Neutral Citation Number: [2006] EWCA Civ 1279

Case No: C1/2006/1064

ON APPEAL FROM THE ADMINISTRATIVE COURT
Latham LJ and Tugendhat J
[2006] EWHC 458 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2006

Before :

LORD JUSTICE BROOKE,
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE LAWS
and
LADY JUSTICE SMITH DBE

- -

Between :

The Queen on the Application of Al Rawi & Others	**Appellant**
- and -	
The Secretary of State for Foreign and Commonwealth Affairs & Anor	**Respondents**

- -
- -

Mr Rabinder Singh QC, Mr Tim Otty, Mr Raza Husain and Mr Guglielmo Verdirame (instructed by **Messrs Birnberg Peirce & Partners**) for the **Appellants**
Mr Christopher Greenwood QC, Mr Philip Sales and Mr Ben Hooper (instructed by **Treasury Solicitors**) for the **Respondents**
Mr Guy S Goodwin-Gill (instructed by **Baker & McKenzie LLP)** for the **UN High Commissioner for Refugees,** intervening
Mr Andrew Nicol QC (instructed by **Treasury Solicitors** as **Special Advocate)** was not called upon

Hearing dates : 24-26 July 2006

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LAWS LJ:

This is the judgment of the court prepared by Laws LJ.

INTRODUCTORY

1. The first three appellants ("the detainee claimants") are imprisoned by the American authorities in the detention facility at Guantanamo Bay. They were previously resident in the United Kingdom, having been granted indefinite leave to remain. They are not British nationals. Two of them, Mr El Banna and Mr Deghayes, have been granted asylum here. The other appellants ("the family claimants") are members of their families. They are all resident in the United Kingdom. On behalf of all the appellants representations have been made to the Secretary of State for Foreign and Commonwealth Affairs (the first respondent) that he (Mrs Beckett had not then succeeded Mr Straw in that office) should make a formal request of the American authorities for the release of the detainee claimants. He declined to do so (the first respondent has now issued a request in respect of Mr Al Rawi, but on a basis different from that urged by the appellants). So the appellants sought orders of the High Court to the effect that the first respondent should make the request. The evidence is that it is against her (and her predecessor's) better judgment to do so. She considers that it would probably be seen by the United States as unjustified special pleading by the United Kingdom, and would be likely to be both ineffective and counterproductive.

2. On conventional public law principles that would have been the end of the matter. The first respondent's judgment could hardly be impugned as perverse in the *Wednesbury* sense ([1948] 1 KB 223); although, as we shall show, Mr Rabinder Singh QC for the appellants has in fact sought to mount a *Wednesbury* challenge. But in any case the conduct of foreign relations by the executive government of the United Kingdom would have been regarded as beyond the scope of judicial review. A generation or more ago the courts would we think have said there was no jurisdiction to conduct such a review. More recently the line would have been – has been – that the conduct of foreign relations is so particularly the responsibility of government that it would be wrong for the courts to tread such ground; and aside from the division of constitutional territory, the courts have not the competence to pass objective judgment, hardening into law, in so intricate an area of State practice. However in this case, on 16 February 2006, Collins J granted permission to seek judicial review of the United Kingdom's response to requests for assistance in securing the release and return of the detainee claimants. The case was heard by the Divisional Court (Latham LJ and Tugendhat J) on 22 and 23 March 2006. No point as to jurisdiction was taken. The Foreign Secretary and the Home Secretary were both impleaded, respectively as first and second respondent, the latter because the appellants sought relief which would secure the re-admission of the detainee claimants into the United Kingdom. The Divisional Court dismissed the application on 4 May 2006. Brooke LJ granted permission to appeal on 15 May 2006 and directed that the appeal be expedited. The appeal was argued before us over three days from 24 to 26 July 2006. The case could hardly have got less summary treatment at the hands of the courts.

3. What has been the engine of so painstaking a review in an area which in recent years was thought barely apt for judicial review at all? The prisoners at Guantanamo Bay, some of them at least, have suffered grave privations. In this appeal we should in our judgment proceed on the premise that the detainee claimants have been subjected at least to inhuman and degrading treatment. We say at least; the appellants claim they have been tortured. Although the respondents certainly make no unqualified admission of such misconduct (and the United States authorities have consistently

denied any allegations of ill treatment), they do not as we understand it suggest that we should not, strictly for the purpose of this litigation, proceed on the premise we have stated. The family claimants assert that they too have suffered intensely (and continue to do so) by reason of the plight of the detainee claimants. The Divisional Court accepted that their suffering was at a level sufficient to engage Article 3 of the European Convention on Human Rights ("ECHR") (judgment, paragraph 83).

4. The case is thus acute on its facts. But this on its own makes no rule that the executive's conduct of foreign relations is justiciable. The force which seeks to press the courts into this area, and within it to exercise a robust independent judgment, is the legal and ethical muscle of human rights and refugee status.

5. The appellants' arguments are not however all based on propositions of human rights law. There are other points, notably on the Race Relations Act 1976 ("the RRA"). But to our mind the centre of the case consists in appeals to the appellants' human rights and, in the case of Mr El Banna and Mr Deghayes, refugee status. We have to decide how far such appeals should rightly press the courts into territory they do not generally occupy or have not so far occupied.

6. In fact the law of human rights in the context of what has happened at Guantanamo Bay is not virgin to the English courts. They have visited it in an earlier, recent decision, *Abbasi* [2003] UKHRR 76, in which similar claims were made to some of those put forward in this case. In *Abbasi* the detainee claimant was a British nationals. The claims were dismissed in the High Court and this court. One might have thought, since here the detainee claimants are not British nationals, that *Abbasi* is *a fortiori* the present case, and the respondent Secretaries of State submit that that is so. But various points of distinction are suggested. Clearly we must pay careful attention to the *Abbasi* decision, as did the Divisional Court.

RELEVANT PROVISIONS OF THE ECHR

7. It is convenient at this stage to set out ECHR Articles 1, 3, 8 and 14, and the first paragraph of Article 1 of the First Protocol:

> "1. The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.
>
> 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> 8.(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

> 14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> [Article 1 Protocol 1] Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law..."

RELEVANT PROVISIONS OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ("THE REFUGEE CONVENTION")

8. Article 16 of the Refugee Convention provides:

> "(1) A refugee shall have free access to the courts of law in the territory of all Contracting States.
>
> 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi* [sc. security for costs].
>
> 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

THE FACTS

The Divisional Court's Narrative

9. The facts of the case, up to May 2006, are comprehensively described in the judgment of the Divisional Court. Paragraphs 3 – 11 deal with events concerning the first two detainee claimants, Mr Al Rawi and Mr El Banna. Those concerning the third detainee claimant, Mr Deghayes, are set out at paragraphs 12 – 13. The evidence concerning the detainee claimants' treatment in Guantanamo Bay is described in paragraphs 14 and 15, and paragraphs 16 – 26 give details of evidence about the treatment of detainees at Guantanamo Bay generally. The response of the Secretary of State for Foreign and Commonwealth Affairs to the claims and requests of the appellants is described at paragraphs 29 – 42. The evidence supporting the claims of the family claimants is set out in paragraphs 74 – 79. For the details about all these matters we would refer to the narrative given in the paragraphs listed, upon which we cannot improve and with some exceptions see no purpose in repeating. However so that the arguments may be followed without the inconvenience of frequent cross-reference, we offer here what is for the most part a much more summary account. We will dwell on some matters a good deal more than others, according to the demands of the submissions advanced before us. There is also important new evidence, coming

into existence since the date of the Divisional Court's judgment. We must of course deal with that fully.

Background Outline

10. Mr Al Rawi is an Iraqi national born in 1967. He came to this country with his family in 1983. The family members all became British citizens. The family, however, selected him as the one who should refrain from applying for British citizenship himself. They thought it might be easier to reclaim their confiscated property (if Saddam Hussein ever fell from power) if their claim was made by a citizen of Iraq. Immediately before his detention Mr Al Rawi was living with his mother (the fifth appellant) and sister in New Malden. We will summarise the circumstances of his detention (and Mr El Banna's) shortly. Mr El Banna is a Jordanian national who came to this country in 1994 and was given indefinite leave to remain as a refugee. His wife (the sixth appellant) also has refugee status. They have five young children all of whom are British citizens. Mr Deghayes is a Libyan national born in 1969. His father was a prominent lawyer in Libya who is said to have been murdered by the Gaddafi regime in 1980. He came to the United Kingdom with his mother and three siblings in 1986. All were granted asylum. His family members are all British citizens. Mr Deghayes applied for British citizenship but by the time he was called for interview he was in Afghanistan studying, it is said, the Taliban regime. He married an Afghan woman and they have a child. In 2001 he moved to Pakistan. He was detained there in April 2002, apparently having been captured by bounty hunters and handed over to the Pakistani authorities.

The Detention of Mr Al Rawi and Mr El Banna

11. The circumstances in which Mr Al Rawi and Mr El Banna were detained, and ultimately found themselves in Guantanamo Bay, were briefly as follows. In October 2002 they and two others including the fourth appellant (Mr Al Rawi's brother Wahab) made arrangements to travel to The Gambia ostensibly in order to set up a peanut processing business. The fourth appellant went ahead. The other three sought to follow but were stopped by the police at Gatwick Airport and detained under the Terrorism Act 2000. The police had found a suspect device in Mr Al Rawi's luggage. It turned out to be a modified battery charger. At length the three were released. On 8 November 2002 they flew to The Gambia.

12. When they arrived they were immediately detained by the Gambian authorities. On a date before 23 January 2003 they were transferred to the United States Air Base in Baghram in Afghanistan. They remained there for about a month. Then they were transferred to Guantanamo Bay.

13. The British security services, believing them to be close associates of a man called Abu Qatada, had kept them under surveillance in the period up to their departure for The Gambia. Information about their movements or proposed movements was passed on to the authorities in The Gambia and (directly or indirectly) the United States. In amended grounds before the Divisional Court the case advanced for Mr Al Rawi and Mr El Banna included the claim that authorities of the United Kingdom "deliberately facilitated" their arrest in The Gambia and, in effect, were complicit in their transfer to Guantanamo Bay. That was denied by "Witness A" on behalf of the Security Service, and in letters from the Treasury Solicitor. The respondents' case has always

been that information was passed on so that Mr Al Rawi and Mr El Banna could be monitored, pursuant to obligations imposed by Resolution 1373 adopted by the Security Council of the United Nations on 28 September 2001, which exhorted States to find ways "of intensifying and accelerating the exchange of operational information especially regarding actions or movements of terrorist persons or networks".

14. The Divisional Court accepted (paragraph 10) that on the evidence Mr Al Rawi and Mr El Banna fell into the category of persons whose movements might be monitored in that way. They considered, however, that the question whether "the British authorities knew that the result of disseminating this information was that the claimants would be detained, by the United States authorities, and more importantly removed to Afghanistan and then Guantanamo Bay" was another matter, upon which there was insufficient evidence to reach a determination.

15. When the Divisional Court's judgment was handed down the appellants indicated that they wished to challenge the accuracy of Witness A's evidence and allege that the UK authorities *were* knowingly complicit in the allegedly unlawful detention of Mr Al Rawi and Mr El Banna; and also to pursue a separate, fact-specific, argument relating to Mr Deghayes. The Divisional Court decided to stay those applications and to allow this appeal to proceed to judgment before they were further considered. This aspect of the case's procedural history is of some importance given the need to establish the precise factual basis on which the appeal proceeds. The appellants say there is a "causal link between the conduct of the Security Services and the detention of Mr El Banna and Mr Al Rawi in The Gambia", and assert that this was a relevant factor which the Secretary of State failed to consider in assessing the merits of any prospective request to the Americans for their release (appellants' skeleton argument, 6 June 2006, paragraphs 10.3.4 and 22.4). We shall deal with that submission in due course. However in their supplementary skeleton argument of 21 July 2006 (paragraph 36(d)) some colour is given to the "causal link", such as might suggest an attempt to reinstate in this court a submission to the effect that the British authorities were complicit in Mr Al Rawi and Mr El Banna's detention. Such an argument is not open on this appeal. In fairness, the appellants appear to recognise as much (supplementary skeleton paragraph 36(d) (end)).

Treatment of the Detainee Claimants

16. Mr Stafford Smith, a United States qualified attorney, and another American lawyer called Brent Mickum, have had access to all three detainee claimants at Guantanamo Bay. Mr Al Rawi and Mr El Banna have claimed to them that they were badly beaten, brutalised and degraded in Afghanistan and at the Baghram Air Base. Mr Deghayes, who was transferred from Pakistan to the Baghram Air Base and then in September 2002 to Guantanamo Bay, has alleged that he was badly tortured and beaten both in Pakistan and Afghanistan. In Guantanamo Bay itself Mr Al Rawi claims to have been shackled in a small cell enclosed by wire mesh. A recent statement made on 13 September 2006 by an American attorney, Mr Katznelson, describes the author's visit to Mr Al Rawi in Camp V at Guantanamo Bay on 15 August 2006. He reports Mr Al Rawi's account of the harsh conditions in which he is detained. It includes allegations that the guards inflict extremes of temperature, sleep deprivation, and other grave hardships. (We have considered this evidence although it postdates the hearing in this court by some weeks.) Mr El Banna has complained that his interrogators have used his separation from his children, especially his youngest

daughter whom he has never seen, in order to demoralise him. Both have been kept short of food, allowed virtually no exercise, and repeatedly interrogated with repetitive questions. They claim to have been driven to participate in hunger strikes, exposing them to the risk of being force fed. Mr Deghayes claims to have been sexually assaulted and brutally attacked and beaten at Guantanamo Bay, and to have been partially blinded.

17. All three detainee claimants have been declared enemy combatants by the Combatant Status Review Tribunal ("CSRT"), which was established by the United States authorities on 7 July 2004 following the decision of the Supreme Court in *Rasul v Bush* 542 US 446 (2004). The CSRT is composed of three commissioned officers. Its task is to examine the legality of individual detentions.

