

British court bows to US on Guantanamo Bay prisoners

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The detention of a British citizen by United States military forces at Guantanamo Bay is “legally objectionable”, the Court of Appeal in London ruled on November 6. Furthermore the US is acting “in apparent contravention of the fundamental principle of law” by detaining 22-year-old Briton Feroz Abbasi, who has been held without charge at the notorious military camp since his arrest in Afghanistan in January, the three judges stated.

Despite their strongly worded statement, however, the Appeal Court, led by Master of the Rolls, Lord Phillips of Worth Matravers, struck down a legal bid to force the British government to intervene on Abbasi’s behalf, citing foreign policy considerations.

The action at the Court of Appeal was brought by Abbasi’s mother, Zumrati Juma, on her son’s behalf in an attempt to force the Blair government to make diplomatic protests against America’s breach of international law.

About 600 people, including seven British citizens, are being held at the US military camp in Cuba. Shackled, blindfolded and locked in tiny cages exposed to the elements, the detainees are subject to indefinite detention and denied access to lawyers. By defining the prisoners as “illegal combatants”—a term that has no meaning in international law—rather than prisoners of war, the US has deprived the detainees of the usual protections of the Geneva Convention, under which POWs, unless formally tried for war crimes, must be returned to their home countries at the end of “active hostilities”. Moreover, as no criminal charges have been brought against the detainees, they have also been denied any of the legal rights defined by law in the US and their home countries.

Earlier this year, a federal judge in Washington stated that the Guantanamo military base was outside US sovereignty and that consequently those detained there had no grounds for challenging the validity of their detention through the US legal system. It was precisely

for this reason that the US established the military camp as a basis for the imprisonment of suspected Al Qaeda suspects, so as to be freed from all legal restraints.

The US actions have brought condemnation from human rights and civil liberties groups internationally. But those countries whose citizens have been arbitrarily placed in detention by the US military have made virtually no protest.

Britain is not alone in refusing to defend the democratic rights of its own citizens. A French court last month rejected a plea by lawyers acting for two French nationals, Nizar Sassi and Mourad Benchellali, held at Guantanamo Bay that they be treated as prisoners of war. The judge said that he was “not qualified” to rule on the status of the two men.

Governments such as Labour in Britain are anxious not to antagonise the US for fear of retaliation and lest they be cut out of the Bush administration’s planned carve-up of the oil and mineral wealth of the Middle East and Caspian region. Domestically, too, the Blair government is just as keen as the Republicans in the US to curtail democratic rights. Labour has insisted that civil liberties are contingent on national security considerations, utilising the September 11 terror attacks to push through a series of undemocratic measures, including indefinite detainment of suspected terrorists.

Ms. Juma’s action, initiated in February, was an attempt to force an end to Britain’s compliance with US abrogation of international law. Backed by Britain’s Law Society and the Bar Council’s human rights committee, representing more than 100,000 lawyers in England and Wales, Ms. Juma’s lawyers argued the Blair government’s refusal to intercede on behalf of its captured citizens constitutes “aiding or assisting” the US in their unlawful detention. Under United Nations provisions, a state can be held responsible for the unlawful actions of another state if it “knowingly aids in

the commission” of the act, her lawyers argued.

An application to the High Court for a judicial review on these grounds by Ms. Juma’s solicitors in March had been rejected. Justice Richards ruled, “The challenge seeks to involve this court in an area of international relations and foreign policy for which the judicial process is manifestly unsuited. The rights and wrongs of detention of persons at Guantanamo Bay and the conditions of their detention and of their questioning are not matters for this court,” he had stipulated.

The appeal court’s decision to review Justice Richards’ ruling came after hearing representation that the question of whether the courts had power to scrutinise foreign affairs was “a question of fundamental importance”. Justice Richards’ ruling, if allowed to stand, would exclude any development of judicial review in the context of human rights of British citizens, Ms. Juma’s lawyers submitted.

Writing in the *Telegraph* earlier this year, Legal Expert Joshua Rozenberg had warned that the appeal courts agreement to consider Ms. Juma’s application was a “legal minefield”. A ruling in favour of Abbasi “would not only draw the courts into an unprecedented conflict with politicians but also set Britain and the US on a renewed collision course,” he wrote.

In their judgement Lord Philips, Lord Justice Waller and Lord Justice Carnwarth endorsed the assertion that political considerations with regards to foreign policy should override questions of legal principle.

Their ruling is an extraordinary example of attempting to face both ways. They accepted that the US was acting “in apparent contravention of the fundamental principle of law” in its indefinite holding of the Guantanamo detainees and expressed “deep concern” at Abbasi’s ongoing detention. Noting that Abbasi was being held under US military order, which excludes any right of access to any court in America or elsewhere, the judges stated, “What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the US has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.”

In a summary to the judgement, Lord Phillips said: “The court does not express any view on whether Mr. Abbasi’s detention as an alleged enemy combatant may be justified as a matter of law. But it finds legally objectionable that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of

his detention before any court or tribunal.” Abbasi was being arbitrarily detained in a “legal black hole”, Lord Philips continued, in contradiction of the legal principles of both the US and Britain.

The court found it “surprising” that the writ of the US courts did not run to territory held by the US under a long lease from Cuba, the appeal judges stated, but noting that a US appeal court is expected to reconsider the legal status of the Guantanamo detainees they expressed hope that their “anxiety” over the matter would be drawn to that court’s attention.

Regardless of their damning findings, however, the appeal judges struck out Ms. Juma’s action. The court accepted that Foreign Secretary Jack Straw was under a duty to give “proper consideration to a request by a British subject to make representations about an injustice at the hands of a foreign state”, although he could not be compelled to do so. If the Foreign Office refused even to consider making diplomatic representations in these circumstances, the judges said they would order it to do so. But they ruled that this was not applicable in this case, as there had already been direct discussions between the foreign secretary and the US secretary of state as well as “numerous communications at official level”. Officials visited British detainees in January, February and May from the Foreign Office and the security services.

Having made this nod towards democratic considerations, the appeal court stated explicitly that it would not be appropriate to order Straw to make any specific representations to the US, “even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy ... at a particularly delicate time”.

Faced with such a ruling, Ms. Juma’s lawyers’ claims of victory in having caused the British judiciary to send out an unprecedented “direct signal” to US authorities of their dissatisfaction are disingenuous. Far from safeguarding democratic rights, the appeal court ruling has demonstrated the contempt with which Britain’s ruling circles regard such principled considerations as the independence of the judiciary from the political calculations of the government of the day.



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