

# Should the Decision of the Foreign Secretary be Justiciable?

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Ladies and Gentlemen

Many thanks for inviting me to give this talk which I would like to dedicate to the memory of one of my legal heroes, the late Ronald Dworkin, who very sadly died last week. His death is a huge loss to the academic and legal worlds on both sides of the Atlantic. He held distinguished Professorships at Oxford and then UCL as well as at New York university and lived in London and in New York. As a young solicitor, his books inspired me to see the law not as an arid set of rules but as the expression of human rights, integrity and human dignity, and of making the world a better place. Long before the Human Rights Act, his 1977 book "Taking rights seriously" postulated a rights-based view of the law. I was extremely honoured to be invited about six years ago, to respond to a lecture he gave at the Sheldonian Theatre in Oxford and to meet him at dinner afterwards. At that time he had just published a book entitled "Is Democracy possible here?" in which he debated the US response to 9/11, and the establishment of Guantanamo Bay and the use of torture, In it he said as follows:-

"We damage ourselves, not just our victim, when we ignore his humanity, because in denigrating his intrinsic value, we denigrate our own. We must take care not to define "emergency" as simply "great danger" or to suppose that any act that improves our own security, not matter how marginally is for that reason justified. We must hold to a very different virtue; the old fashioned virtue of courage. Sacrificing self-respect in the face of danger is a particularly shameful form of cowardice. We show courage in our domestic criminal law and practice; we increase the statistical risk that each of us will suffer from violent crime when we forbid preventive detention and insist on fair trials for everyone accused of crime. We must show parallel courage when the danger comes from abroad because our dignity is at stake in the same way."

Sadly more than ten years after President Bush announced a war on terrorism, that call for the courage to stand up for due process and the rule of law is being ignored by the US and by other states throughout the world. Despite the signing in January 2009 of an

order pledging to close down Guantanamo within a year, President Obama has entered his second term with it still open, and one hundred and sixty seven men inside, including a long term British resident Shaker Aamer. There are also other long term detention facilities, where detainees are not put on trial fairly or at all, including Bagram in Afghanistan. Meanwhile the US has increased its use of drone attacks in Pakistan and the Yemen to carry out targeted assassinations. And although Obama has said he is opposed to waterboarding, the use of torture and the so called enhanced interrogation methods used by the Bush administration, there has been no clear break with the abrogations of human rights which were claimed to be justified by the so called war on terrorism. The practice of extraordinary rendition, or the kidnapping of persons to be taken to countries where they face torture, continues.

This has inevitably meant that some of the most difficult human rights decisions which have had to be made by our Courts have entered firmly into the sphere of foreign relations and the decision making powers of the Foreign Secretary. And this in its turn has raised the question of whether it is appropriate for there to be judicial scrutiny of this area, given an ancient principle of non justiciability in relation to foreign policy, and a general reluctance of the Courts to intervene in foreign policy decisions. I want to look at one aspect of the dilemmas facing the Courts in this area, which is what happens when our government is in a position to have some control or influence over the plight of an individual outside the jurisdiction, whose rights are being denied. This is however by no means the only situation where individual rights collide with the principle of non justiciability and practice of non intervention. So I should start by saying that it seems to me to be fundamentally objectionable that any individual rights should be subordinated to a form of special deference to the Executive in the conduct of foreign affairs. Even as Dworkin could not see why we could not be just as courageous in our insistence on the need for respect for rights in the conduct of foreign affairs as in the conduct of domestic affairs, so I do not see why the Courts should grant any special immunity in this area, when individual rights are in issue. In recent years the European Court of Human Rights, which is not constrained by any principle of non justiciability, has decided in the cases of *Al Skeini and Al Jedda (Al-Skeini v UK Application no 55721/07 [2011]53EHRR 18 (ECHR Grand Chamber)* and *Al-Jedda v UK Application no 27021/08 [2011] 53 EHRR 23 (ECHR Grand Chamber)* that the UK government does have responsibility for Convention rights in the whole area for which our government has responsibility as an occupying power and not just to those persons directly controlled by British troops. However when challenges to the legality of going to war have been made, such as in the cases brought in 2008 demanding an inquiry into the Iraq war by the relatives of British soldiers killed in it (*Gentle and Clark v Prime Minister [2008] 1AC1356*), the Courts have shied away

from making any finding. I find it difficult to understand how it can be justified for relatives of British soldiers who die, to be able to challenge the adequacy of equipment such as snatch landrovers protecting their family members, but not the validity in international law of the cause for which our government sent them to fight (see *Allbutt Ellis Smith and Others v MOD* CA [2011] EWHC 1676). The Supreme Court is due to decide shortly whether to uphold the Court of Appeal on the challenge to the adequacy of equipment point. I hope it does so and I also hope that if our government were to decide tomorrow on an illegal war, any soldier ordered to take part and indeed any citizen, whose rights would be affected, could challenge the decision.

