

South Bucks., where the relevant officer had only ostensible authority, suggests that factual scenarios that were once argued using estoppel might now be argued using legitimate expectations. Hence, *Reprotech* may not effect as significant a curtailment of estoppel arguments as their Lordships contemplated. Thirdly, the case requires a re-evaluation of the theoretical justifications for giving effect to legitimate expectations. In particular, one of the main justifications—the moral force of a lawful promise made by a public authority—is less compelling in the case of unauthorised representations, and this ought now to be considered when deciding whether an expectation is “legitimate”. If legitimate expectations are no longer restricted to cases concerning *authorised* representations made by public authorities, a new rationale for the broader doctrine will be required. Such justification might be found, for example, by focusing upon the *public* interest in certainty when dealing with public authorities, rather than the *private* interest of the individual in the particular case. Whilst the clarification of the role of estoppel in public law is helpful, this encouragement to reassess the theoretical justification for the legitimate expectations doctrine will be the most useful legacy of *Reprotech*, and will be essential for the doctrine to mature in its new field of application.

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ARBITRARY DETENTION IN GUANTANAMO BAY:
LEGAL LIMBO IN THE LAND OF THE FREE

THE dramatic terrorist attacks in the United States in September 2001 all too clearly illustrated the threat posed by international terrorism. Understandably, politicians are provoked into taking tough measures to protect their citizens from terrorist enemies. In times of danger the civil liberties implications of such measures can easily play second fiddle to security needs. Indeed, we need look no further in our jurisprudence than the discredited majority decision in *Liversidge v. Anderson* [1942] A.C. 206. Recently, Lord Woolf has warned that “the mistakes which have been made in the past, in relation to internment of aliens at the outbreak of war, should not be forgotten” (*A v. Secretary of State for the Home Department* [2002] EWCA Civ 1502 at para. [9]).

The Court of Appeal’s judgment in *R. (on the application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 addresses this tension between the

protection of fundamental human rights of the individual and States' responses to international terrorism. The facts are unusual. Abbasi, a British national, was captured by the United States forces in Afghanistan in January 2002 and transported to the US naval base located at Guantanamo Bay in Cuba. At the date of the hearing in September 2002, he had been held for eight months without access to a lawyer or to any court or other form of tribunal. His mother brought proceedings on his behalf contending that Abbasi's arbitrary detention was a violation of his fundamental rights. In this novel application for judicial review, the claimants sought to compel the Foreign Office to make representations on his behalf to the USA or to take other action appropriate in the circumstances.

Customary international human rights law prohibits arbitrary detention. Under customary humanitarian law, a nation at war may detain a lawful combatant as a prisoner of war (POW) until hostilities have ceased. If there is any doubt about whether a person is a lawful combatant, and hence a POW, upon capture, the Conventions provide that the detaining State should establish a tribunal to determine the issue.

According to the US Government, Abbasi is not entitled to POW status. He appears to be detained (his legal status is unclear) under the executive authority of the President of the USA in his capacity as Commander in Chief of the US Military. *Habeas corpus* applications in the US courts by non-US detainees at Guantanamo Bay have to date been unsuccessful, although further appeals are expected. The nub of the issue is that the US military has determined that Abbasi is an enemy combatant, who has not been, and may never be charged, and who is held for an indeterminate period of time and given no avenue to challenge the legitimacy of his detention before a competent tribunal. His misfortune is to inhabit a "legal black hole" (para. [22]).

The claimants argued that as Abbasi had no means to challenge the legality of his detention, the Foreign Secretary had a duty to assist him. In order to obtain appropriate relief against the Secretary of State (the United States Government was not before the Court), the claimants had to overcome issues of justiciability. The authorities have established that, in general, the English courts will not examine the legitimacy of action taken by a foreign sovereign State. The rule is not absolute. Public policy issues, including a grave infringement of human rights, may lead the courts to review the actions of a foreign State (*Kuwait Airways Corporation v. Iraqi Airways Company (Nos. 4 & 5)* [2002] 2 W.L.R. 1353, noted (2002) 61 C.L.J. 499, and *Oppenheimer v. Cattermole*

[1976] A.C. 249). After considering this jurisprudence, the Court concluded that it was necessary to consider Abbasi's legal position and that it was open to it to do so.