The Family Claimants

18. The fourth appellant is, as we have indicated, Mr Al Rawi's brother. The fifth is their mother. The sixth is Mr El Banna's wife. The seventh is Mr Deghayes' brother. The evidence (including a clinical psychologist's report relating to Mr El Banna's family) shows that the continued incarceration of the detainee claimants has caused very substantial distress and concern to the families. The fourth appellant has become ill and taken to drink. The fifth has deteriorated in body and in mind, suffers from major depression and weeps all the time. The sixth suffers from stress-related problems. Mr El Banna's absence has badly affected the children. There are telling letters, including one written to the Prime Minister by the eldest boy, Anas. The seventh appellant has become very depressed. In addition he describes the effect of Mr Deghayes' continued detention on their mother as "extreme". We have already said that the Divisional Court was prepared to accept that the suffering of the family claimants was at a level sufficient to engage ECHR Article 3. That finding, however, is contested in the Secretaries of State's respondent's notice.

19. In support of their case under Article 3 the family claimants rely in particular on certain correspondence from the Foreign and Commonwealth Office ("the FCO") which they claim was crass and inappropriate, and compounded their suffering. The first letter relied on, dated 14 October 2002, concerns Mr Deghayes. It was signed by Baroness Amos (the relevant Foreign Office Minister at the time) and sent in reply to the first set of representations made on Mr Deghayes' behalf on 24 September 2002:

> "Although we understand Mr Deghayes has long term or indefinite leave to remain in the United Kingdom he is a Libyan National and not a British National. We are therefore unable to act on his behalf. His detention and welfare are matters for the United States and Libya. I can only advise that you contact the Embassies of the United States and Libya in London and seek information from them…"

The other letter was sent by Baroness Amos on 28 February 2003 in response to the first representations made on behalf of Mr Al Rawi and Mr El Banna on 31 January 2003. We need only cite this paragraph:

> "Your letter does not make clear Bashir Al-Rawi's precise status, although I understand that he is an Iraqi national with

> indefinite leave to remain in this country. If he was travelling on Iraqi documentation, then clearly it is the role of the Iraqi authorities to provide assistance either directly, or through a country which they have indicated they wish to represent their interest."

20. The Divisional Court's comment on the letters is a model of understatement:

> "31. Bearing in mind the fact that the third claimant's refugee status was based upon a well founded fear of persecution in Libya, as a result, at least in part, of the evidence of State complicity in his father's death, the reply to the solicitors acting on behalf of his family was unfortunate. And bearing in mind the date of the answer to the letter written on behalf of the first claimant's family, which was the eve of the allied invasion of Iraq, the suggestion in the reply to them was unrealistic. There is no doubt that it caused distress to both families."

21. Mr Greenwood QC for the respondent Secretaries of State could say little about the text of the letters, which were crass in the circumstances. Rather he pointed to certain meetings in 2005 between Baroness Symons (by then the responsible Foreign Office Minister), the families and the claimants' representatives, which he said made it plain that the British government was at pains to afford considerable assistance. There were three separate meetings, on the 17 March 2005 (with Mr Deghayes' family and representatives), 5 April 2005 (with Mr Al Rawi's Member of Parliament and family representatives), and 19 April 2005 (with Mr El Banna's family and representatives). While on each occasion Baroness Symons made it plain that she could give no assistance on an official or consular basis because the detainee claimants were not British nationals, she went on to say that she could make representations on human rights grounds or (as she put it to Mr Al Rawi's family) "humanitarian" grounds. She evinced a particular concern about the position of Mr El Banna's wife and family: they had strong links with the United Kingdom, and that would be specifically mentioned to the Americans.

22. Very shortly after these meetings, on 27 April 2005, Baroness Symons met senior officials from the United States Embassy in order to pass on the concerns of the detainee claimants' families and lawyers. Although she made no specific request for their return, she expressed concern about the reasons for their detention, the fact that they had not been charged, and the families' anxiety that they might be returned to countries where they might face torture. She raised the allegations of mistreatment – and torture – which had been put to her at the meetings and asked for assurances as to the conditions in which the detainee claimants were being held. The matter was followed up by British officials in Washington but there has been no formal response to the representations that were made.

23. There is evidence of other communications between the British and American authorities, but it goes more to elucidate the general stance of the respondents, which we shall shortly describe, than the particular plight of the family claimants.

Treatment of Detainees at Guantanamo Bay: General

24. As we have said paragraphs 16 – 26 of the Divisional Court's judgment give details of evidence about the treatment of detainees at Guantanamo Bay generally. There is a summary of material findings set out in a report of five mandate holders of Special Procedures of the Commission on Human Rights, made to the Economic and Social Council of the United Nations and dated 15 February 2006. The report recommended that the Guantanamo Bay detention facility should be closed without further delay. This echoed the views expressed in Resolution 1433(2005) adopted by the Parliamentary Assembly of the Council of Europe on 26 April 2005.

25. There is, of course, some controversy as to the specifics of what has been done at Guantanamo Bay. Again we will not repeat the whole of the Divisional Court's narrative as to the general position. However it is we think useful to incorporate their account of the forms of treatment which have actually been authorised by the Secretary of Defense. The Divisional Court said this:

> "20… On the 2nd December 2002 [sc. thirteen months after the Guantanamo Bay facility was inaugurated] interrogation techniques contained in the Army Field Manual were approved by the Secretary of Defence which included:
>
> (i) The use of stress positions (like standing) for a maximum of four hours;
>
> (ii) Detention and isolation up to 30 days;
>
> (iii) The detainee may have a hood placed over his head during transportation and questioning;
>
> (iv) Deprivation of light and auditory and literary stimuli;
>
> (v) Removal of all comfort items;
>
> (vi) Forced grooming, shaving the facial hair etc.
>
> (vii) Removal of clothing.
>
> (viii) Interrogation for up to 20 hours.
>
> (ix) Using detainees individual phobias (such as fear of dogs) to induce stress.
>
> 21. These guidelines were later rescinded and replaced by a memorandum which in its introduction states that:
>
> 'US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent to military necessity, in a manner consistent with the principles of the Geneva Convention.'

> 22. It then authorised inter alia the following techniques; that authorisation remains in force:
>
> (i) Incentive/removal of incentive i.e. comfort items,
>
> (ii) Change of scenery down (*sic*) might include exposure to extreme temperatures and deprivation and auditory stimuli;
>
> (iii) Environmental manipulation: altering the environment to create moderate discomfort (e.g. adjusting temperature or producing unpleasant smells);
>
> (iv) Sleep adjustment; adjusting the sleep times of the detainee (e.g. reversing sleep cycles from night to day). This technique is not sleep deprivation.
>
> (v) Isolation: clearly isolating the detainee from any other detainee while still complying with basic standards of treatment."

26. Mr Greenwood was at pains to emphasise that the harsher guidelines (subparagraphs (i) – (ix) set out in paragraph 20 above) were operative for a few weeks only, between 2 December 2002 and 15 January 2003. He also submitted that there is material before the court which casts rather a different light on conditions at Guantanamo Bay than the picture of unrelieved misery urged by the appellants. There is, for example, evidence of information and assurances given by the US authorities to FCO officials (in response to concerns raised by Mr Stafford Smith) as to the quality and availability of medical care and facilities. We do not propose to canvass the details: not because we do not respect the acute importance of what has been happening there, but because there is as we have said no substantive contest (strictly for the purpose of the appeal) to the premise upon which the case should in our judgment proceed, namely that the detainee claimants have at least suffered inhuman and degrading treatment. Moreover as an appellate court we are manifestly not equipped to determine the exact state of affairs as a fact-finding exercise; a consideration which has to be borne in mind not only as regards the general situation, but also in relation to the detainee claimants' specific circumstances, where the evidence – which we do not dismiss – is hearsay reports of assertions by them. As we have already said the specifics of what has been done at Guantanamo Bay are controversial; and in that context it is to be noted that the United States government has expressed reservations about the United Nations mandate holders' report and has indicated that it does not consider that the report accurately recorded information provided by it. Mr David Richmond, Director-General Defence and Intelligence at the FCO, says this in his first witness statement (14 March 2006):

> "56. ... [T]here remain serious difficulties in independently assessing what is actually going on at Guantanamo, in part because of the refusal of the US authorities to allow full, unrestricted and unconditional access to the detention facilities by external observers."

He adds (paragraph 57):

> "The United Kingdom Government also attaches considerable weight to public and private assurances from the US Government that no torture is being practised at Guantanamo. The United States is a close and trusted ally, with a strong tradition of upholding human rights."

27. The forms of treatment authorised by the Secretary of Defense, whose description by the Divisional Court we have set out, of course constitute hard information.

The Position of the First Respondent (the Secretary of State for Foreign and Commonwealth Affairs) as at the Date of the Divisional Court's Judgment

28. Before the Divisional Court a key feature of the first respondent's stance consisted in a point of public international law. Although (as we shall show) the point's importance has receded, it remains necessary to explain it. It is that a sovereign State only possesses standing to seek redress or remedial action from another sovereign State on behalf of an individual where that individual is a national of the first State. "It is the bond of nationality which establishes the connection between the injury suffered by the private person and the right of the state to seek redress" (*Oppenheim's International Law*, 9th ed., 1996, Vol. 1, Part 1, paragraph 150 at p. 512). The reference to standing is, however, liable to mislead. There is of course nothing to prevent a State from making representations to another on behalf of a person who is not one of its nationals; indeed, there is nothing to prevent such representations being made on behalf of anyone at all. But the principle of international law asserted by the first respondent, and summarised in the assertion of standing to which we have referred, articulates a legal position which is quite distinct from this ordinary factual reality. The reference is to a *right* which is recognised and enjoyed by every State to afford diplomatic protection for its own nationals by means of a State to State claim.

29. We will use this expression "State to State claim", as a convenient shorthand for the right in question. By it we do not mean a claim in legal proceedings, but the assertion of this recognised right by one State to another. Such claims are governed by rules of international law. The response of the State to which the claim is made is thus as much a legal act as is the making of the claim. The process is by its nature wholly different from the making of intercessionary or humanitarian representations on behalf of a non-national, and the response which they might elicit.

30. The point made by the first respondent is that the United Kingdom enjoys no right to make such a State to State claim on behalf of the detainee claimants, because they are not British nationals; yet on the face of it that is precisely what the appellants, by these proceedings, seek to have done. So much is demonstrated by the third head of relief set out in the claim form. However we are the first and third heads (we shall need to refer to the first head in another context, so it is conveniently set out now):

> "1. A declaration that the Foreign Secretary is under a duty to make a formal and unequivocal request of the United States for the release and return of the detainee claimants to this country; and/or...
>
> 3. A declaration that the Foreign Secretary is under a duty to make the same representations to the United States of America

> in respect of the detainee claimants *as have been made in respect of British citizens* detained at the Guantanamo Bay Naval Base in Cuba". (my emphasis)

(In relation to this third head of relief no distinction falls to be drawn between citizens and nationals.)

31. Mr Rabinder Singh confirmed in the course of argument before us that the appellants seek to pursue all the heads of relief pleaded in the claim form. He does not accept that his clients' claim to the foregoing declarations can be so readily defeated as the first respondent's position on international law would suggest. He relies on extant proposals for the assimilation of refugee status with that of nationals in the context of diplomatic protection, contained in Article 8 of the International Law Commission ("ILC") draft Articles on Diplomatic Protection. In addition Mr Goodwin-Gill, appearing for the United Nations High Commissioner for Refugees ("UNHCR"), who intervened in the appeal with the leave of the court, has submitted in terms that "the national/non-national distinction is redundant" (further written submissions, 27 July 2006, paragraph 11) because the United Kingdom possesses standing to make formal representations to the United States derived from another, no less potent, source of international law, namely the Refugee Convention, to which both the United Kingdom and the United States are party. (Strictly, the United States has only ratified the 1967 Protocol. However the effect is a ratification of the Convention in its present form, as amended in 1967.) We must consider these points in dealing with the law. At this stage we should resume the narrative of the position taken by the first respondent.

32. The next aspect of that position which we should emphasise consists in the UK government's concern with the position of *all* the remaining detainees held at Guantanamo Bay, and generally with the future of the detention facility there. Mr Richmond says in his first statement:

> "19. Whilst British nationals remained at Guantanamo, the UK Government's main diplomatic efforts were focused upon them. However, the UK Government did in the same period express reservations to the US Government about Guantanamo more generally, including the legal basis on which the detainees were held there, the conditions of their detention and the process by which they might be tried or released. These concerns were expressed, for example, at Foreign Secretary/US Secretary of State level in December 2004. Following the return of the last of the British nationals, UK Government policy has concentrated on the position of all the remaining detainees and the future of Guantanamo as a whole.
>
> 20. Further, in the conduct of UK/US diplomatic relations, a group of issues has come to be discussed together, and points taken in relation to one of them have implications for how relations in respect of the others are conducted. The issues associated in this way may be grouped together under the general heading of US detainee policy and practice, and include in particular the position of all detainees at Guantanamo and its

> future, and the treatment of terrorist suspects more generally. The UK Government is making considerable efforts to engage with the US Government on all these interconnected issues."

The Divisional Court stated (paragraph 95):

> "It is plain from all the material that we have that the United Kingdom government has made it abundantly plain that it wishes the Guantanamo Bay facility to close. That wish has been expressed repeatedly and by the Prime Minister."

This reflects what was said by Mr Richmond at paragraph 12 of his first statement, which we need not set out, and other materials.

33. The third, and for the appeal's purposes crucial, aspect of the first respondent's position to which we should draw attention consists in the FCO's judgment as to what action to take in relation to the detainee claimants in response to the representations made on behalf of the appellants from 2002 onwards. It is perhaps obvious that the more general concerns which we have just described formed an essential backdrop to any decision the FCO might take upon that issue. But the connection between such concerns, and the specifics of the appellants' pleas, is we think both more acute and more subtle than common sense alone suggests. It is because of the delicate balances that fall to be struck in the conduct of diplomatic relations. Mr Richmond explains it thus (first statement):

> "5. The aim of the United Kingdom Government's foreign policy is the pursuit of the United Kingdom's national objectives. These are wide-ranging and often inter-linked and complex. The United Kingdom Government faces difficult choices about how to pursue these objectives and what priority to give them. The UK Government must place reliance on the relationships that it builds and maintains with a range of other governments. The diplomatic credit which the UK Government has with each of these international partners is intangible, but nonetheless real. Although it will vary according to the circumstances, it will never be unlimited. Ministers and officials in the FCO must decide how best to use the credit they have with foreign States at any given time, in the face of different and sometimes conflicting demands. This involves a careful assessment of whether diplomatic efforts are likely to be successful - and at what cost - in pursuit of a particular objective, or whether they are likely to be unhelpful or counterproductive.
>
> 6. A further dimension to the complexity of international relations should be noted. Relations between States are not conducted in hermetically sealed boxes, topic by topic. Rather, they are conducted across a wide range of areas where the interests of States come into contact and, as is often the case, collide. Diplomatic pressure applied at one point may produce unwelcome reactions in other areas. Further, all States have

> areas which are of particular sensitivity for them (whether for internal reasons, related for example to domestic politics or the policy priorities they have adopted, or for external reasons, related for example to their standing with other States). Guantanamo Bay and what the US calls the 'Global War on Terror' are currently topics of particular significance and sensitivity for the US Government."

