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Case No: CO/10470/2005

IN THE SUPREME COURT OF JUDICATURE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2006

Before :

LORD JUSTICE LATHAM
and
MR JUSTICE TUGENDHAT

- -

Between :

R ON THE APPN OF BISHER AL RAWI & OTHERS	**Claimants**
- and -	
(1) SS FOR FOREIGN & COMMONWEALTH AFFAIRS	**Defendants**
(2) THE SS FOR THE HOME DEPARTMENT	

- -
- -

Timothy Otty & Raza Husain (instructed by Birnberg Peirce) for the **Claimants**
Christopher Greenwood QC, Phillip Sales & Ben Hooper (instructed by the Treasury Solicitor) for the **Defendants**

Hearing dates : 22nd & 23rd March 2006

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Judgment

Lord Justice Latham :

This is the judgment of the Court

Introduction

1. This claim arises out of the continued detention in Guantanamo Bay of the first three named claimants by the United States authorities. None of them are British nationals, but each has been a long term resident of the United Kingdom in circumstances set out in more detail below. They claim that their connection with this country is such that they have a legitimate expectation that the British government will make a formal and unequivocal request for their return to this country, in the same way as it did in relation to British nationals, who were returned after such requests in March 2004, and January 2005. The first defendant, the Secretary of State for Foreign and Commonwealth Affairs, has consistently declined to make such a request, making it clear that he considers himself under no obligation to do so because these claimants are not British nationals. He considers that to make such a request would be ineffective and counterproductive, particularly in the context of the British Government's efforts generally to secure closure of Guantanamo Bay. The claimants submit that this stand cannot survive the anxious scrutiny required of decisions affecting their human rights, and is discriminatory under the Race Relations Act 1976. They further submit that the first defendant has both misunderstood the position in international law, and failed to take proper account of factors which indicate that the United States, far from being unresponsive to such a request, could well welcome it.

2. The fourth to seventh claimants are representatives of the detainees' families in the United Kingdom. Their claim is that the first defendant's failure to make a formal request amounts to a breach of their rights under Article 8 of the Convention in respect of their family and private life and has had effects on their lives amounting to inhumane treatment contrary to Article 3 of the Convention. They also claim that they have been discriminated against contrary to the Race Relations Act 1976 and Article 14 of the Convention. There are also discrete claims on behalf of the first and third claimants which go beyond the general arguments relating to all three of the detained claimants, and which have been stayed pursuant to the order of Collins J of the 16th February 2006.

The Facts

The first and second claimants

3. The first claimant is an Iraqi National who was born in Iraq in 1967. He came to this country as a child with his family in 1983, and remained in this country until the time of his detention. Throughout that time he lived with his family, all of whom became British citizens. From the witness statement made by the fourth claimant, his brother, it would appear that the family made a deliberate decision not to obtain British citizenship for the first claimant, so that at least one member of the family would remain an Iraqi national to assert any claims that the family might have as to property in Iraq after the departure of Saddam Hussein. Immediately prior to his detention, he was living with his mother, the fifth claimant, and sister in New Malden.

4. The second claimant is a Jordanian national who came to this country in 1994 and was given indefinite leave to remain as a refugee. He is married to the sixth claimant, who also has indefinite leave to remain as a refugee, and who has applied for British nationality. They have five young children all of whom are British citizens. At the time of his detention, he was travelling on refugee travel documents issued by the United Kingdom.

5. The events leading up to the detention of the first and second claimants are recounted in the fourth claimant's witness statement. He recounts how, in October 2002, he, together with the first and second claimants, and another United Kingdom citizen, Abdullah El Janoudi, made arrangements to travel to The Gambia at the end of that month in order to set up a peanut processing business for which they had purchased the necessary machinery which was by then in The Gambia. In fact the fourth claimant travelled to the Gambia ahead of the rest of the group on the 30th October 2002. On the 2nd November 2002 the other three attempted to follow him, but were stopped by the police at Gatwick Airport and detained under the Terrorism Act 2000. The reason for their detention was, apparently, a suspect device found in the luggage of the first claimant which would appear to have been a modified battery charger. They were ultimately released unconditionally and on the 8th November 2002 they flew to the Gambia.