According to the Court, it is a fundamental principle in both English and American law that every imprisonment requires justification, and "the right to liberty and security of the person" (Article 9 ICCPR) is part of international human rights law. Given Abbasi's indeterminate arbitrary detention without any opportunity of challenge, the Court concluded that there was an apparent breach of fundamental principles in both jurisdictions and under international law, although no direct remedy for the breach was available, or sought.

The Court then considered on what legal basis the Foreign Secretary could owe Abbasi a public law duty of diplomatic assistance. According to Lords Phillips M.R., no assistance could be derived from customary international law, which had not yet recognised such a right. Nor could the claimants rely upon the European Convention of Human Rights and the Human Rights Act 1998; the jurisdiction of the Convention is territorial and the UK Government is not responsible for the predicament of Abbasi. Diplomatic assistance is not a human right secured by the European Convention. Nevertheless, the Court considered that in circumstances where a British subject is suffering a violation of a fundamental human right as the result of activities of a foreign State, a refusal to render diplomatic assistance could be subject to judicial review. In the opinion of the Court, the Foreign and Commonwealth Office, through its statements of policy, had created a legitimate expectation that a request for assistance would be considered in the light of all relevant factors.

The Court then turned to the second issue of justiciability: can the English courts adjudicate upon actions taken by the executive in the conduct of international relations? The grant of diplomatic protection by the UK Government is an exercise of prerogative power. The landmark decision in *Council of Civil Service Unions v. Minister for Civil Service* [1985] A.C. 374 established that a power derived from the prerogative is not necessarily excluded from the scope of judicial review. Review turns on the justiciability of the subject-matter in the particular case. In the view of the Court, any determination of the appropriateness of diplomatic representations will be intimately connected to foreign policy considerations, a subject-matter that is inappropriate for review by the courts. However, a public law duty to consider the position of a particular citizen "would seem unlikely to impinge on any forbidden area" (para. [106]).

The Court's willingness to extend the boundaries of judicial review where fundamental human rights are at stake is a progressive development. This decision has further opened the door to judicial consideration of issues traditionally considered immune from review. The Court has to tread a fine line in order to avoid interfering with legitimate executive discretion in the field of international relations. Indeed, the Court is proceeding cautiously. The expectations of a citizen are limited while the discretion of the Foreign Office is wide. On the facts of this particular case, it was clear that the Foreign Office had considered Abbasi's position and it would therefore be inappropriate to order the Secretary of State to make specific representations to the USA. Nevertheless, this decision is a clear indication that the courts will look closely at the exercise of power, even if it touches upon an apparently non-justiciable prerogative power.

The predicament of the detainees at Guantanamo Bay is to be considered by the appellate courts in the USA and the Inter-American Commission on Human Rights has taken up the case. One can only hope that they are rescued from legal limbo in the near future.

STEPHANIE PALMER

TREATIES AND TITLES TO TERRITORY

ON 10 October 2002, the International Court of Justice adopted the judgment on *Land and Maritime Boundaries between Cameroon and Nigeria (Cameroon v. Nigeria)*, in which it ruled on sovereignty over certain territories disputed between the litigating parties and also delimited the land and maritime boundaries between them. The differences dealt with in the case followed from the long-standing disagreements between Cameroon and Nigeria which—as is not uncommon—went back to the legal framework established by colonial powers.

The judgment deals with several issues of major significance, including delimitation of land and maritime boundaries. But the most significant aspect of the judgment was the issue of the dynamics of territorial title in the context of interaction of treaties, as normative instruments apparently or arguably conferring title on a given State, and factual realities related to such title, especially if these realities diverge from what is required by a treaty. This problem is dealt with in the judgment with regard to the title to certain Lake Chad areas, as well as to the Bakassi Peninsula.