34. Coming closer to the matter in hand, Mr Richmond says this:

> "27. In deciding whether to make humanitarian representations in any case, the UK Government would have to take into account the extent to which it would have to expend significant political credit, and would have to risk losing a measure of credibility, with the State to whom the representations are made. This is so, irrespective of the context. It is particularly true in relation to such highly controversial and (especially from the US Government's point of view) sensitive matters as Guantanamo and the circumstances and conditions of persons detained there.
>
> 28. Turning to this particular case, any humanitarian representations to the US Government on behalf of non-British nationals who had in the past been residents in the UK of the form proposed by the Claimants would be far from straightforward. The US Government is fully alive to the UK Government's lack of any recognised right to intervene on their behalf in the way that the Claimants seek. In our assessment and that of the FCO, the US Government would be very likely to resist any intervention along the lines which the Claimants seek. I consider that the US Government would be likely to consider an intervention by the UK Government on these lines to be a case of unjustified special pleading by the UK for particular individuals. In our view (and that of the FCO and the UK Government), lobbying along these lines would not be effective in itself, and would make it much more difficult for the UK to engage successfully with the US across the range of issues to which we have referred in paragraph 20 above."

The references in these paragraphs to "humanitarian representations" presume the correctness of the proposition of international law adhered to by the first respondent, that although there is nothing to prevent such representations being made by one State to another, the United Kingdom enjoys no right to make a State to State claim, recognised as such by international law, on behalf of the detainee claimants.

35. Notwithstanding the position described by Mr Richmond at paragraphs 27 – 28 the appellants' pleas were by no means simply stonewalled. In paragraph 29 Mr Richmond says that "[t]he UK Government has used some credit with the US in order to raise their cases on a humanitarian basis, so far as it has felt it appropriate to do so without excessive risk of provoking unhelpful or hostile reactions from the US authorities." He proceeds to describe the meetings with Baroness Symons, and gives

details of the matters which she raised with senior officials from the US Embassy on 27 April 2005 (paragraphs 31 – 32). He refers also to follow-up meetings held by FCO officials in the UK's Embassy in Washington with US officials (paragraphs 33 – 35). There follows this passage:

> "38. ... [T]he Foreign Secretary, in consultation with Cabinet colleagues, has had to make difficult choices as to how to use the FCO's resources and diplomatic credit with the US authorities across a range of issues concerning Guantanamo Bay and related matters. He decided to focus efforts in the first instance on assisting the British nationals detained there [the reference is to the British nationals the subject of the *Abbasi* case, which we discuss later] and, having ultimately (and after a major effort) secured their release, has made the assessment that - in the absence of a direct locus in relation to non-nationals - the focus of efforts now should be directed to the whole issue of resolution of the Guantanamo situation. My own and the FCO's assessment is that this is the best use of the UK's resources and credit with the US in current circumstances: it is more likely to bear fruit than an attempt to focus on the class of non-national past residents as the Claimants demand; and, if successful, it will promote and protect the interests of all persons detained at Guantanamo (including, but not limited to, the detainee Claimants). The Foreign Secretary considers that, as things stand at present, we have already pressed the US Government on the question of the treatment of the class of non-national former resident detainees as far as we reasonably or safely can, bearing in mind our overall relations with the US across the range of issues referred to in paragraph 20 above."

36. In dealing with this third aspect of the first respondent's position – the FCO's judgment as to what action to take in relation to the detainee claimants – we should note Mr Richmond's reference (paragraph 59) to:

> "the desirability of the UK Government continuing to use its diplomatic credit with the US in order to press for resolution of the whole situation at Guantanamo, rather than deflecting its efforts to press more extensive representations in relation to the detainee Claimants (which would be likely to be seen by the US as unjustified special pleading by the UK and would be likely to be both ineffective and counterproductive): see paragraph 28 above."

Later:

> "69. The Foreign Secretary has given careful consideration to the present claim by all the Claimants and the question whether the UK Government should make formal requests for the return to the UK of the detainee Claimants. He has concluded that such formal requests should not be made...

> 70. The principal reasons for this decision are those we have explained above. In particular, the Foreign Secretary's assessment is that making formal approaches to the US Government along the lines demanded by the Claimants would be ineffective because of the absence of a consular locus and would be counterproductive in terms of the UK Government's ability to engage constructively with the US authorities across the group of issues referred to in paragraph 20 above."

37. The fourth aspect of the first respondent's position to which we should draw attention is a matter which informed his judgment on the third, which we have just described; but it is convenient to set it out separately. It concerns the government's assessment of the threat to national security which the detainee claimants would pose if they were permitted to return to the United Kingdom. Mr Richmond deals with it very shortly:

> "71(1). ... [The Foreign Secretary] has had regard to the assessment of the threat to national security which the detainee Claimants would pose if they were permitted to return to the UK. It is assessed that Mr El Banna and Mr Deghayes would pose a significant threat to national security and the public if they were permitted to return to the UK. The assessment in relation to Mr Al Rawi is that he might in some circumstances pose a threat, but the risk of this is at a lower level than for the others. The Foreign Secretary considers that this material is relevant to his assessment that a fair balance between the interests of the Claimants and the general public interest does not require him to make the formal requests to the US Government which the Claimants have demanded..."

The Position of the First Respondent (the Secretary of State for Foreign and Commonwealth Affairs) as at the Date of the Court of Appeal Hearing

38. We indicated at the outset that the first respondent has now issued a request for the release of Mr Al Rawi, though on a basis different from that urged by the appellants. His decision to do so was notified to the appellants (and the court) on the first day of the hearing before the Divisional Court, although the fact is not referred to in that court's judgment. The appellants rely on this development as evincing a "change of stance" by the first respondent which they say amounts to an additional factor relevant to any assessment as to the likely reaction of the United States authorities to a request for the release of all the detainee claimants (skeleton argument 6 June 2006, paragraph 22.7). In those circumstances it is appropriate to explain the position a little more fully, by reference to the letter containing the first respondent's reasons for his decision to request Mr Al Rawi's release:

> "...The account given by Mr Al Rawi of his dealings with the Security Service is inaccurate in very many respects. However, the Foreign Secretary has investigated these matters and has concluded that there is a basis on which it would be possible to approach the US Government on Mr Al Rawi's behalf with some reasonable prospect of success, and without causing the significant counterproductive effects more generally of the kind

> which are referred to in paragraphs 28 and 70 of the witness statement of David Richmond in these proceedings. I wish to make it clear that the view of the Foreign Secretary, on legal advice, is that the matters referred to do not give rise to a legal obligation on him to make any request at all. Nonetheless, in his discretion, he has decided in principle that a request should be made for Mr Al Rawi's return to the UK.
>
> The approach which the Foreign Secretary has decided should be made to the US authorities will not be a humanitarian request, of the kind sought by the claimants in their general claims to be heard in court over the next three days. It will not be a request put forward on humanitarian grounds, for all the reasons explained in Mr Richmond's witness statement. Nor will the request be put forward on any kind of consular or quasi-consular grounds. Rather, the Foreign Secretary considers that there are matters which would enable him to approach the US authorities on Mr Al Rawi's behalf on the basis of shared UK/US counter-terrorism objectives, and which would offer a reasonable prospect in Mr Al Rawi's case of affording grounds which might be acceptable to the US authorities to encourage them to allow his release."

Mr Al Rawi has not so far been released from Guantanamo Bay. The matter is still being pursued by the first respondent.

39. In fact the case has moved on, at least as the appellants would have it, on a wider front than is represented by the first respondent's initiative in relation to Mr Al Rawi. On 28 June 2006 a witness statement was made on behalf of the appellants by Irene Nembhard. She produced as exhibits a series of reports of public statements by United States officials. It is asserted that these evince a willingness on the part of the United States to accept requests for release or transfer of detainees from States other than the States of the detainees' nationality. They include an extract from the *Sunday Times* for 25 June 2006 where a US official was quoted as saying: "We would like every government to take responsibility for their detainees, whether they are nationals or residents of their countries". They also include a statement by John Bellinger, legal adviser to Secretary of State Condoleeza Rice, on which the appellants place some emphasis: "There are a few people we are not prepared to release or transfer but we are open to all offers".

40. In reply to Ms Nembhard's evidence Mr Richmond made a second statement, dated 14 July 2006. Mr William Nye, Director of the Counter-Terrorism and Intelligence Directorate at the Home Office, also made a statement (on 17 July 2006) on the second respondent's behalf dealing with security issues. He states (paragraph 1) that his statement's purpose is "to explain... why it would not be feasible or desirable for the UK Government to make a commitment to the Administration of the United States of America, prior to any release of [Mr El Banna and Mr Deghayes], to put in place security arrangements that would satisfy the US Administration's concerns about the security threat that would be posed by each of them following their release to the UK".

41. The appellants say there is now at least a real prospect that a request by the United Kingdom authorities for the release of the detainee claimants would be acceded to ("at least following an appropriate exchange as to security issues": appellants' supplementary skeleton, 21 July 2006, paragraph 6(d)); and their nationality has now been shown to be immaterial to the likelihood of such an outcome. It was submitted in a skeleton argument prepared on 18 July 2006 on the appellants' behalf for a forthcoming directions hearing (paragraph 4(a)) that on the respondents' own evidence the US Administration would now accept that the United Kingdom government has standing to make a request of the kind sought by the appellants in the case of non-nationals such as Mr El Banna and Mr Deghayes. In light of Mr Nye's evidence it is in particular submitted (supplementary skeleton, 21 July 2006, paragraph 6(e)) that "the sole obstacle identified by the respondents' evidence to the making of such a request relates to the security arrangements which the United Kingdom could make – or would be prepared to make – for the monitoring of the Detainee Claimants on their return". This proposition is also implicit in the terms of counsel's "Note on Approach to Respondents' Open Evidence" of 20 July 2006, and Mr Rabinder Singh sought to support it in his oral submissions.

42. That, then, is the primary factual basis on which the appellants invite the court to determine the appeal. If it were the correct basis, the issues falling for decision would clearly lie within a narrower compass than they did before the Divisional Court. The focus would be on Mr Nye's evidence, and upon the question whether there is any legal flaw in the judgments there set out as to matters of security and in particular the practicality of establishing protective security arrangements, satisfactory to the Americans, by which Mr El Banna and Mr Deghayes might be monitored in the event of their release from Guantanamo Bay and return to the United Kingdom. Such a debate might still present formidable difficulties for the appellants. The scope of judicial review relating to security questions is tightly constrained, though not as severely as in the past. But the broader issues canvassed in the case, touching the conduct of foreign relations and the nature of State to State claims in public international law, would disappear; at least they would leave centre stage.

43. However we are satisfied that the appellants' circumscription of the appeal's prospective scope is unjustified on the evidence. It is true that the reports of public statements by United States officials, including the President, produced by Ms Nembhard (some of which are referred to in paragraphs 21 to 26 of Mr Richmond's second statement) make it clear that the US Administration is presently undertaking a re-examination of its stance on detainee policy and practice. They take their place with other recent developments relating to Guantanamo Bay, two in particular: first, an approach apparently made to the US Administration by the Chancellor of Germany for the release and return to Germany of a Turkish national, Mr Kurnaz, who had been born and brought up in that country, and secondly, information coming from a US official that the US Administration might in the future be more willing to contemplate an approach by the UK Government for the release of former UK residents (see Mr Richmond's second statement, paragraph 35). We shall have more to say about Mr Kurnaz given certain factual developments since the hearing before us.

44. Mr Richmond (second statement, paragraph 35) says that these developments

> "...have caused the UK Government to explore with US officials whether there might be a change in the US

> Administration's likely attitude to a formal request for the release and return of the Detainee Appellants to the UK, such that it might have some chance of being effective and would not undermine the UK Government's efforts to engage constructively with the US Administration across [the range of interconnected issues concerning US detainee policy and practice]".

Accordingly the FCO initiated a round of discussions between an official from the British Embassy in Washington and the most senior officials directly responsible for Guantanamo Bay in the key departments of the US Administration, that is to say the Department of Defense, the State Department and the National Security Council. These are, plainly, developments of the first importance. But there are large knots not yet untied. Mr Richmond says (second statement, paragraph 38) that these discussions have established that:

> "(1) the US Administration have not changed their policy in relation to the acceptance of requests for release from Guantanamo Bay;
>
> (2) the case of Mr Kurnaz is treated by them as strictly exceptional, and not as setting any kind of precedent upon which other states might rely; and
>
> (3) any formal request for release of the Detainee Appellants would be unacceptable to the US Administration, unless supported by arrangements to meet US security concerns that were very extensive and on a wholly different scale from the arrangements in relation to the British nationals who had previously been released from Guantanamo Bay and returned to the UK..."

45. It is convenient at this stage to take note of new facts relating to Mr Kurnaz which have come to light since the hearing and have been communicated to us by means of a further statement from Ms Nembhard made on 5 September 2006. Mr Kurnaz was released from Guantanamo Bay and returned to Germany on 24 August 2006, following negotiations between Germany and the United States as to the conditions under which he would be monitored. Ms Nembhard's further statement contains much argument (though it should only give evidence) as to what the Kurnaz case should teach us about this appeal.

46. Mr Richmond's third conclusion set out above might appear to support the proposition that there is nothing left in the case save the question whether the United Kingdom could or should establish security arrangements satisfactory to the Americans relating in particular to Mr El Banna and Mr Deghayes in the event of their release and return here. But the matter is by no means so simple. Mr Richmond (second statement, paragraph 45(1)) describes the enduring stance of the US Administration as being to the effect that "States could only engage with the US Administration in relation to non-nationals on intelligence or law enforcement

grounds". Accordingly, contrary to the appellants' submission made in their skeleton argument of 18 July 2006 to which we have already referred, it is not the case that the United States would now accept that the United Kingdom government has standing to make a request of the kind sought by the appellants in the case of non-nationals such as Mr El Banna and Mr Deghayes.