6. On arrival at Banjul they were immediately detained by the Gambian authorities as was the fourth claimant and another man, who had gone to meet them. The other man was released the next day. The fourth claimant and Mr El Janoudi were released on the 5th December 2002. It is now clear that the first and second claimants were transferred at some date prior to the 23rd January 2003 to the United States Air Base in Baghram in Afghanistan, via Kabul. After approximately one month in Baghram, they were transferred to Guantanamo Bay. It is clear from the evidence of the fourth claimant, and the second claimant's wife and the sixth claimant that the United Kingdom security services had kept the first and second claimant under surveillance in the period up to their departure for the Gambia. That has been confirmed by documents disclosed in exhibit to an open witness statement of a member of the security service identified as Witness "A". These documents show that the first and the second claimants were both considered to be close associates of Abu Qatada. The documents deal with a meeting that security service personnel had with the second claimant at his home shortly before the first attempt to travel to the Gambia, reports of what was found when the luggage was searched at the time of their detention, and minutes and what are described as "out-telegrams" setting out the reasons for the security services interest in them, the fact that they proposed to travel into Banjul, and notification that they had boarded the flight to Banjul, giving the names which they were using at check-in.

7. This material makes it clear that the information was communicated to the authorities of another country. It is not clear however from the documents whether that country was The Gambia, to whom some of the information was undoubtedly sent, or some other country. The claimants say that the only inference is that the information was made available to the United States authorities. In his witness statement, the fourth claimant says that when he asked for the United Kingdom High Commissioner to be notified of his detention, one of the Gambian officials laughed and said "It was the British who told us to arrest you". Amongst those who questioned him were two men

who introduced themselves as American Embassy officials. The claimants ask the court to infer that the United Kingdom authorities thereby created the situation in which the first and second claimants were effectively delivered into the hands of the United States authorities. This, it is said, is consistent with a note made by Clive Stafford Smith, the United States qualified attorney when he was permitted to see the second claimant in Guantanamo Bay, of a meeting with the second claimant in which he recalled the second claimant as having said:

> "My interrogator asked me "Why are you so angry at America? It is your government, Britain, the MI5, who called the CIA and told them that you and Bisher were in the Gambia and to come and get you. Britain gave everything to us. Britain sold you out to the CIA."

8. Those acting on behalf of the claimants asked the first defendant a number of questions in a letter in January 2003 including whether the British authorities knew in advance that detention would take place, whether the British authorities assisted in the detention, including notifying the Gambian and the United States authorities in advance of the proposed journey, and what communication was had with the United States authorities of their presence in the Gambia so they could interrogate the detainees. The first answer that was given was in a letter of the 9th February 2006 from the Treasury Solicitor in which it was said:

> "I can say that any suggestion of complicity on the part of the British authorities in the detention of Mr Al Rawi, and Mr El Banna is denied."

9. Subsequently, in a letter of the 16th February 2006, the questions were answered but in terms of whether or not the Foreign and Commonwealth Office and the Home Office, as opposed to the security and intelligence agencies, were complicit in the detention of the claimants. And in that context, each of the questions was answered in the negative.

10. The fact of the matter, however, is that information was undoubtedly given to the Gambians about the proposed movements of the claimants; and the surrounding circumstances suggest that either directly or indirectly this information came into the hands of the United States authorities. It would be surprising if the information as to the movements of the claimants had not been passed on, at least to The Gambia. On the 28th September 2001 the Security Council of the United Nations unanimously adopted Resolution 1373 which included an exhortation to all States to find ways "of intensifying and accelerating the exchange of operational information especially regarding actions or movements of terrorist persons or networks". The material that we have makes it plain that, rightly or wrongly, the two claimants fell into the category of those whose movements should be monitored in that way. 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, is another matter. We have insufficient evidence to make any positive finding to than effect, in the face of the denials, albeit somewhat carefully worded, referred to in the last paragraph.

11. As was the United States policy in relation to detainees at Guantanamo Bay, no access was permitted to either claimant until after the decision of the Supreme Court in *Shafiq Rasul et al –v- George W Bush et al* 542 US 446, 1249. Ct 2686 (2004). Since then, they have been visited by Mr Stafford Smith to whom I have already referred and another American lawyer, Brent Mickum. From the material that they have provided, it is clear that both claimants claim that they were beaten terribly, brutalised and degraded when they were in Afghanistan, first in the prison in Kabul, and then at the Baghram Air Base. I will return to the conditions in which they were held in Guantanamo Bay later.