Back in the dark days of early 2002, not long after the great tragedy of 9/11 and when we had just learned of the existence of Guantanamo Bay, I was approached by the mother of one of the first British detainees to be taken there, Feroz Abbasi. It was not long before I began to feel very critical not just of the US government for the unlawful detention but of the UK government for not doing enough (or it seemed at the time, not doing anything) to secure any access by him to a Court. At the time I did not know much about the treatment at Guantanamo although pictures of inmates in orange jump suits kneeling blindfolded in shackles and prone on a trolley were not reassuring, and it was not long before we learned of the cages in which detainees were kept. Letters to the US embassy went completely unanswered and proceedings being taken in the US to challenge the legality of the detention were not being met with success, despite the involvement of excellent US lawyers from the Centre for Constitutional Rights in New York. Meanwhile letters to the British Foreign Office, while they were at least answered, resulted in no expression of opinion about the legality of Mr Abbasi's detention, let alone any action. Although there were welfare visits by the Foreign Office to Guantanamo, there were also visits by our security services to take advantage of the situation and carry out their own interrogations. And of course in the background was the knowledge that our government had brought in its own legislation to hold foreign nationals in Britain suspected of terrorism indefinitely without charge in the Anti Terrorism and Security Act. In the face of this, I decided that I should try and challenge the British government in the British courts. Judicial review proceedings were issued challenging the failure of the British government to call for Mr Abbasi's release. The initial response was not encouraging and permission for a judicial review was refused on the ground that this was foreign policy and was non justiciable. My shock at this has probably resulted in my strong feelings about legal immunity in this area. Fortunately after a change of Counsel to the brilliant Nicholas Blake QC – now of course Mr Justice Blake – we were able to persuade the Court of Appeal to grant permission on the papers and to reserve the case to itself. The case was dominated by arguments about non

justiciability and was ultimately unsuccessful but the eventual judgment of the Court of Appeal and the way in which it described the international law position was hugely influential throughout the world and undoubtedly ultimately caused the British government to rethink its position. The Court said that Mr Abbasi was detained in “a legal black hole” and described this as “objectionable.” (Abbasi v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598) As Lord Sumption put it in his lecture of May 2012 on Foreign Affairs in English Courts since 9/11: -

“..having held that it should not require the Foreign Secretary to make the representations that Mr Abbasi wanted, the court made the representations itself.”

And although the case was lost, it was not lost on non justiciability, although I think the detail of the decision demonstrated a degree of deference which I hope might not come into play if it were decided today. The judgment was to the effect that Mr Abbasi did have a legitimate expectation that the Foreign Secretary should consider making direct representations to the US government on his behalf but that once this consideration had taken place, which it was satisfied it had, it was inappropriate to order any specific representations to be made. It was not the first time in my legal career that the loss of a case had not meant losing the argument however, since the strong terms in which the illegality of the detention was described created their own momentum.

It is worth saying something here about the enormous importance of British lawyers in opposing the unlawful detentions at Guantanamo. I was asked about this recently by a PhD student writing a thesis on the subject and it made me remember that the first press conference at which family members of those detained in Guantanamo spoke was jointly organised by the Law Society and the Bar Council Human Rights Committee in 2002 and was the first in a series of such initiatives. I remember that both organisations were initially quite nervous of such a high profile intervention but quickly gained in confidence. And even the most eminent lawyers were not above a bit of campaigning on Guantanamo. Apart from the campaigning judgment of the Court of Appeal in the Abbasi case, a watershed moment came a year later in November 2003 when Lord Steyn delivered a lecture at Lincoln’s Inn condemning, in no uncertain terms, the legal black hole at Guantanamo. I have a fond memory of an enormous overflow of lawyers, including several very senior judges, being shut out of the hall because the numbers were too great, and of having the privilege of delivering Lord Steyn’s lecture by proxy to the overflow audience, because I had been given an advance copy by the media. Of course, over the Atlantic, our US counterparts were no less active and were undeterred by their initial failure to gain any purchase in the US courts. But, over here, the efforts of

lawyers and others did have an effect on our government. We don't know exactly what negotiations took place but releases of British citizens took place in 2004 and 2005 – with Mr Abbasi returning in 2005- and then later there were releases of British residents including Mr Al Rawi and Mr El Bannah and Mr Binyam Mohammed. It should be noted that Mr Al Rawi and Mr El Bannah had also mounted judicial review proceedings against the British government which were unsuccessful but the legal case was more difficult because they were not British nationals. Nevertheless the decision of the Court of Appeal – again without recourse to non justiciability - was swiftly followed by their release.