47. Mr Richmond concludes (second statement, paragraph 39) that in light of what the senior US officials have told the UK Embassy, "a formal and unequivocal request of the United States for the release and return of the [detainee claimants] to this country" (the subject of the first head of relief sought by the appellants: we have set it out above):

> "...would be unacceptable to the US Administration, and indeed would provoke a negative reaction, because the US Administration would take this to indicate that the UK was not taking their security concerns in relation to Mr El Banna and Mr Deghayes seriously. The FCO and we consider that such an approach would seriously undermine the credibility of the UK Government on detainee issues in the eyes of the US Administration."

It is clear also (Richmond second statement, paragraph 40) that the FCO take the view that an approach to the Americans of the kind reflected in the third head of relief "would... serve to undermine the credibility of the UK Government in the eyes of the US Administration"; and that would diminish the United Kingdom's potential for influence with the United States on issues of detainee policy at Guantanamo for the potential benefit of all the detainees.

48. In all these circumstances it appears to us that the question of security arrangements apt for the detainee claimants (more particularly Mr El Banna and Mr Deghayes) were they to be returned here cannot be viewed in isolation from more strategic issues relating to the conduct of State to State relations. That seems to us to be the stance taken by the first respondent, and we have seen nothing to contradict it. Strict questions as to the nature of the United Kingdom's standing in international law to make representations have, indeed, receded to the background. Indeed in a written submission of 21 July 2006 replying to Mr Goodwin-Gill's argument for UNHCR Mr Greenwood goes so far as to say (paragraph 2) that "questions regarding whether, as a matter of legal theory, the UK Government would have standing under international law to make any particular form of representation... no longer have any practical bearing on the (factual) matters in issue in these proceedings". Overall, however, it remains the first respondent's position that the making of a formal request in any form sought by the appellants would be "ineffective and counterproductive". It is clear, moreover, that the government's judgment as to security arrangements is inherent in that position. This judgment, for which the second respondent Secretary of State has responsibility, is described by Mr Nye. The appellants seek to challenge it, so we must confront it next.

The Position of the Second Respondent (the Secretary of State for the Home Department) as at the Date of the Court of Appeal Hearing

49. Mr Richmond (second statement, paragraph 45(3)) tells us that while the US authorities do not consider that Mr El Banna and Mr Deghayes fall into what is called a "super-high" threat category, both have been marked down for continued detention following the first reviews of their cases by the relevant Administrative Review Boards. Mr Nye says (paragraph 6):

> "In the case of the possible return to the UK of detainees at Guantanamo, including [Mr El Banna and Mr Deghayes], US officials have made it clear that security arrangements similar to those which were put in place when British nationals were returned would not be acceptable... In the case of [Mr El Banna and Mr Deghayes], US officials have made it clear that active and aggressive measures would have to be taken to mitigate the security threat that the US Administration assessed the detainees posed. The British Embassy in Washington assesses that the US Administration envisages measures wholly different in scale from those provided in respect of the British nationals."

50. There being no extant criminal charges in this country against Mr El Banna and Mr Deghayes the only means by which their movements might lawfully be restricted would be through the imposition of control orders under the Prevention of Terrorism Act 2005. Such orders, however, could not involve their detention, since a valid order having that effect – a "derogating control order" – would require there to be in place an appropriate and effective derogation from ECHR Article 5, and there is none.

51. Accordingly, any overt control measures which might be set in place would in reality have to be effected by means of non-derogating control orders. Mr Nye says (paragraph 15):

> "My assessment is that the obligations which I am advised the US would seek would be at the most stringent end of the range of potential obligations which can be imposed under non-derogating control orders, or even derogating control orders. The UK Government could not give a commitment in advance to taking these measures, as specific legal tests for the making of such orders are set out in the legislation. Further, such orders are subject to court control. The UK Government could not guarantee the outcome of any court hearing in relation to a control order. However, on the basis of the material currently available to the UK Government, I am not satisfied that it would be proportionate to impose on [Mr El Banna and Mr Deghayes] the kind of obligations which might be necessary to satisfy the US Administration."

52. Mr Nye proceeds to discuss the possibilities of covert investigation of the two men's activities. The principal responsibility for such an exercise would fall on the Security Service. In paragraph 17 he gives an outline description of some of the techniques

available to the Security Service, but observes: "None of these techniques, individually or collectively, would be able to provide the sort of guarantee sought by the US, as set out above". In paragraph 18 he says that the use of such resources against Mr El Banna and Mr Deghayes at the level the Americans would require could not in any event be justified because it would divert, to an unacceptable extent, their use away from coverage of other persons who pose a greater threat to British national security. The point is briefly developed in paragraphs 19 and 20. We should cite paragraph 20:

> "Both [Mr El Banna and Mr Deghayes] are currently assessed to pose a threat to the national security of the UK. However, it is the assessment of the Security Service that they do not pose a sufficient threat to justify the devotion of the high level of resources to covering their activities following any return to the UK which might be required to satisfy the US Administration."

Compare paragraph 71(1) of Mr Richmond's first statement, which we have already cited.

53. Mr Nye concludes:

> "23. Accordingly, in the light of what the UK Government assesses are likely to be the US Administration's requirements about control and monitoring measures which would have to be taken in respect of [Mr El Banna and Mr Deghayes], I and the Home Secretary do not believe that the UK Government would be able to give any set of commitments to the US Administration that it would find satisfactory. Hence any formal request to the US Administration for [their] release... could not be supported by the required assurances as to security arrangements."

54. The remainder of Mr Nye's statement addresses the question whether the second respondent ought now to make a substantive decision on the issue of Mr El Banna and Mr Deghayes' readmission to the United Kingdom in the event of their release from Guantanamo Bay. The fourth head of relief claimed by the appellants is in these terms:

> "A declaration that the detainee claimants will be entitled to immediate return to the United Kingdom in the event of their release from detention at Guantanamo Bay and that any refusal of permission to do so by the United Kingdom Authorities by reference to the time they have been detained at Guantanamo Bay would be unlawful."

The Divisional Court said:

> "98. ... The claim is made because, certainly in relation to the second and third claimants, the travel documents with which they were issued when they left the United Kingdom only gave them a right to return to the United Kingdom if they did so

> within two years. Their detention in Guantanamo Bay has therefore taken them beyond the end of that period. The correspondence makes it plain that the second defendant has not been prepared to give an unequivocal commitment that they will be permitted to return to this country. It seems to us that that is the only proper stance he can take until such time as their release from detention becomes imminent. The decision will then be made on all the information available to him at that time. All that we can say at the moment is that a decision to refuse them entry based merely on the fact that they have been out of the country for more than two years would be difficult to justify."

55. Given that the Americans are (as Mr Richmond explains) re-examining their policy on Guantanamo Bay, the second respondent Secretary of State has considered whether he should now make a substantive decision on the issue of Mr El Banna and Mr Deghayes' readmission to the United Kingdom in the event of their release. He concluded that he should not. He had in mind (Nye paragraph 26) the current assessment of the threat posed by Mr El Banna and Mr Deghayes to national security. Mr Nye then describes the three specific reasons for the decision, which was made on 8 July 2006:

> "28. First, the current re-examination by the US Administration of its policy on Guantanamo meant that if the Home Secretary were to make a substantive decision now, he would be doing so without full consideration of all the factors which might ultimately be significant for this issue. Such factors include the longer-term US policy on Guantanamo.
>
> 29. Second, he considered the impact that a substantive decision made now might have on the UK's wider ability to engage with the US on Guantanamo during a period when the US Administration is re-examining its policy in this regard. The Home Secretary noted advice from the FCO that substantive decisions to exclude the Appellants could damage wider exchanges with the US on detainee matters. Some in the US Administration might see such a decision as self-serving or hypocritical, particularly in the light of the extent to which the UK Government has sought information about the First, Second and Third Appellants despite the UK's lack of consular locus, the request which the UK Government has now made in respect of the First Appellant, and the consistent pressing of the US Administration by the UK Government to close Guantanamo.
>
> 30. Third, he was mindful that if he were to make a substantive decision at this time to exclude the Appellants, such a decision might have a potentially negative impact on the Government's ability to engage with those minority sections of the Muslim community in the UK that are at risk of being

radicalised. At a different time and in different circumstances the potential for harm in this respect might be less."

Postscript on the Facts

56. The narrative we have given generally suffices for the resolution of the issues we are required to decide. However we should note three points. First, it will be necessary to refer to some other matters of fact when we come to address the arguments. They are more conveniently dealt with at that stage. Secondly, the narrative's content has been drawn only from open evidence before the court. We should state that the respondents had also prepared certain closed evidence, that is evidence which cannot be disclosed for public interest reasons, in the shape of a further statement from Mr Nye and exhibits. In the event it has not been necessary to refer to or rely on this material (though the court has seen it for the purpose of giving directions in relation to it), and the case has proceeded without any regard being paid to it. Thirdly, in counsel's "Note on Approach to Respondents' Open Evidence" of 20 July 2006 (to which we have referred in passing) the appellants offer an analysis of the evidence which marries with the proposition, urged as we have said by Mr Rabinder Singh, that there is now at least a real prospect that a request by the United Kingdom authorities for the release of the detainee claimants would be acceded to, and their nationality has now been shown to be immaterial to the likelihood of such an outcome. This proposition we have rejected for reasons we have given. In the Note of 20 July 2006 counsel state that if their analysis were "seriously disputed" they would wish to seek disclosure of various documents. However as we understand it they have not sought to maintain that position, and rightly so. There is no proper basis for any order for disclosure whatever our view of the facts.

THE ISSUES

57. The appellants' case has been variously articulated but may conveniently be summarised in these following propositions.

i) The first respondent Secretary of State's refusal to make the same representations to the United States in respect of the detainee claimants as had been made in respect of British citizens (the third head of relief claimed) constitutes unlawful discrimination contrary to the RRA, and a violation of ECHR Article 14 read with Article 3 and/or Article 8.

ii) The first respondent's refusal to make representations to the United States in any form sought by the appellants (as described in the first or the third head of relief) constitutes a breach of enforceable legitimate expectations enjoyed by them.

iii) The first respondent's refusal to make representations to the United States in any form sought by the appellants constitutes a violation of the family claimants' rights under ECHR Articles 3 and 8 (Article 14 is also relied on but we shall deal with that in addressing submission (i) above).

iv) The first respondent's position on State to State claims in international law, and the prime role of nationality, is mistaken. (This is the issue on which Mr Goodwin-Gill has made submissions on behalf of UNHCR.)

v) The first respondent's judgment as to the efficacy and practicality of making representations to the Americans, and the second respondent's judgment as to the establishment of satisfactory security arrangements, are flawed by a failure to have regard to all material considerations.

vi) The Divisional Court erred in its approach to certain lesser forms of relief sought on behalf of the appellants.

58. However the case calls up certain wider questions. One is whether, or the extent to which, the appeal is concluded against the appellants by this court's judgment in *Abbasi*. And that question itself engages two connected, overarching issues. (1) How does the law approach the balance of individual claims of right with the general public interest in a context as acute as this? (2) How big is the court's role as decision-maker? We find it most convenient first to introduce the decision in *Abbasi*, then to deal with the individual submissions in the case as we have enumerated them, and finally to make some general remarks about the remaining two overarching points.

ABBASI [2002] EWCA Civ 1598, [2003] UKHRR 76

59. Abbasi was one of the British detainees at Guantanamo Bay. He brought a claim (together with his mother) seeking, among other things, a declaration that the respondents owed a duty to take all reasonable steps to secure his release. He alleged that a fundamental human right enjoyed by him, namely, the right not to be arbitrarily detained, had been infringed. Judicial review permission was refused at first instance but granted by the Court of Appeal, which proceeded to hear the substantive application. The essence of the parties' respective cases was summarised by the court as follows:

> "25. The essence of his [the applicants' counsel's] submissions was that Mr Abbasi was subject to a violation by the USA 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 for his request for assistance. Mr Blake [the applicants' counsel] accepted that no legal precedent establishes such a duty, but submitted that the increased regard paid to human rights in both international and domestic law required that such a duty should be recognised.
>
> 26. For the Secretary of State, Mr Greenwood QC submitted that the authorities clearly established two principles that posed insuperable barriers to the relief claimed in these proceedings:
>
> (1) The English court will not examine the legitimacy of action taken by a foreign sovereign state;
>
> (2) The English court will not adjudicate upon actions taken by the executive in the conduct of foreign relations."

In *Abbasi*, Mr Greenwood did not seek to contradict the proposition that arbitrary detention violated a fundamental human right. His case was that by force of the two submissions cited by the court at paragraph 26, the legality of that detention was not in the circumstances justiciable in an English Court.

60. The court in *Abbasi* considered whether a duty such as was contended for by the claimant was imposed on the State either by international law, or municipal law. It was clear that there was no such duty in international law, and a premise of the court's discussion of the subject was that the debate was anyway limited to the case where the duty's prospective beneficiary was a British national (as Abbasi of course was):

> "69. It is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a *citizen* who is suffering or threatened with injury in a foreign State." (emphasis added)

Turning to domestic law, the court addressed the impact of the Human Rights Act 1998 ("HRA"). We will deal with the appellants' contentions based on the ECHR more closely when we come to submission (iii) above. It is enough at this stage to notice that the Court of Appeal (paragraph 79) did not consider

> "...that the [ECHR] and the [HRA] afford any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf."

61. The court did not, however, go so far as to hold that there were no circumstances in which it might be appropriate to grant relief against the relevant government department at the behest of a British citizen detained by a foreign State. They held that the citizen might enjoy a legitimate expectation engendered by a statement of government policy. In the background there was what the court called (agreeing with Taylor LJ as he then was in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Everett* [1989] 1 QB 811) the "normal expectation of every citizen" that, if he were subjected abroad to a violation of a fundamental right, the British government would not simply wash their hands of the matter and abandon him to his fate: see paragraphs 96 – 98. However it was important to see precisely what expectation had been generated. The material policy statements indicated only that in certain circumstances the British government would "consider making representations". Whether to make any representations and if so in what form was left entirely to the discretion of the Secretary of State. At paragraph 99 the court said:

> "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."

62. However the court made it clear that the government's judgment of foreign policy issues themselves was not justiciable. Their conclusions appear in the final two paragraphs of the judgment:

> "106. We would summarise our views as to what the authorities establish as follows:

(i) It is not an answer to a claim for judicial review to say that the source of the power of the [FCO] is the prerogative. It is the subject matter which is determinative.