The Third Claimant

12. The third claimant was born in 1969. The family consists of three brothers and one sister. Their father was a prominent lawyer in Libya who was assassinated, it is said, by Colonel Gadafy in 1980. Their mother then came to Britain with the children in 1986; and all were granted asylum. His elder brother, the seventh claimant is now a British citizen as are all the members of his family. The third claimant applied for British citizenship in 1996 and was called for interview in June 2000. Unfortunately by then he had gone abroad and was in Afghanistan studying, it is said, the Taliban regime. He is a devout Moslem. He married an Afghan woman and they have a child. In 2001, the third claimant moved to Pakistan which is where he was detained in April 2002 by the Pakistan authorities. He was transferred to the Baghram Air Base and then to Guantanamo Bay.

13. Mr Stafford Smith has seen him in Guantanamo Bay. He was told by the third claimant that he had been tortured and beaten by government agents in Pakistan. The third claimant was told that he was being held at the behest of the United States and subsequently learnt that that was on the basis of a photograph said to be of him in a Chechen rebel training camp. He denies that the photograph is of him. He was subjected to systematic beatings, simulated drownings, stress positions and electric shocks as well as being threatened with snakes whilst he was in the custody of the Pakistanis. Whilst in Afghanistan he was subjected to food deprivation, stripping, beatings, hooding, shackling and force kneeling. He was also locked in a box with no air and suffocated for significant periods. He was chained to the wall and forced to live naked.

The treatment in Guantanamo Bay as described by the claimants

14. The only information as to the claimants' treatment in Guantanamo Bay comes from the interviews with Mr Stafford Smith and Mr Mickum. Neither the first nor the second claimant make any specific allegations of ill treatment, other than the general nature of their detention. The first claimant was in a cell approximately 6 by 8 feet enclosed by wire mesh and was completely shackled. The second claimant appeared to have lost a great deal of weight. He had been traumatised by the fact that he has not been able to see his children and in particular his youngest daughter whom he has never seen. The result is that his interrogators have used this in order to demoralise him. He had been deprived of letters from his family as a result of which he believes that they are not writing to him. Both were short of food and were allowed virtually no exercise. They were repeatedly interrogated with repetitive questions. They had been driven to participation in hunger strikes. This put them at risk of being force fed.

15. As far as the third claimant is concerned, he had been held in similar conditions, but made specific allegations of brutality on occasions when he had been taken out of his cell by the Extreme Reaction Force at the base. These involved both physical assaults, and the spraying of "mace" into his face. This resulted in his being permanently blinded in one eye and losing his sight in his other eye temporarily. He also alleged that he had been sexually assaulted and on one occasion a jet of high pressure water was sprayed up his nose until he thought that he would suffocate. He had been kept in solitary confinement for more that eight months. Like the first and second claimant, he had joined hunger strikes.

Treatment of Detainees Generally

16. The most comprehensive and up to date report on the conditions in which detainees are held at Guantanamo Bay is contained in a report of five mandate holders of Special Procedures of the Commission on Human Rights to the Economic and Social Council of the United Nations dated the 15th February 2006. It is based on the replies of the Government of the United States to a questionnaire, interviews conducted by the mandate holders with former detainees currently residing in France, Spain and the United Kingdom, responses from lawyers acting on behalf of some of the Guantanamo Bay detainees and information available in the public domain. The mandate holders were invited to visit the detention facilities by the United States authorities but the invitation stipulated that the visit would not include private interviews or visits to detainees. The mandate holders accepted the invitation, but were unable to obtain assurances that they would be able to have access to detainees and ultimately cancelled the visit.

17. As is well known, the original regime established at Guantanamo Bay denied detainees access to lawyers or the courts. The regime was imposed by the Military Order on Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism of 13th November 2001. The justification for such a regime was that the United States was engaged in an armed conflict with Al- Qaeda, in which the detainees were enemy combatants who could accordingly be held until hostilities ceased. The report concludes, however, that the objective of ongoing detention would not appear to be primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaeda Network. It noted in particular that many of the detainees, like the first and second claimants, were captured in places far removed from any armed conflict involving the United States.

18. The position changed however in June 2004 when the Supreme Court in *Rasul –v- Bush*, held that detainees were entitled to access to Federal Courts which had jurisdiction to consider challenges to the legality of detention. However no habeas corpus petition has yet been decided on its merits by any United States Federal Court.