Some while later a large number of the people who had been detained in Guantanamo and were released back to the UK issued civil proceedings in the High Court against the Foreign Secretary, the Home Secretary and the Security Services. One of these ex detainees seeking damages was another client of mine, Martin Mubanga. He had been detained in March 2002 not in Afghanistan but in Zambia and initially detained by Zambian security services before being handed over to US forces for rendition to Guantanamo. As is well known, all the cases for damages were settled by the British government for undisclosed damages in November 2010. But before this happened I had on the advice of my Leading Counsel, Michael Fordham QC, issued an application for summary judgment for misfeasance of office and negligence against the government over the evidence we had obtained about the rendition from Zambia. This evidence, I think, adds some support to my views about the absurdity of putting the Foreign Secretary in a special box of immunity from judicial scrutiny. What we learned from the documents which we had managed to get disclosed, despite substantial obstructionism from the defendants, was that there had been extensive discussions at Cabinet Office level about what to do about British citizens detained abroad in the wake of 9/11 and at risk of being taken to Guantanamo. In the case of Mr Mubanga, the Foreign Office and the security services were informed of his detention in Zambia and of the risk of rendition to Guantanamo. Mr Mubanga had both a British and a Zambian passport and was entitled to British consular protection, particularly since the Zambian authorities did not allow dual nationality and would not therefore afford him any protection. The documents we were given, and which were referred to in open Court, show that there was a deliberate decision by the Foreign Office to breach its own policy and not to seek consular access because they knew the Zambian security services would be willing to hand Mr Mubanga over to British custody. A Foreign Office memo of 21<sup>st</sup> May 2002 said:-

“Conflicting instructions and expectations in this case placed us in an impossible situation. We cannot always have our cake and eat it. ....Mubanga is a dual national....But instructions from London were unequivocal. We should not accept responsibility or take custody of him. This was subsequently reinforced by the message from No 10 that under no circumstances should Mubanga be allowed to return to the UK.... And it became clear that if we requested consular access thereby de facto acknowledging him as a UK national, he would have been handed over to us. This would have gone against all other instructions from London.”

The memo concluded:-

“...the handling of the Mubanga case placed us in an impossible position. One half of the FCO said that we should not take responsibility for him, and the other half said that we should. We need to realise that, attractive as it may seem, we cannot always play things all ways. We need co-ordinated thinking to avoid such dilemmas arising again, other posts having to face the difficulties we have had to face, and any UK national having to go without the consular protection to which they are entitled.”

I can think of no more convincing reasons than those put forward by this clearly honourable and troubled Foreign Office official for why the Courts should indeed intervene in such situations. The British government clearly had potential control over Mr Mubanga’s fate and failed to discharge its duty to him in breach of its own policy. This decision appears not to have been taken by the Foreign Secretary alone but at Cabinet level. I should add that the pages and pages of the Cabinet office disclosure were entirely redacted so we were not told of all the discussions.

Now, you may share my dismay that despite the Government promising an inquiry and despite the seriousness of the evidence that our government deliberately broke its own policy so one of our own citizens could be taken to a place of torture, and despite it happening eleven years ago there has to date been no investigation. The private inquiry set up under Sir Peter Gibson which would have allowed no participation by those making the allegations and was boycotted by NGOs and lawyers, was not proceeded with after police investigations into other matters are said to be still ongoing. I asked the police to look into what happened to Mr Mubanga too. In a letter dated 22<sup>nd</sup> August last year, Assistant Commissioner Mark Rowley said that a panel which included the Director of Public Prosecutions, Keir Starmer QC, had decided that it was not “a case so serious that it needed to be looked at immediately.” Apparently justice delayed is justice denied was not a factor they consider important. Instead what happened to Mr Mubanga may

be investigated at some time in the unspecified future by another Inquiry set up by the government.