(ii) Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen. The Convention does not impose any such duty. Its incorporation into municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this Court.

(iii) However the [FCO] has a discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained 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 is irrational or contrary to legitimate expectation; but the court cannot enter into the forbidden areas, including decisions affecting foreign policy.

(iv) It is highly likely that any decision of the [FCO], as to whether to make representations on a diplomatic level, will be intimately connected with decisions related to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

(v) The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case.

107. We have made clear our deep concern that, in apparent contravention of fundamental principles of law Mr Abbasi may be subject to indefinite detention in territory over which the USA has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or Tribunal. However, there are a number of reasons why we consider that the applicant's claim to relief must be rejected.

(i) It is quite clear from Mr Fry's evidence that the [FCO] has considered Mr Abassi's request for assistance. He has also disclosed that the British detainees are the subject of discussions between this country and the USA both at Secretary of State and lower official levels. We do not

> consider that Mr Abassi could reasonably expect more than this. In particular, if the [FCO] was to make any statement as to its view of the legality of the detention of the British prisoners, or any statement of the nature of the discussions held with US officials, this might well undermine these discussions.
>
> (ii) On no view would it be appropriate to order the Secretary of State to make any specific representations to the USA, even in the face of what appears to be a breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.
>
> (iii) The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the USA. It may be that the anxiety that we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the court in *Rasul*. As is clear from our judgment, we believe that the US courts have the same respect for human rights as our own.
>
> (iv) The Inter American Commission on Human Rights has taken up the case of the detainees. It is as yet unclear what the result of the Commission's intervention will be. It is not yet clear that any activity on behalf of the [FCO] would assist in taking the matter further while it is in the hands of that international body."

A fair reading of the judgment shows, we think, that the premise of the court's reasoning to which we have already referred, namely that the debate in hand was limited to cases of British nationals, applied not only to the discussion of a possible duty under international law, but generally to the issues addressed in the judgment.

63. Mr Greenwood's first submission before us was that the appellants' case against the first respondent invited the court to do precisely what was closed off by the decision in *Abbasi*, namely (a) to impose a duty on the Secretary of State not only to consider a request put to him, but to act on it, and (b) to enter into a "forbidden area", the conduct of foreign relations. More than this: the court was invited so to act in relation to persons (the detainee claimants) who were not British nationals, and thus did not enjoy even the limited legitimate expectation allowed in *Abbasi*.

64. This is a powerful submission, but we do not think it has the force without more to carry the whole case in Mr Greenwood's favour. We have to consider, point by point, how far (if at all) *Abbasi* undercuts the appellants' arguments. Accordingly, as we have indicated, we will deal next with the individual submissions in the case as we have enumerated them.

(i) THE RACE RELATIONS ACT 1976 AND ECHR ARTICLE 14

65. S.1(1)(a) of the RRA defines discrimination as follows:

> "A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-
>
> > (a) on racial grounds he treats that other less favourably than he treats or would treat other persons..."

This part of the definition delineates what is generally referred to as direct discrimination. The term "racial grounds" includes "nationality": RRA s.3(1). RRA s.3(4) is a critical provision:

> "A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1)... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

S.19B(1) (which falls within Part III of the RRA) provides:

> "It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination."

S.41 is entitled "Acts done under statutory authority etc". It provides so far as relevant:

> "(2) Nothing in Parts II to IV shall render unlawful any act whereby a person discriminates against another on the basis of that other's nationality or place of ordinary residence or the length of time for which he has been present or resident in or outside the United Kingdom or an area within the United Kingdom, if that Act is done—
>
> > ...
> > (d) in pursuance of any arrangements made (whether before or after the passing of this Act) by or with the approval of, or for the time being approved by, a Minister of the Crown..."

66. The appellants' argument on the RRA is that in declining to make formal representations on behalf of the detainee claimants of the same kind and status as were made on behalf of Abbasi and other British citizens, the first respondent is guilty of direct discrimination on racial grounds (viz. nationality) contrary to RRA ss.1(1)(a) and 19B(1).

67. If the argument is good, the proposition that a State may only make a formal State to State claim on behalf of its own nationals is rendered offensive to the law of England, however settled and venerable it may be in the international law books. This consequence, which Mr Rabinder Singh sought unpersuasively to avoid, would plainly be surprising, not to say bizarre. And as the respondents submit (skeleton 14 June 2006, paragraph 85) the Consular Relations Act 1968 gives various provisions of the Vienna Convention on Consular Relations the force of law in the United Kingdom, including Articles 5(a) and 5(e), which set out consular functions of assistance that are expressly limited to the nationals of the country concerned. Thus it

seems Parliament itself has recognised that in the conduct of international relations in this area a distinction drawn on grounds of nationality is basic. However the law is not short of surprises, and we have to examine the argument's merits.

68. The submission is a straightforward one, and at first blush compelling. S.19B(1) plainly brings the first respondent's relevant acts and omissions within the ambit of s.1(1)(a). No less plainly the first respondent has treated the detainee claimants less favourably than the British nationals. But the relevant circumstances of the two groups are the same, or not materially different: s.3(4). Direct discrimination is thus established. Considerations of foreign policy or national security are irrelevant, since under the statute direct (unlike indirect) discrimination cannot be justified. (Certain governmental acts relating to immigration and nationality are excluded from the statute by s.19D, but there is no such exclusion here.)

69. The Divisional Court dealt with this argument in a single paragraph:

> "72. It is accepted by the first defendant that he was carrying out a function within the meaning of Section 19B(1) but asserts that the relevant circumstances of the comparators in this case, that is the nationals, were not the same, by reason of the very fact of nationality which relates to their status under international law. It is the difference in status which is the material difference. Because that difference in status is recognised in international law we cannot see how the nationals can be used as comparators for the purposes of section 3(4) in the very context where the difference in status is relevant. We reject the claim based upon the Act."

70. Mr Rabinder Singh submits that this approach to the application of RRA s.3(4) is erroneous and contrary to authority. In relation both to race and sex discrimination (where there are analogous statutory provisions) there is a consistent body of learning to the effect that reliance upon what has been called "the impugned characteristic" as a legitimate basis for distinguishing between the putative victim of discrimination and the relevant comparator, so as to take the case out of s.3(4) and therefore s.1(1)(a), is impermissible. Here the impugned characteristic is nationality. Nationality, therefore, is not a proper basis on which to distinguish between the two groups so as to refute the claim of discrimination. But the Divisional Court held, in effect, that it was.

71. The first authority relied on is the case of *Showboat Centre v Owens* [1984] 1 WLR 384, in which Browne-Wilkinson J (as he then was) said this (391):

> "Although one has to compare like with like, in judging whether there has been discrimination you have to compare the treatment which would have been afforded to a man having all the characteristics as the complainant except his race."

In *James v Eastleigh Council* [1990] 2 AC 751, a case on the sex discrimination legislation, the House of Lords held that the correct approach was to ask whether the complainant would have received the same treatment as the chosen comparator but for

his or her sex. If the answer was "yes" then unlawful discrimination was established: see *per* Lord Bridge at 764F - 765E and Lord Goff at 774B - C.

72. A recent leading case of high authority is the decision of their Lordships' House in *R v Immigration Officer at Prague Airport ex p. European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1. Baroness Hale of Richmond said this at paragraph 73:

> "The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on sex or racial grounds. However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds: see *Glasgow City Council v Zafar* [1997] 1 WLR 1659, approving *King v Great Britain-China Centre* [1992] ICR 516. If the difference is on racial grounds, the reasons or motive behind it are irrelevant: see, for example, *Nagarajan v London Regional Transport* [2000] 1 AC 501."

73. The first respondent offers two answers to the claim of discrimination. The first is that on the proper application of s.3(4) to the facts, the detainee claimants and the British nationals are not in truth in like case. The second is that the first respondent's relevant acts were done pursuant to "arrangements" within the meaning of s.41(2)(d), and are accordingly exempt from the prohibition on discrimination. The "arrangements" are articulated in the respondents' skeleton argument of 14 June 2006 as follows (paragraph 87):

> "...settled policy adopted by Ministers that (save in any case where a different approach is the subject of a specific agreement with another state) where the UK Government decides to make consular-type representations to another state, which could include a formal request to another state for release of an individual from custody for return to the UK, this will be on behalf of British nationals only".

74. We turn to the application of s.3(4). Mr Greenwood (skeleton argument 14 June 2006, paragraph 80) correctly submits that "the appropriate characteristics of the comparator for the purposes of s.3(4) of the RRA cannot be identified without considering the reason why the detainee appellants were treated as they were". In this context we should, with diffidence, set out a passage from Law LJ's judgment in the *Roma Rights* case in this court ([2003] EWCA Civ 666), which was cited and approved by Lady Hale in the House of Lords (paragraph 81):

> "One asks Lord Steyn's question [in *Nagarajan v London Regional Transport* [2000] 1 AC 501, 521-522]: why did [the immigration officer at Prague airport] treat the Roma less favourably? It may be said that there are two possible answers: (1) because he is Roma; (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably *because* Roma are (for very well understood reasons) more likely to wish to seek asylum and thus, more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds: his duty to refuse those without a claim under the Rules, manifestly including covert asylum-seekers, and his knowledge that the Roma is more likely to be a covert asylum-seeker. But that is irrelevant to the claim under s.1(1)(a) of the 1976 Act."

Lady Hale continued (paragraph 82):

> "The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. As Laws LJ observed, at para 108:
>
> > 'The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is *untrue*. But that cannot be right. If it were, it would imply that direct discrimination can be justified;…'"

75. How in this case is "Lord Steyn's question" – why were the detainee claimants treated as they were – to be answered? As in *Roma Rights*, it 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?

76. Mr Rabinder Singh's response has an attractive simplicity. He says we should simply apply the reasoning in *Roma Rights*, as of course we are bound to do if it is not distinguishable. He submits that just as in that case the officer treated the Roma less favourably (because Roma are more likely to wish to seek asylum and so put forward a false claim to enter the United Kingdom), so here the first respondent treated non-nationals less favourably because, on his view of the law, they were not candidates for State to State claims. In each case the engine of the decision was the "impugned characteristic", namely race – being Roma, or being a non-(British) national.

77. But in our judgment the analogy is false, and for a reason closely touching the policy of the legislation. We have seen that as a rule the "impugned characteristic" cannot be allowed to distinguish between putative victims of discrimination and their

comparators. Why? Because if it did, that would license the very vice which the absolute statutory prohibition of direct discrimination is intended to suppress: racial stereotyping. To treat the impugned characteristic – race – as the actual factor said to distinguish the putative victim from the comparator is naked discrimination in the simplest case. In the more likely case, it is to assume or assert that persons possessing that characteristic are *thereby* differently inclined from the comparator: inclined to behave in some different and (to the alleged discriminator) undesirable way. That is, exactly, racial stereotyping.

78. But nothing of the kind applies in this case. A person who is not a British national is not entitled to the protection of a State to State claim made by the first respondent. That is not an *attribute* of the non-British national. It is not a function of how he is likely to behave. It is (subject of course to the wholly separate issues addressed by submission (iv) above) simply a legal fact. There is no question of the non-British national being, by virtue of that characteristic, more likely to do or not do this, that, or anything. Contrast the Roma who, by virtue of being Roma, was or was believed to be more likely to make a false asylum claim. 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. On the learning such a difference ought only to be disregarded if it assumes or implies a process of racial stereotyping. But it does not. The difference is therefore a proper and legitimate basis of distinction for the purposes of the RRA. 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. Their respective relevant circumstances are not the same. On the contrary they are materially different (s.3(4)). Accordingly there is no violation of s.1(1)(a) read with s.19B(1).

79. In light of that conclusion, we propose to express no more than a provisional view upon the first respondent's alternative case based on s.41(2)(d). Though the Divisional Court (paragraph 71) cited the subsection they passed no comment on the argument. Mr Rabinder Singh submits that the first respondent cannot rely on the putative "arrangements" which we have set out because to do so falls foul of House of Lords authority. He points to *Hampson v Department of Education and Science* [1991] 1 AC 171, in which their Lordships held that acts done "in pursuance of any instrument made under any enactment by a Minister of the Crown" (the words of s.41(2)(b)) were limited to acts done "in necessary performance of an express obligation contained in the instrument" and so did not extend to acts done "in the exercise of a power or discretion conferred by the instrument". It is submitted that the same must apply to the parallel words of s.41(2)(d); and that, we think, is right. Then it is said that under the "arrangements" – the policy we have cited – only a discretion, and not a duty, to make representations is contemplated. Accordingly there is no question of the "necessary performance of an express obligation". It follows that the policy cannot qualify for the purposes of s.41(2)(d).

80. Mr Greenwood's riposte was to submit that while the policy contemplates a discretion whether or not to make representations, there is no discretion as to the material element in the policy: the fact that it is applied to nationals only.

81. On this part of the case we are inclined to think that Mr Rabinder Singh is right, though not for the reason he advances. We would accept, as Mr Greenwood submits,

that the first respondent's refusal to make formal representations on behalf of non-nationals is a necessary consequence of the policy's application. That is no less so by reason only of the fact that the policy contemplates a discretion whether or not in any given case to act on behalf of a British national. Accordingly we doubt whether the appellants are much assisted by *Hampson*.

82. Our misgivings, however, arise on a point which was not, we think, clearly exposed in argument. As we have shown the "arrangements" relied on take the shape of a policy of the government. It is not encapsulated in any particular form of words. The formulation we have given is, as we have said, taken from Mr Greenwood's skeleton argument. The words used (while of course loyal to his instructions) are presumably those of counsel. Mr Richmond (first statement, paragraph 23) describes the policy somewhat differently, though not inconsistently. He says it is "the long-standing policy of the UK Government not to offer consular or similar assistance to non-British nationals, except in cases where a specific agreement to do so exists with another State"**.** We entertain some doubt whether the legislature intended "arrangements" within s.41(2)(d) to include policies of the government having no special, or formal, characteristics. Such a position suggests that the government may escape the rigour of RRA s.1(1)(a) read with s.19B(1) merely by promulgating policy, at least if it does so before the events happen which trigger the relevant discrimination. But in that case the bite of the statute is greatly weakened. We are inclined to think that the term "arrangements" contemplates something altogether tighter, less fluid: a code of some kind, such as one might find in a statutory instrument, but made in a context where legislation is not required. At the hearing Mr Greenwood submitted that the "arrangements" were indeed to be found in something of that sort, namely the United Kingdom's Rules on International Claims. However we apprehend that the Rules reflect, rather than constitute, the policy, which as we have shown is not articulated by reference to the Rules in counsel's skeleton argument. But as we have said we have not had the point fully argued.

