an individual in Guantánamo could constitute an actionable breach of Articles 3 and 5 of the ECHR, even if the actual abuse occurs extra-territorially and at the hands of another state.[143]

Evidence concerning the involvement of the British security services in events leading up to the detention of Bisher Al-Rawi and Jamil El Banna, uncovered after the Court of Appeal proceedings, led Edward Davey, a Member of Parliament, to allege that the "British secret services were utterly complicit in the arrest and rendition of Bisher and Jamil."[144] On the basis of this evidence, and bolstered by the progress in the *Mohamed* case, these former detainees, together with Richard Belmar, Omar Deghayes, Moazzam Begg, Binyan Mohamed and Martin Mubanga, instituted a claim for damages as a result of the collusion of the British Government in their detention.[145] In an initial judgment in the case, the Mr. Justice Silber accepted that the government can use "closed evidence," presented by security cleared special advocates, in hearings

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[141] Al-Adsani v. United Kingdom, App. No.35763/97, 34 Eur. H.R. Rep. 11, ¶ 40 (2002).

[142] Canada (Prime Minister) v. Khadr, [2009] Fed. Ct. App. 246, ¶¶ 60, 65. Subsequent to the submission of this article the Supreme Court of Canada affirmed that Khadr's rights under § 7 of the Charter had been breached and the Canadian government had contributed to his ongoing detention. However, the Supreme Court of Canada did not impose a remedy on the Canadian government. *See* Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 3, ¶¶ 47-48.

[143] Ironically, these actions against the United Kingdom would appear to be more likely to succeed than future claims against the United States' Government in the US Courts, in the wake of the rejection of such claims in *Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc). *See also*, George Brown, *Counter-counter-terrorism via Lawsuit – The Bivens Impasse*, 82 S. CAL. L. REV. 842 (2009).

[144] 455 PARL. DEB., H.C. (6th ser.) (2007) 117 (U.K.) (statement of Edward Davey, Member of Parliament).

[145] *See* Al Rawi v. Security Serv., [2009] EWHC (QB) 2959, [8]-[9], (Eng.), *available at* http://www.bailii.org/ew/cases/EWHC/QB/2009/2959.html.

closed to the claimants and general public, in response to this action.[146] Mr. Justice Silber did, however, note that "[t]he Judge conducting a closed material procedure with the assistance of a special advocate acting for the claimant would be carefully scrutinizing whether any documents for which [Public Interest Immunity] has been claimed should be disclosed to the claimants' open advocate."[147]

V. CONCLUSION

Despite President Barak Obama's announcement on January 22, 2009, of the planned closure of the Camp Delta detention facility in Guantánamo Bay[148] and the release of most of the British residents as charted in this article, the litigation surrounding Guantánamo in the English legal system continues to gather pace. This article has indicated that, to date, there have been two important "ripple effects" from the detentions at Guantánamo evident in litigation before the English courts.

Firstly, judicial review actions have been employed to press the British Government to adopt a more active stance in opposition to the detentions in Guantánamo Bay. In the earlier Guantánamo cases, when evidence did not directly link the United Kingdom to the detention and treatment of individuals, many judges endorsed this aim by the exercise of "soft power" rather than ruling against the British Government. Even though the British Government won these cases, headline-grabbing statements on the arbitrary detention and ill treatment of those individuals detained in Guantánamo set the tone of public debate. More recently, the tenacity of the Divisional Court judges hearing the *Mohamed* case drew an exasperated response from Jonathan Sumption, QC, representing the Foreign Secretary in the Government's appeal against their order to disclose the redacted material in their judgments. Before the Court of Appeal he argued that the position adopted by Lord Justice Thomas and Mr. Justice Lloyd Jones was "in many respects unnecessary and profoundly damaging to the interests of this country."[149] The Divisional

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[146] *Id.* [92].

[147] *Id.* [94].

[148] *See* Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

[149] Frances Gibb & Tom Coghlan, *David Miliband Attacks "Irresponsible" Judges over Binyam Mohamed*, TIMES ONLINE, Dec. 15, 2009, http://business.timesonline.co.uk/tol/business/law/article6956218.ece. In response to this outburst, and subsequent to the submission of this article, the Master of the Rolls Lord Neuberger asserted that "I would certainly not accept that the conclusion in the fifth judgment could fairly be described as "irresponsible", as suggested by Mr Sumption. ... The Foreign Secretary's case on redaction before the Divisional Court was, to put it mildly, not assisted by the remarkably drip-fed way in which the evidence was presented, and I do not think

Court's reason for demanding the publication of this information relates directly to its importance in potentially revealing the complicity of the United Kingdom in torture:

> "In our view . . . a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating to the British security services in wrongdoing be placed in the public domain in the United Kingdom."[150]

Secondly, where serious human rights abuses are at issue, the English courts have shown a willingness to disregard historic conceptions of comity between the courts of different jurisdictions and to assert their view of the correct interpretation of law for the benefit of the appellate courts in the United States.[151] In the *Abbasi* case, for example, with United States Government maintaining that the detention of prisoners at Guantánamo was lawful, and with the issue still live before the federal courts, the British Government argued that the issue was not justiciable before the Court of Appeal.[152] Lord Phillips, however, rejected the application of this principle of comity given the seriousness of the human rights abuses which were at issue, proceeding on the basis that *Abbasi* was being held "in apparent contravention of fundamental principles recognized by both jurisdictions and by international law."[153]

Both trends, evident throughout the Guantánamo litigation examined in this article, highlight the importance of these cases as part of the jurisprudence of the English courts after the Human Rights Act. However, it is one thing for these courts to attempt to maneuver the British Government into protecting the interests of detainees, or to seek to influence their fellow judges in the United States. As the Guantánamo cases involving claims for diplomatic protection have shown, such exercises of "soft power" may take years to have an effect, and it may prove difficult to discern the impact of the judiciary's position as separate from other influences on decision making. The ongoing litigation will require the English courts to assess whether the British Government was complicit in the detention and torture of detainees, in circumstances where only a direct decision will suffice. This might require the English courts to

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that the arguments advanced [to the media] ... were entirely the same as those addressed to us." *Mohamed* (Court of Appeal), [2010] EWCA (Civ) 65, [206] (Eng.).

[150] *Mohamed*, [2009] EWHC (QB) 2549, [105] (Eng.).

[151] *See* Katherine R. Thomas, *The Changing Status of International Law in English Domestic Law*, 53 NETH. INT'L L. REV. 371, 380-81 (2006).

[152] *See Abbasi*, [2002] EWCA (Civ) 1598 [31] (Eng.).

[153] *Id.* [64].

reach uncomfortable decisions with an impact which is very close to home.[154]

[154] Subsequent to the submission of this article, the Court of Appeal rose to this challenge in two extraordinary judgments. In the first Lord Neuberger, at the request of the government, removed general criticisms of the actions of the Security Service from his judgment pending further argument, leaving only an uncontroversial statement that "witness B is currently under investigation by the police." *Mohamed* (Court of Appeal), [2010] EWCA (Civ) 65 [168] (Eng.). However, in a subsequent judgment, the Court of Appeal restored his specific criticisms of the role of the Security Service in the Mohamed case to damning effect; "the Security Services had made it clear in March 2005 ... that 'they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training' ... , indeed they 'denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government'. ... Yet, in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials." *R. (Mohamed) v Sec'y of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158, [28] (Eng.).