There has been a more recent case which was not on all fours with either of these situations but in which control was the crucial issue. The case which was finally decided by the Supreme Court in October last year was brought by Mr Yunus Rahmatullah against the Foreign Secretary and was not a judicial review application but an application for habeas corpus. Mr Rahmatullah, a Pakistani citizen, was originally detained by British forces in Iraq in February 2004. He was then transferred into the custody of US forces in accordance with the terms of a Memorandum of Understanding between the US, the UK and Australian forces dated 23<sup>rd</sup> March 2003. (“the Mou”) The UK authorities became aware, about a month after Mr Rahmatullah had been taken into custody, that US forces intended to transfer him out of Iraq. By June 2004, however, UK officials knew that he was no longer in Iraq. He had been taken to Bagram in Afghanistan where he still was at the time of the judgment. The Mou had provided that the arrangement would be implemented in accordance with Geneva Conventions 3 and 4 and that if the US failed to comply with these Conventions, the detaining power, the UK must take effective measures to correct the situation or request the return of the transferred person and Clause 4 of the Mou gave the UK the unqualified right to get the return of the detained person in response. At the time the case came before the Court of Appeal the British government had neither taken effective measures to correct the situation nor requested the return of the detained person. The Court of Appeal allowed the issue of a writ of habeas corpus. In response the British government wrote to the US government but did not mention its right under Clause 4 of the Mou to get the detained person returned. The US government refused to do anything. The Supreme Court, by a majority, dismissed appeals and cross appeals by both the British government and Mr Rahmatullah but an important dissenting judgment from Lord Carnwath and Lady Hale would have accepted Mr Rahmatullah’s argument that the letter from the Foreign Secretary did not go far enough in that it did not assert its right to demand his return. The refusal to write such a letter had been excused by Lord Neuberger in the following terms:-

“The language of diplomats representing different states discussing a problem can no doubt be very different from that of lawyers representing different interests discussing a problem or even the same problem, particularly when, as here, the problem may be one of some sensitivity.”

This smacks of more of the same deference – refusing a role in deciding exactly what should have been said, as in Abbasi. But the dissenting response of Lord Carnwath and Lady Hale was unequivocal:-

“We cannot accept this reasoning. We do not understand either why the US government should have had any diplomatic problem in expressing its position clearly or still less why the court should acquiesce in that position. The US must have a view on whether the UK retains an interest in the matter. Either it accepts that the UK retains an interest as detaining authority, and under the 2003 Mou, or it does not. One way or the other, it should address the issue. Where liberty is at stake, it is not the court’s job to speculate as to the political sensitivities which may be in play.”

(Secretary of State for Foreign and Commonwealth Affairs and Another v Yunus Rahmatullah [2012] EWCA Civ 182)

I am with Lord Carnwath and Lady Hale. Enough of the deference, enough of the speculation about the sensitivities because it concerns foreign affairs. If fundamental individual human rights are in issue, whether those of a British citizen or of a citizen of another state, the British government should do all in its power to enforce and uphold those rights and if the British courts are asked to scrutinise the behaviour of the Foreign Secretary, the only issue should be what power he or she has to secure a favourable outcome for the victim and not anything about the Courts keeping out of foreign affairs. But even the decision of the majority following the issue of the writ of habeas corpus by the Court of Appeal represents a considerable step forward in the willingness of the Courts to intervene.

I believe that this is not an issue which is going to go away. Domestic and foreign politics are no longer separate worlds and the conduct of our government abroad impacts more and more on the rights of its citizens and residents, given modern communications and travel. I was struck recently by the congruence between two reports on the BBC Radio 4 Today programme. In one, Victor Gregg, a prisoner of war in Dresden over fifty years ago, described his shock and disgust at the bombing of civilians there during the second world war. In another it was announced that a NATO air strike in a remote area of Pakistan had killed four suspected Taliban leaders and had also disturbingly killed sixteen women and children. In the modern age news such as this travels fast and it is much more likely that there will be friends or relatives of those in this country, who have a connection to what happens abroad, even where it is a long way away rather than in Europe. Ideally one should be able to rely on international law to complain but it is up to states to agree enforcement measures and this is more likely to happen, if

challenges can be brought in national courts. It is of course no coincidence that more obstacles are being put up by our government. Proposals to limit the time limit for judicial review, cuts in legal aid and proposals for closed material procedures will all seek to halt the forward march. But we live in increasingly international times and I hope that all you young lawyers will come to see yourselves as lawyers of the world.