83. In the event we would reject the case advanced under the RRA on the ground that no discrimination is shown, for the reasons we have earlier given. We should say that we have not forgotten the appellants' reminder (skeleton argument 6 June 2006, paragraph 12) that the RRA claim was brought on behalf of the family claimants as well as the detainee claimants. But the family claimants cannot assert any separate points to refute the reasoning in the foregoing paragraphs.

84. Can the family claimants make a better discrimination case by relying on ECHR Article 14? We would accept that their complaints fall within the scope or ambit of Article 8 for the purposes of Article 14. Their separation from the detainee claimants and consequent suffering show as much. (We shall consider whether there is a *violation* of Article 8, and also the bite of Article 3, in dealing with submission (iii) above.) But in our judgment the family claimants cannot make a case under Article 14. They must assert, just like the detainee claimants themselves in the RRA context, acts of discrimination by reference to the first respondent's treatment of the detainee claimants. We have held that for the purposes of the RRA that treatment involved no discrimination. We cannot see how a different result might be arrived at for the purposes of Article 14.

85. In this context Mr Greenwood draws attention to *Moustaquim v Belgium* (1991) 13 EHRR 802. Mr Moustaquim was a Moroccan national who had lived in Belgium

with his family since early childhood. He was ordered to be deported after having committed many offences as a juvenile. His claim under ECHR Article 8 was upheld by the European Court of Human Rights. However he also alleged a violation of Article 14 taken together with Article 8, in respect of the difference in treatment between himself and other juvenile delinquents falling into two categories. The first category was that of juveniles possessing Belgian nationality, who could not be deported under any circumstances. The second category was that of juveniles who were citizens of another EU State, in respect of whom a criminal conviction was not in itself sufficient to render them liable to deportation. Clearly Mr Moustaquim had been treated less favourably than both these sets of other juveniles. But the court rejected his Article 14 claim under both heads. As regards the first category it was held that

> "...the applicant cannot be compared to Belgian juvenile delinquents. The latter have a right of abode in their own country and cannot be expelled from it; this is confirmed by Article 3 of Protocol No. 4."

As regards the second:

> "As for the preferential treatment given to nationals of the other member-States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order."

86. Thus as it seems to us the court in *Moustaquim* (in relation to both categories) accepted for the purposes of Article 14 that differences in legal status, though they arose from nationality, might constitute objective points of distinction so as to deny a claim of discrimination.

87. In the result there is in our judgment no discrimination here, under the RRA or Article 14.

(ii) LEGITIMATE EXPECTATION

88. Before us Mr Rabinder Singh indicated that on this point he would rely on the submissions set out in paragraph 8 of his supplementary skeleton argument of 21 July 2006. It is there simply stated that

> "the [appellants] have a legitimate expectation, enforceable in domestic law, that like cases will be treated alike and that State conduct which conflicts with that principle – particularly in the context of fundamental rights – is unlawful."

There is a cross-reference to paragraph 25 of the appellants' main skeleton of 6 June 2006. Set out there is a series of points intended to show (paragraph 25.1) that "[t]he suggested distinctions between the detainee claimants and the British nationals released from Guantanamo Bay either by reference to nationality, or by reference to consular standing, are unsustainable". But this engages submission (iv) set out above, namely that the first respondent's position on State to State claims in international law, and the prime role of nationality, is mistaken. If that submission is right the

court will have to consider with great care what (if any) relief to grant. We doubt whether, in those circumstances, the assertion of a legitimate expectation would add anything.

89. We should therefore approach this claim of legitimate expectation as a free-standing argument, independent of the broader point made in submission (iv). But in that case it founders on two fronts. First, we have held in relation to submission (i) that the first respondent did not discriminate (within the meaning of the RRA or ECHR Article 14) against the detainee claimants in his treatment of their claims to have representations made to the United States. It follows that neither the detainee nor the family claimants can complain that the first respondent has failed to treat like cases alike. Indeed, so far as that is the complaint, it is merely a variant of the appellants' discrimination case which we have rejected. Secondly, if it is suggested (and in fairness, we do not think it is) that the appellants enjoyed some broader legitimate expectation, that is refuted by *Abbasi*: the only legitimate expectation there contemplated is that the first respondent would *consider* a British national's request that representations be made on his behalf. There is no basis for accepting a like expectation enjoyed by non-British nationals. In any event it is plain that the first respondent has *considered* the requests made to him.

90. For these reasons we conclude that there is nothing in submission (ii).

(iii) THE FAMILY CLAIMANTS' RIGHTS UNDER ECHR ARTICLES 3 AND 8

91. The family claimants rely on their enforced separation from the detainee claimants, with all the suffering that involves, to assert against the respondents violations of their rights under ECHR Articles 3 and 8. As we have indicated, the Divisional Court accepted that their suffering was at a level sufficient to engage Article 3. And for our part we have acknowledged that (for the purposes of Article 14) their complaints fall within the scope or ambit of Article 8. The family claimants also submit that the detainee claimants have been tortured, and the prohibition of torture imposed by international law has special force as a *ius cogens erga omnes*. They rely on the Convention on the Rights of the Child, and the primacy which they say is to be afforded to the best interests of children separated from their parents in scrutinising State action which has caused such a separation or maintains it in being.

92. In order to sustain this part of their case the family claimants must demonstrate that the first respondent owes a duty, recognised by the law of the ECHR or our domestic law of human rights (or a duty which should be so recognised), to take such action as would provide at least a real prospect of alleviating the suffering of which they complain. The only suggested candidate for such action is the making of representations to the United States of the kind urged in the first and third heads of relief, which we have set out.

93. The principal obstacle facing the family claimants' case on Articles 3 and 8 is not far to seek. It is that the source of their grave misfortunes is the action of a foreign sovereign State. Does, or should, our human rights jurisprudence require the United Kingdom to intervene with the United States out of a duty owed in domestic law to the family claimants?

94. It may well be thought there is a short answer: such a claim is closed off by *Abbasi*. We repeat for convenience what this court said at paragraph 79:

> "... [T]he [ECHR] and the [HRA] [do not] afford any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf."

One might be forgiven for supposing that the respondents' argument in relation to the family claimants, relatives of detainees who are (unlike Abbasi) not British nationals, is *a fortiori*. But we do not think it would be right to dispose of this important part of the case in so summary a fashion. We have indicated that we would deal with the appellants' contentions based on the ECHR more closely in addressing this part of the argument. The appellants, of course, seek to distinguish *Abbasi*. They pray in aid a number of matters, including "the issue of torture" and "the position and Convention claims of the family claimants" (skeleton 6 June 2006, paragraph 10.4). At paragraph 23.4 of the 6 June skeleton these considerations are advanced as distinguishing features:

> "[t]he fact that at the time of *Abbasi* there had been no public recognition by the United Kingdom Government that the indefinite detentions at Guantanamo Bay should be brought to an end, let alone that the United States authorities were actively engaged in discussions with the United Kingdom as to how to bring about repatriation of detainees held there. It is now official Government policy that those held at Guantanamo Bay should be released from their detention there and the Government has an obvious opportunity and forum in which to state to the United States that they would be content to accept the Detainee Claimants back in this country and would like this to occur."

95. The appellants face the obvious difficulty that the Court of Appeal's conclusions in *Abbasi* are cast in general terms. However, events have moved on. We will deal with the family claimants' ECHR case on its merits.

96. In *Bertrand Russell Peace Foundation v. UK* (1978) 14 D&R 117 the European Commission of Human Rights had to consider claims under Articles 8 and 10 arising from the failure or refusal of the British postal authorities to complain to the Soviet authorities about the interception and destruction of mail sent by the claimant Foundation to Russia. The Commission declared the complaint to be inadmissible, on the basis that ECHR Article 1 could not 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, even though, as in the present case, their failure to do so may have adverse effects on persons within the jurisdiction of the Contracting State." (p.124)

Bertrand Russell has been followed in later decisions of the Commission. In his oral submissions Mr Greenwood referred in particular to *Kapas v UK* (Application No.

12822/87, 9 December 1987). The claimant was a Cyprus-born British citizen resident on the United Kingdom. Property of his in Cyprus was appropriated by the Turkish authorities after the invasion of the island in 1974. The relevant Claims Commission declined to process his claim. He brought proceedings in the Queen's Bench Division seeking to rely on the British government's obligations under the Treaty of Guarantee relating to Cyprus. They were struck out on the basis that the courts could not control the use of the prerogative in relation to treaty-making powers. He launched an application in Strasbourg, relying in part on Article 1 Protocol 1. The Commission said:

> "The alleged expropriation of his property in Cyprus is attributed to Turkey and therefore in itself is not a matter for which the United Kingdom Government is responsible under the Convention. The applicant maintains however that the United Kingdom is obliged to take measures against Turkey to protect his property rights."

After referring to *Bertrand Russell*, the Commission continued:

> "[T]here is no right in the Convention which requires a High Contracting Party to espouse the applicant's complaint under international law or intervene with the Turkish authorities on his behalf. This complaint must therefore be rejected as incompatible *ratione materiae* with the provisions of the Convention..."

We should refer also to *Dobberstein v. Germany* (12 April 1996). That case concerned a complaint by a German national under Article 1 Protocol 1 regarding a failure by the Federal Republic to take diplomatic action in relation to certain property of hers which was formerly in German territory but after the Second World War fell within Polish territory. The Commission declared the complaint to be manifestly ill-founded. Applying *Bertrand Russell*, it stated:

> "... [T]he Convention does not contain a right which requires High Contracting Parties to espouse an applicant's complaints under international law or otherwise to intervene with the authorities of another State on his or her behalf".

97. This line of authority has never been doubted in Strasbourg. The appellants seek to distinguish *Bertrand Russell* by reference to these submissions (supplementary skeleton 21 July 2006 paragraph 16):

> "(1) The underlying complaint at issue [in *Bertrand Russell*] was of a wholly different order: interference with post cannot sensibly be compared with psychological suffering of an intensity sufficient to engage Article 3/8 of the Convention as a result of the arbitrary detention and reported torture of relatives;
>
> (2) The Foundation was not able to point to any particular measure with (at least) a real prospect of bringing an end to the

> matters complained of. The Claimants in this case are – namely a request for the release and return of the Detainee Claimants;
>
> (3) The Foundation was not able to advance any case of discrimination. There was no example of others in a materially similar or identical position being treated more favourably. In this case there is such an example readily available in the British nationals previously held at Guantanamo Bay and their families, like the Family Claimants, themselves British nationals and currently resident in this country;
>
> (4) The Foundation was not able to rely upon the State's *erga omnes ius cogens* obligation to forestall torture."

98. We have already rejected the appellants' case on discrimination (point 3 above). As for point 2, it is plain that the Commission's reasoning in *Bertrand Russell* and the later cases did not depend on the absence of "any particular measure with a real prospect of bringing an end to the matters complained of". The basis of the decisions is inescapable: it is that 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 State.

99. That being so, there is no more force in point 1 above than in points 2 and 3. If in principle the ECHR contains no such requirement, then in our judgment none can be found or conjured by appeal to the actual or apparent gravity of the affected individual's complaints.

100. Point 4 requires fuller consideration. It is not ruled out by our statement of the premise on which this appeal should proceed, namely that the detainee claimants have been subjected at least to inhuman and degrading treatment – thus not necessarily torture. Very plainly there are allegations of torture. If the British government owed a duty to intercede in case of torture, it would no doubt have to arrive at a judgment, after enquiry as appropriate, as to the likely truth of the allegation; although it is to be noted that the European Court of Human Rights accepts a rule in respect of allegations of violations of Article 3 under the ECHR that they have to be established beyond reasonable doubt: see eg *Ocalan v Turkey* (12 May 2005) paragraph 180.

101. In *A v. Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221 Lord Bingham of Cornhill said this (paragraph 33):

> "It is common ground in these proceedings that the international prohibition of the use of torture enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law. For purposes of the Vienna Convention, a peremptory norm of general international law is defined in article 53 to mean 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1

> AC 147, 197-199, the *jus cogens* nature of the international crime of torture, the subject of universal jurisdiction, was recognised. The implications of this finding were fully and authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998 in a passage which, despite its length, calls for citation..."

Part of the passage there cited reads:

> "b) The Prohibition Imposes Obligations Erga Omnes.
>
> 151. Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued.
>
> 152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfill its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.
>
> (c) The Prohibition Has Acquired the Status of Jus Cogens.
>
> 153. While the erga omnes nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.
>
> 154. Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the

> international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.
>
> 155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State'."

102. This learning shows that, as a matter of international law, (1) the status of *ius cogens erga omnes* empowers but does not oblige a State to intervene with another sovereign to insist on respect for the prohibition of torture (paragraph 151 of *Prosecutor v Furundzija*); (2) special standing is accorded to international bodies charged with impartially monitoring compliance (paragraph 152); (3) there can be no derogation from the prohibition (paragraph 153); (4) the prohibition is to be treated as an absolute value (paragraph 154); (5) any measure authorizing torture is illegitimate and proceedings may be taken to declare it so (paragraph 155); (6) perpetrators of torture may be held criminally responsible in the courts of any State (paragraph 155). These features are a powerful constellation, demonstrating, as Lord Bingham said

(paragraph 33), that "[t]here can be few issues on which international legal opinion is more clear than on the condemnation of torture".

103. But none of this imposes a duty on States, sounding in international law, of the kind for which the appellants must here contend. As a matter of the law of the ECHR, there is nothing to qualify the principle in the *Bertrand Russell* case. The appellants' point 4 above appears to possess no more force than the others.

104. There is, however, a further authority to be considered. Before the hearing Brooke LJ drew the parties' attention to the decision of the Constitutional Court of South Africa in *Kaunda v The President of the Republic of South Africa* CCT 23/04. The applicants were 69 South African citizens held in Zimbabwe on various charges relating to the allegation of an attempted coup against the President of Equatorial Guinea. The applicants feared extradition to Equatorial Guinea where they might face the death penalty following an unfair trial; and they made grave allegations about the conditions in which they were held in Zimbabwe. They sought orders to require the South African government to make certain representations on their behalf to the governments of both Zimbabwe and Equatorial Guinea, to take steps to secure their release or extradition and to see that their fundamental rights were respected.