19. In response to that judgment, the United States authorities on the 7th July 2004 created a Combatant Status Review Tribunal (CSRT), a body composed of three commissioned officers, to examine the legality of individual detentions. Apparently all those detained at Guantanamo Bay have had their status reviewed by the CSRT; that certainly includes the first, second and third claimants. They have all been declared enemy combatants. The report notes, however, that the US District Court for the District of Columbia, on the 31st January 2005, ruled that these proceedings "deny

[the detainees] a fair opportunity to challenge their incarceration." and thus failed to comply with the terms of the Supreme Courts Ruling: see *In Re Guantanamo Detainees Cases* 355 F Supp. 2d 433, at 468 to 478.

20. Turning to the question whether or not detention has included torture and other cruel, inhuman or degrading treatment or punishment, the report expresses considerable concern as to the United States authorities views as to what constitutes forbidden treatment under this heading, be it under the provisions of the International Covenant on Civil and Political Rights (ICCPR), or the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention Against Torture). It notes that in relation to both the United States made reservations indicating that it considered itself bound by the prohibition of cruel, inhuman and degrading treatment only to the extent that it meant the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. And since the Guantanamo Bay facilities were opened in November 2001, there have been conflicting statements from the United States authorities as to what they consider to be acceptable or unacceptable, whilst officially reiterating their adherence to the prohibition of torture. On the 2nd December 2002 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.

23. The report expresses concern that some of these techniques could result in cruel, inhuman or degrading treatment or punishment, and in extreme cases, torture, in that exposure to extreme temperatures, if prolonged could conceivably cause severe suffering. In interviews with former detainees, complaint was made of exposure to extreme temperatures, the use of dogs, sleep deprivation and prolonged isolation in circumstances which caused severe stress.

24. The report expresses further concern about the use of excessive violence, in particular in three contexts, namely during transportation, when the Initial Reaction Force was deployed, and force-feeding during hunger strikes. It considers that the reports of ill-treatment during transportation and during the course of operations by the Initial Reaction Force were corroborated by both photographic and video material showing detainees shackled, chained, hooded, forced to wear ear-phones and goggles, being beaten, kicked, punched, stripped and force shaved.

25. Leaving aside the conclusions on the arbitrariness of detention, the report concludes:

> "86. Attempts by the United States Administration to redefine "torture" in the framework of the struggle against terrorism in order to allow certain interrogation techniques that would not be permitted under the internationally accepted definition of torture are of utmost concern. The confusion with regard to authorised and unauthorised interrogation techniques over the last years is particularly alarming.
>
> 87. The interrogation techniques authorised by the Department of Defence, particularly if used simultaneously, amount to degrading treatment in violation in Article 7 of ICCPR and Item 16 of the Convention against Torture. If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amount to torture as defined in Article 1 of the Convention. Furthermore, the general conditions of detention, in particular the uncertainty of the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of detainees under

Article 10(1) of ICCPR to be treated with humanity and with respect for the inherent dignity of the human person.

88. The excessive violence used in many cases during transportation, in operations by the Initial Reaction Forces and force feeding detainees on hunger strike must be assessed as amounting to torture as defined in Article 1 of the Convention against Torture

…….

90. The lack of any impartial investigation into allegations of torture and ill treatment and the resulting impunity of the perpetrators amount to a violation of Articles 12 and 13 of the Convention against Torture."

26. The report recommended that the Guantanamo Bay detention facility should be closed without further delay. This echoed the views of the Parliamentary Assembly of the Council of Europe which on the 26th April 2005 adopted Resolution 1433(2005), which, inter alia, called on member states "to enhance their diplomatic and consular efforts to protect the rights and secure the release of their citizens, nationals or former residents currently detained at Guantanamo Bay whether legally obliged to do so or not."

The claim of the detained claimants.

27. The three detained claimants submit that this report confirms what had been known for some time, namely that in addition to the underlying arbitrary nature of the detention, which in itself breached their fundamental human rights, the conditions of detention amount to breaches of the Convention on Torture, and Article 3 of the European Convention on Human Rights, or at the very least give rise to a real risk of their being exposed to such breaches. In these circumstances, they submit, their connection with the United Kingdom, and in particular their lack of any real connection with any other country entitles them to require the first defendant to take steps equivalent to those which secured the release of the British Nationals. The form of the relief claimed is in wide terms. As follows:

"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

2. A declaration that it would be unlawful for the Foreign Secretary to refuse to make such a request solely on the basis that the detainee claimants are not United Kingdom citizens; and/or

3. A declaration that the Foreign Secretary is under a duty to make the same representation 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; and/or

4. A declaration that 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."

28. By an amendment which is not opposed by the defendants, the following further claims were added shortly before the hearing:

> "7. A declaration that the refusal and failure to make a request of the kind referred to in paragraph 1 constitutes unlawful discrimination on the part of the 1st Defendant against both the Detainee Claimants and the family Claimants.
>
> 8. An order of Mandamus requiring the 1st Defendant to reconsider whether or not to make a request of the kind referred to in Paragraph 1. In the light of all the matters set out in these Grounds and in the event that no such request is made, to provide a full statement of the reasons for such a decision."