105. The highest this authority goes in the appellants' favour is, we think, a passage in paragraph 69 of the principal judgment delivered by Chaskalson CJ:

> "There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action."

But it is, we think with respect, very doubtful whether the court intended to vouchsafe an approach that would be more intrusive than that commended by this court in *Abbasi*, which is much referred to in the judgments in *Kaunda*. The Chief Justice said:

> "77. A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.

> 78. This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection…
>
> 79. For instance if the decision were to be irrational, a court could intervene. This does not mean that the courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection…
>
> 81. What needs to be stressed, however, in the light of some of the submissions made to us in this case, is that government has a broad discretion in such matters which must be respected by our courts…"

106. This marches with this court's observations in *Abbasi* at paragraph 106(iii), which we have set out; though it is right that the South African court does not speak in the language of "forbidden areas". In the result the court refused relief in *Kaunda*, on the ground that the government's response to the applicants' approaches was within the wide margin of discretion which it enjoyed (paragraph 144(10) and (11)).

107. *Kaunda* is plainly, with great respect, a powerful and important authority. But it cannot in our judgment be treated as an engine to drive a significant change in the law of human rights or in any general principle of international law. In essence it was a domestic constitutional case. It does not push out the edges of *ius cogens erga omnes*; it does not shift or undercut the rule of the *Bertrand Russell* decision.

108. There are some other issues on this part of the case. There are first some points on the family claimants' Article 3 claim. The respondents contend that the Divisional Court erred in holding that their level of suffering passed the Article 3 threshold. We entertain some misgivings as to the Divisional Court's finding. The test for the gravity of what has to be shown for the purpose of Article 3 has been consistently expressed in many cases. A frequent formulation is that the ill-treatment concerned must attain "a minimum level of severity and [involve] actual bodily injury or intense physical or mental suffering" (see for example *Pretty v United Kingdom* (2002) 35 EHRR 1, paragraph 52). However we are not prepared to hold that the Divisional Court's conclusion was wrong. It is supported by powerful objective evidence. There may no doubt be room for differences of view but (although we are in as good a position to assess the evidence) we see no reason not to respect the lower court's conclusion.

109. However we agree with Mr Greenwood that the effect of the FCO's wholly inapt letters of 14 October 2002 and 28 February 2003, which we have cited, could not of itself constitute Article 3 ill-treatment. The case of *Orhan v Turkey* (25656/94, 18 June 2002) shows, certainly, that an Article 3 case may in some circumstances be built on the way in which authorities *respond* to attempts to obtain assistance following a report of severe human rights violations (see paragraphs 358 – 360). But in our judgment the conduct of the Turkish authorities in *Orhan* (in which close relatives of the applicant had "disappeared" – allegedly at the hands of the respondent State) was at so great a distance from the FCO's actions here that the case provides no assistance.

110. We agree also that *Pretty*, which is much relied on by the appellants, cannot help them overcome the fundamental objection to their case, namely that their suffering is the consequence of the actions of a foreign sovereign State for which the United Kingdom bears no responsibility under the ECHR or the HRA. References in *Pretty* and other cases to "flexibility" in the application of Article 3 (*Pretty*, paragraph 50), and observations in the learning as to the imposition in some circumstances of positive obligations in order to vindicate Convention rights (to which we refer further below), cannot pull the argument round so as to meet this conspicuous difficulty.

111. The appellants' Article 8 case founders on the same rock. In any case the family claimants could not, we think, establish a positive obligation on the shoulders of government, to make representations for the detainee claimants, on all the facts here. In *Botta v Italy* (1998) 26 EHRR 341 the court at Strasbourg recalled its earlier learning to the effect that a positive obligation is only to be imposed upon the State in the Article 8 context "where it has found a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life" (paragraph 34). The difficulties which, on the evidence, would confront any diplomatic initiative on the detainee claimants' behalf put the case well outside such a category.

112. Moreover this is an area in which the first respondent must enjoy a wide discretionary area of judgment. In *Goodwin v UK* (2002) 35 EHRR 18 the Strasbourg court stated (paragraph 72):

> "The Court recalls that the notion of 'respect' as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention."

Plainly these observations apply in cases having nothing to do with the special area of the conduct of foreign relations. If in that context Article 8 has a place, the margin of appreciation must be all the greater. It is clear on the evidence that the first respondent has had regard to the distress of the family claimants and in particular to the interests of the children of Mr El Banna and Mr Deghayes. We cannot see that that consideration should be treated as a decisive factor such as to prevent the first respondent, in striking the fair balance which Article 8 (if it applies) requires, from choosing to pursue the interests of detainees generally, and seeking to resolve the issue of Guantanamo Bay as a whole, rather than giving critical preference to a small class.

113. We should in this context refer to Mr Otty's submission, in his helpful reply note (paragraph 21), that Mr Nye for his part has not had regard to the rights of the family claimants in considering the issues of resources and security. But the decision whether or not to make representations to the Americans was the first respondent's responsibility. There is every reason why she should have regard to the Home Office assessment of the security implications, without the Home Office having for itself struck the balance under Article 8.

114. For all these reasons we would reject the family claimants' ECHR case.

(iv) NATIONALITY AND INTERNATIONAL LAW

115. In this part of the case the appellants challenge the correctness of the rule of international law, as the first respondent would have it, to the effect that a State only enjoys a right – recognised and enjoyed by every State – to afford diplomatic protection for its own nationals by means of a State to State claim. Under this head we will deal first with a particular argument which, looked at strictly, asserts not so much that the first respondent's proposition is wrong but that there exists an important legal development to which she should have had regard in deciding what steps to take to assist the detainee claimants. To that extent the point falls more readily within submission (v) than submission (iv) with which we are now dealing. But it is very closely linked with other arguments, advanced not only by the appellants but also (and in an extended form) by Mr Goodwin-Gill for the UNHCR, which belong to submission (iv). So we will deal with it here.

116. The argument is that we should discern an emerging principle of customary international law by which the status of refugees would be assimilated with that of nationals in the context of diplomatic protection, and the first respondent should have recognised its force in deciding what, if any, action to take in relation to the detainee claimants. The principle, so it is contended, is expressed in detailed and advanced proposals which are in particular to be found in Article 8 of the ILC draft Articles on Diplomatic Protection. Article 8 provides:

> "1. A state may exercise diplomatic protection in respect of a stateless person, who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that state.
>
> 2. A state may exercise diplomatic protection in respect of a person recognised as a refugee by that state when that person, at the time of the injury and the time of the official presentation of the claim, is lawfully and habitually resident in that state."

117. Mr El Banna and Mr Deghayes have as we have explained been recognised as refugees in the United Kingdom. The appellants are at pains to emphasise that the United States government has recently described these proposals as "unobjectionable" in a formal statement to the United Nations (UN Document A/CN.4/561, 27 January 2006). There is also some evidence, relied on by the appellants, that the United States government has requested the release of refugees, whom it has recognised as such, who have been deprived of their liberty in questionable circumstances.

118. Should the first respondent have treated Article 8 of the ILC draft Articles as if it were now the law? Article 8 is, in the argot of international lawyers, *lex ferenda*, that is, proposed law, as opposed to *lex lata* (existing law, law already laid down): see the *Seventh Report* of the ILC Rapporteur on Diplomatic Protection (7 March 2006, 58th Session, A/CN.4/567) at paragraph 50: draft Article 8 "is a clear exercise in progressive development". This perhaps reflects the fact that the use of the gerundive *ferenda* suggests that the measure in question is not merely proposed but enjoys a degree of approval in authoritative quarters. But we have been shown no learning

which turns what ought to be into what is. In the circumstances we do not see how the first respondent could sensibly have proceeded on the footing that ILC Article 8 represented a legal basis for action. The Americans' description of the proposal as "unobjectionable" does not qualify the point. It does not entail an acceptance by the United States authorities for their part that this *lex ferenda* may now be treated as *lex lata*.

119. Even though ILC Article 8 could not be treated as existing law, however, this part of the argument asserts (as we have said) that still the first respondent should have had had regard to it in deciding what, if any, action should be taken in relation to the detainee claimants. But once it is accepted that the Article is no more than *lex ferenda* this point becomes incoherent. In what way should the first respondent have "had regard" to it? It cannot sensibly be suggested that she was required – as a matter of English law – to have entered into a debate with the Americans in an endeavour to persuade them, relying no doubt on their view that it was "unobjectionable" – to treat it after all as *lex lata*. There is in truth no practical sense in which she should have had regard to it, as if it were a factual consideration which she should have deemed relevant to her deliberations. Either it is law, in which case she was obliged to act consistently with it, or it is not; and it is not.

120. ILC Article 8, then, is something of a distraction. Apart from anything else, once it is accepted that there is nothing to show that the United States authorities would treat the proposal as if, in effect, it were *lex lata*, the argument based on it does not really confront the first respondent's central factual position, namely that any formal representations to the United States on behalf of the detainee claimants would be ineffective and counterproductive.

121. We turn to Mr Goodwin-Gill's submissions for the UNHCR. In two written arguments he has elaborated an extremely scholarly thesis essentially to the effect that the United Kingdom has standing in international law to raise with the United States, on behalf of the detainee claimants, actual or alleged violations of Article 16 of the Refugee Convention: a standing quite as secure as that given by the principle asserted by the first respondent, namely the right recognised and enjoyed by every State to afford diplomatic protection for its own nationals by means of a State to State claim.

122. We hope we may be forgiven for dealing with this part of the case quite shortly. The reason is that Mr Goodwin-Gill's submissions, like those based on ILC Article 8, do not in truth engage the core of the case: the first respondent's judgment that any formal representations to the United States authorities on behalf of the detainee claimants would be ineffective and counterproductive. But out of respect for the argument there are some points we should make.

123. At the centre of Mr Goodwin-Gill's submission is the proposition that the United Kingdom possesses standing to take up the detainee claimants' case with the United States by means of what is referred to as "treaty-based protection" (see UNHCR submissions, 27 July 2006, paragraphs 11 ff). This is said to be quite independent of the law of diplomatic protection, so that there is no question of any nationality requirement. It is also distinct from what Mr Goodwin Gill calls "merely humanitarian representations" (paragraph 12). "It arises from the fact that both the United Kingdom and the United States of America are party to the same treaty regime, namely, [the Refugee Convention]" (paragraph 11).

124. Mr Greenwood accepts (written response, 4 August 2006, paragraph 11) that the United Kingdom "has standing to raise a violation of the Refugee Convention... with another State party". Indeed in his first statement Mr Richmond said (paragraph 24):

> "The FCO recognises that it would be possible as a matter of international law for the UK Government to take up with a third State a breach by the latter of its international human rights obligations, even if the breach is manifested by actions against persons who are not nationals of the UK. However, normally any such action by the UK Government would be directed towards encouraging the third State to bring its actions into conformity with international law: it would not be directed towards the sort of action which the Claimants are seeking in this case, namely a formal request for their return to the UK."

But none of this would, as it seems to me, give the appellants what they seek, and for two connected reasons. First, there is nothing to show that the kind of standing envisaged would extend to the proposal that the detainee claimants should be *released*, as opposed to being accorded the benefit of Article 16. Secondly, so far as we can see Mr Greenwood is right to submit (written response of 4 August 2006, paragraph 11) that the standing in question

> "is derived from the fact that each State party to the [Refugee Convention] owes obligations to all other parties. However, those obligations concern the treatment of *all* refugees, not just those refugees whom the State which raises the matter has recognized and admitted into its territory. There is no notion of a party to the Refugee Convention... being injured because of the treatment by another State of a refugee whom the former State has recognized and admitted to its territory..."

And it is then submitted that such a notion, assimilating refugees to nationals, would in effect constitute an extension of the right of diplomatic protection which is contemplated by ILC Article 8; but ILC Article 8 is, distinctly, *lex ferenda* and not *lex lata*.

125. We have heard argument on the question whether Mr Deghayes and Mr El Banna, as recognised refugees, are in truth being deprived of their rights guaranteed by Article 16 of the Refugee Convention. We should say something about this, though in truth it is by the way: as it seems to us, any violation by the Americans of Article 16(1) carries no consequence that the first respondent should make representations of the kind sought by the appellants.

126. Full consideration of this question relating to Article 16 would require a thorough analysis of the decision of the United States Supreme Court in *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006). We will venture only the following observations. Hamdan was detained at Guantanamo Bay. He brought *habeas corpus* proceedings to challenge his proposed trial by military commission. The US government filed a motion to dismiss the proceedings in reliance on the Detainee Treatment Act 2005 ("the DTA"). The material provisions of the DTA were contained in s.1005. The government submitted that ss.1005(e)(1) and 1005(h) (to which we will refer further

below) repealed the federal jurisdiction over all *habeas corpus* actions, whether or not commenced before the DTA was enacted. The court (Justice Stevens, p. 10) rejected this argument as being contrary to ordinary principles of construction.

127. Broadly, the Supreme Court's reasoning would with respect appear to apply to any *habeas corpus* application brought by a Guantanamo Bay detainee if it was pending at the time of the DTA's enactment. The DTA was "signed into law" on 30 December 2005. Information produced by the UNHCR shows that Mr El Banna filed a petition for *habeas corpus* on 6 July 2004. It was stayed by the District Court on 3 February 2005, pending resolution by the Court of Appeals as to whether detainees in Guantanamo enjoy relevant constitutional rights. It seems that the Court of Appeals has not yet ruled in the matter. Mr Deghayes filed a petition for *habeas corpus* on 22 December 2004. It was stayed by the District Court on 27 January 2006, pending a decision by the Court of Appeals as to whether the District Court then still retained jurisdiction over the case. There is no information as to the date of any further hearing. The UNHCR understands that the US government maintains its position that the DTA bars the District Court from further adjudication.

128. It was submitted for the appellants that by their proceedings in the United States the detainee claimants seek to challenge final decisions of the CSRT. In that case, Mr Greenwood acknowledges that the decision in *Hamdan v Rumsfeld* may not have effect to ensure that the jurisdiction of US Courts to entertain their claims has not been ousted by the DTA. The reason concerns an argument raised by the US government in *Hamdan* on the terms of s.1005 of the DTA. S.1005(e)(1) on its face appears to oust the jurisdiction of the court (save as otherwise provided in the DTA) to hear "an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay...". Ss.1005(e)(2) and (3) provide for the Court of Appeals for the District of Columbia to have "exclusive jurisdiction" to determine the validity of any final decision of a CSRT or military commission. S.1005(h)(1) provides that s. 1005 takes effect on the date of the enactment of the DTA. S.1005(h)(2) provides that ss.1005(e)(2) and (3) shall apply prospectively and retrospectively, but there is no express provision making it clear whether or not s.1005(e)(1) has retrospective effect. The US government submitted that to apply ss.1005(e)(2) and (3), but not s.1005(e)(1), to pending cases would produce an absurd result: it would grant dual jurisdiction over detainees' cases where the statute plainly envisages that the District of Columbia Circuit will have "exclusive" jurisdiction. Justice Stevens rejected this argument in *Hamdan* because the case did not fall within s.1005(e)(2) or (3) in any event: Hamdan was not seeking to challenge the final decision of a CSRT or military commission. But if such a challenge is the focus of Mr El Banna's and Mr Deghayes' *habeas* proceedings (as seems to be the case), then there may be scope for the US government to argue that their applications are distinguishable from *Hamdan*, and the DTA indeed operates so as to oust the court's jurisdiction. Indeed, the appellants for their part have produced a set of written submissions filed by the United States government in opposition to a *habeas corpus* claim brought by another Guantanamo detainee which confronts the Supreme Court's judgment in *Hamdan*; and it is apparent that it remains the government's case that the Federal Courts lack jurisdiction over such *habeas* claims. The appellants also submit that such challenges to CSRT determinations as may be brought before the court with exclusive jurisdiction – the District of Columbia Court of Appeals – may only be based on procedural grounds.

129. In all the circumstances the appellants do not accept that the detainee claimants enjoy "free access to the courts of law in the territory [of the United States]" within Article 16(1) of the Refugee Convention. In our judgment we cannot hold definitively that they do, or that they do not. An adjudication on the question would, as it seems to me, involve our arriving at conclusions of American federal law relating to the construction of the DTA and claims of *habeas corpus*. We are in no position to embark upon such an exercise. Nor does this case begin to require us to do so. A violation by the Americans of Article 16(1) carries no consequence that the first respondent should make representations of the kind sought by the appellants.

130. In all these circumstances, with respect to Mr Goodwin-Gill, we see no purpose in travelling further into the learning which he has laid out before us.

(v) MATERIAL CONSIDERATIONS: WEDNESBURY

131. In our judgment the appellants' submissions on this part of the case fall foul of two principles. First, they invite the court to enter into what in *Abbasi* was described as a "forbidden area" that is, the conduct of foreign relations. Secondly what is and what is not a relevant consideration for a public decision-maker to have in mind is (absent a statutory code of compulsory considerations) for the decision-maker, not the court, to decide: see *CREEDNZ v Governor General* [1981] 1 NZLR 172, *per* Cooke J at 183, approved in English law in *Re Findlay* [1985] AC 318, 333F-334C, *per* Lord Scarman.

132. It is not contended, nor could it be, that the respondents have acted in bad faith. The reality is that the appellants seek to persuade us to order the first respondent to adopt a different judgment as to the conduct of negotiations with the United States, upon a delicate policy issue, from that which, upon mature consideration, she has so far made. That offends the first principle to which we have referred. In support of this enterprise, the judicial review grounds list something like 37 factors which it is said should have been taken into account. More factors are given in the grounds of appeal. They have all been constructed by the lawyers, as if for all the world it is for the court to decide what the first respondent should and should not bear in mind in deciding what policy stance to adopt. That offends the second principle to which we have referred.

133. In any event we should note the terms of paragraph 72 of Mr Richmond's first statement:

> "In taking his decision, the Foreign Secretary has had his attention drawn to, and has taken into account, what is set out in paragraph 59 of the Claimants' Amended Statement of Grounds. He recognises that the detainee Claimants' families (who are located in the UK and many of whom are British nationals) are suffering distress, and is concerned that children of Mr El Banna and Mr Deghayes are inevitably seriously affected by their absence. He has given careful thought to the point that two of the detainee Claimants, Mr El Banna and Mr Deghayes, have been granted refugee status by the UK in the past and that they and Mr Al Rawi are nationals of countries (Jordan, Libya and Iraq, respectively) that do not appear likely

> to take action to protect their interests. But the Foreign Secretary does not consider that any of these matters outweighs the reasons referred to above in support of his decision not to make the formal request to the US Government which the Claimants seek."

The reality is that the first respondent has given consideration to the matters raised with her. As regards the second respondent it is suggested, among other things, that thought might be given to the role of the police (as opposed to the Security Service) in relation to surveillance of the detainee claimants if they are released and returned; and that there may be more scope for the use of control orders than Mr Nye appears to acknowledge. But points of that kind merely invite the court to step into the shoes of the Home Office.

134. In this context we should recall a particular submission made by Mr Rabinder Singh, to the effect that a proper approach for the first respondent to take would have been first to request the Americans to release the detainee claimants, and then to enter into discussions about appropriate security arrangements. Presumably the suggestion is that the court should declare that the first respondent was so obliged. But that invites the court to take control of policy in this area. If the suggestion is only that the first respondent should have considered taking such a course, that invites the court to tell the first respondent how, in practical terms, she should think about her responsibilities. We are afraid we consider that these positions represent an outlandish view of the relation between judiciary and executive.

135. We should draw attention to two specific pieces of evidence on this part of the case, both of which have been proffered to us since the hearing. The first is relevant in particular to the appellants' critique of the respondents' evidence regarding the security requirements the Americans would likely demand in the event of Mr El Banna's and Mr Deghayes' release. It consists in Ms Nembhard's further statement of 5 September 2006, which we have already mentioned. As we have indicated Ms Nembhard refers to the recent release from Guantanamo Bay of a Turkish national, Mr Kurnaz, "following the intervention of the German Chancellor and lengthy discussions". On 13 September 2006 the appellants applied for permission to adduce this evidence formally, together with Mr Zachary Katznelson's statement to which we have referred earlier. We have considered both statements (and certain further material, to which we shall refer shortly) provisionally; it is not in the circumstances fruitful to make an issue of its admissibility, questionable though that may be. Ms Nembhard suggests (we summarise) that the Kurnaz case tends to show that Mr Nye's evidence as to the rigour of the security requirements on which the US authorities would likely insist is exaggerated, and that a request for release might be effective even if such requirements are not immediately complied with.

136. Junior counsel for the respondents have produced a note in response to this new statement. They refer to the assertion in Mr Richmond's second statement (paragraph 44) that the US authorities seemingly took the view that Mr Kurnaz represented a lesser threat than do the detainee claimants, an assertion not disputed by Ms Nembhard. Indeed her own evidence (an article of 21 August 2006 in *Der Spiegel* which she exhibits) suggests that the Americans have come to accept the view of German officials that Mr Kurnaz has "no connection to terrorism or Al-Qaida". Counsel enumerate other points of distinction between Mr Kurnaz's case and that of

the detainee claimants. In our judgment they plainly cannot be assimilated or equated.

137. To our mind Ms Nembhard's further statement displays a questionable approach to litigation of this kind: it treats the case as a moving target, as if the legality of the respondents' actions and decisions can be made to depend on a shifting scene of events to which they are not party. It was one thing for the court to consider evidence (essentially Mr Nye's statement and Mr Richmond's second statement) dealing with developments since the Divisional Court judgment as between the US and UK authorities themselves. We think it is quite another to contemplate these new facts concerning Mr Kurnaz as potentially giving rise to inferences about the efficacy of decisions taken by the respondents in different circumstances. The premise of such an exercise is that the court is the judge, not only of the legality, but of the wisdom, of government action in this field. But that is an elementary mistake.

138. The second piece of evidence to which we should draw attention on this part of the case consists of two documents: a copy of the Magna Carta Lecture given in Sydney on 13 September 2006 by the Lord Chancellor on the topic "The Role of Judges in a Modern Democracy", and a transcript of an interview with the Lord Chancellor of the same date on the BBC *Today* programme. Again, we have considered this material on a provisional basis, though we must say we would have serious reservations about our admitting it. In the lecture Lord Falconer refers to the fact of the United States "deliberately seeking to put the detainees beyond the reach of the law in Guantanamo Bay" as being a "shocking... affront to the principles of democracy". In the interview he says it is for the State of which any detainee is a national to exert pressure on his behalf.

139. The appellants say that the terms of the Magna Carta lecture support their broad case that the human rights merits of their case should over-ride the government's broader policy goals; and that the radio interview re-states the inapt position taken in the FCO letters of 14 October 2002 and 28 February 2003 which we have cited. We think these points are misconceived. The force of Lord Falconer's words in Sydney confirms the British government's public disapproval of the Guantanamo Bay regime. But it adds nothing to the appellants' case as to the legality of the first respondent's position. The comments on the radio take the family claimants' case no further. We think it is surprising that it was thought right to seek leave to put this material before us.

140. In this area of government's responsibility to make decisions touching the conduct of foreign relations, the class of factors which are neither compulsory nor forbidden, but which it is open to the decision-maker to treat as relevant or not, must be particularly wide. The appellants' position wholly fails to confront this dimension in the case. For their part they would place in the opposite tent the claims of fundamental human rights and refugee status. We have dealt with the specific issues arising under those heads. There is no learning to show they should be treated as in some way transforming the constitutional nature of judicial review of the government's conduct of foreign relations.

141. For the reasons we have given we would hold that there is no force in this part of the appellants' case. In particular we should make clear our view that the appellants cannot challenge on grounds of legal error the judgment of the first respondent,

supported by the second respondent's position on security, that approaches to the US authorities of the kind sought by the appellants would be ineffective and counterproductive. We have cited or referred to much of the evidence, and we have considered all of it. The appellants would have to show, at the least, that the first respondent's judgment on the question is frankly perverse. On the material before the court such an enterprise is manifestly unachievable.

(vi) LESSER FORMS OF RELIEF

142. As we have shown the appellants seek a declaration (the fourth paragraph of the claim) that the detainee claimants will be entitled to immediate return to the United Kingdom in the event of their release from Guantanamo Bay. They also contend for a direction that the respondents inform the United States that the United Kingdom would be prepared to accept the detainee claimants back into this country, though there appears to be no formal pleading to that effect. We have already set out paragraph 98 of the Divisional Court's judgment which deals with the fourth head of relief. We agree with the reasoning there set out. We repeat for convenience one extract to which we would draw particular attention:

> "The correspondence makes it plain that the second defendant has not been prepared to give an unequivocal commitment that they will be permitted to return to this country. It seems to us that that is the only proper stance he can take until such time as their release from detention becomes imminent. The decision will then be made on all the information available to him at that time."

What the appellants seek, in effect, is an order that the second respondent should engage himself in an advance undertaking to admit the detainee claimants to the United Kingdom if or when, at some presently unknown future date, they are released from Guantanamo Bay. We entertain some doubt whether it would be lawful for him to do so. On ordinary public law principles he cannot fetter himself or his successors by a promise of future action, at least where the circumstances that will obtain at the relevant time cannot certainly be predicted.

143. However that may be, it is clear from Mr Nye's evidence that substantive consideration has been given, in the light of the current re-examination by the US Administration of its policy on Guantanamo Bay, to the question whether the second respondent should now make a substantive decision as to the readmission of the detainee claimants to the United Kingdom in the event of their release. As we have already indicated it was concluded on 8 July 2006 that he should not, for the reasons given in paragraphs 28 – 30 of Mr Nye's statement, which we have set out. They betray no legal error.

CONCLUSIONS

144. We would dismiss the appeal for all the reasons we have given. However we indicated earlier that we would have something to say about two connected, overarching issues. (1) How does the law approach the balance of individual claims of right with the general public interest in a context as acute as this? (2) How big is the court's role as decision-maker?

145. We will deal with these two questions together. It is trite law that inherent in the whole of the ECHR is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see for example *Sporrong v Sweden* [1982] ECHR 5, 23 September 1982). The task of striking this balance is shared by the courts and elected government. Where a public decision is challenged in a matter not touching the ECHR, again the courts and executive (if government is the primary decision-maker) each bear a responsibility for the result. So also in refugee cases: the executive and judiciary each has its part to play in resolving claims consistently with the Refugee Convention.

146. A recurrent theme of our public law in recent years has been the search for a principled means of disentangling the functions of these different arms of government. The reach of the executive's role has sometimes been described by reference to the "deference" accorded to it by the courts, though the term was somewhat disapproved by Lord Hoffmann in *R (ProLife) v BBC* [2004] 1 AC 185 at paragraph 75. He said:

> "In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts."

We think a difficulty in deciding this question of law (at least in a fair number of cases) arises from the fact that, particularly since the HRA came into force, our conception of the rule of law has been increasingly substantive rather than merely formal or procedural. Thus the rule of law requires not only that a public decision should be authorised by the words of the enabling statute, but also that it be reasonable and (generally in human rights cases) proportionate to a legitimate aim. But reasonableness and proportionality are not formal legal standards. They are substantive virtues, upon which, it may be thought, lawyers do not have the only voice: nor necessarily the wisest. Accordingly the ascertainment of the weight to be given to the primary decision-maker's view (very often that of central government) can be elusive and problematic.

147. For present purposes, we would approach the matter as follows. The courts have a special responsibility in the field of human rights. It arises in part from the impetus of the HRA, in part from the common law's jealousy in seeing that intrusive State power is always strictly justified. The elected government has a special responsibility in what may be called strategic fields of policy, such as the conduct of foreign relations and matters of national security. It arises in part from considerations of competence, in part from the constitutional imperative of electoral accountability. In *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153 Lord Hoffmann said at paragraph 62:

> "It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the

> democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."

148. This case has involved issues touching both the government's conduct of foreign relations, and national security: pre-eminently the former. In those areas the common law assigns the duty of decision upon the merits to the elected arm of government; all the more so if they combine in the same case. This is the law for constitutional as well as pragmatic reasons, as Lord Hoffmann has explained. The court's role is to see that the government strictly complies with all formal requirements, and rationally considers the matters it has to confront. Here, because of the subject-matter, the law accords to the executive an especially broad margin of discretion. This conclusion betrays no want of concern for the plight of the appellants. At the outset we described the case as acute on its facts, and so it is. But it is the court's duty to decide where lies the legal edge between the executive and judicial functions. That exercise has been this appeal's principal theme.