The Response of the Secretary of State for Foreign and Commonwealth Affairs.

29. The consistent response of the first defendant has been that the United Kingdom has no right to give consular protection to any of these claimants because they are not British nationals. In response to the first representation made on behalf of the third claimant by solicitors acting on his behalf on the 24th September 2002, Baroness Amos, the relevant Minister at the time, replied on the 14th October 2002 as follows:

> "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…."

30. In response to the first representations made on behalf of the first and second claimants in a letter from solicitors dated the 31st January 2003, Baroness Amos replied on the 28th February 2003 in the following terms:

> "Once we became aware of the arrest of British Nationals in the Gambia we made a number of representations to the local authorities. We sought immediate consular access and information on the reasons why the men had been detained.

> These were repeated at senior level, including by our High Commissioner personally. As you know Abdullah El-Janoudi and Wahid Al-Rawi were subsequently released.
>
> However the two remaining men are not British Nationals. Under International Law and practice we cannot act in a consular or diplomatic role on behalf of the men who are still detained without the consent of the countries of which they are citizens and the country detaining them. The purpose of Consular protection is to allow a state to protect its own nationals when they are travelling in a second country. The primary responsibility for the two men's detention and welfare lies with the country that holds them and the country of their nationality.
>
> Although you refer to both men having "long residence" in the United Kingdom, this is not a substitute for nationality. Neither have made the decision to seek British Nationality. Therefore we cannot provide consular or diplomatic assistance.
>
> I understand that Mr El-Banna is a refugee. Refugee status does not give the country of residence the right to provide consular or diplomatic assistance. However the United Nations High Commissioner for Refugees (UNHCR) is entitled to provide assistance.
>
> 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."

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.

32. Baroness Symons, the responsible Minister in 2005, met the families and representatives of these three claimants at three separate meetings, namely on the 17th March 2005 with the family and representatives of the third claimant, on the 5th April 2005 with the MP and representatives of the family of the first claimant, and on the 19th April 2005 with the family and representatives of the second claimant. On each occasion Baroness Symons made it clear that she could not assist any of the claimants on an official or consular basis, because they were not British nationals on an official, or consular basis. To the third claimant's representative she said that it would be "a non starter"; the Americans had made it "pretty clear" they would not entertain any

consular approach. But she went on to say that she could make representations on human rights grounds or, as she put it to the first claimant's family, "humanitarian" grounds. She was particularly concerned about the position of the second claimant's wife and family, as she considered that they showed strong family links with the United Kingdom which would be specifically mentioned to the Americans.

33. From the witness statement of Mr David Richmond, Director General Defence and Intelligence at the Foreign and Commonwealth Office, it is apparent that Baroness Symons met senior officials from the United States Embassy on the 27th April 2005 to pass on to the United States the concerns of these claimants' families and lawyers and to raise matters of humanitarian concern. She did not make a specific request for their return, but expressed concern about the reasons for detention, the fact that they had not been charged, and the families' concern that they might be returned to countries where they might face torture; they should be returned to the United Kingdom. She also raised the allegations of mistreatment and torture about which she had been told at those meetings and asked for assurances as to the conditions in which they were being held.

34. Despite follow up by British officials in Washington and, in particular, a meeting between the Head of the Foreign and Commonwealth Office's Human Rights Democracy in Governance Group, Alexandra Hall Hall, and an Assistant Secretary at the United States Department of Defense, there has been no formal response to these representations. Mr Richmond states that "in some parts" of the United States Authorities there had been reluctance to help even by way of providing information since they do not recognise any United Kingdom standing in relation to former residents.

35. In his witness statement, Mr Richmond states that the Foreign and Commonwealth Office has on a number of occasions raised issues both generally as to conditions at Guantanamo Bay, and specifically in relation to the allegations made of ill-treatment by the claimants and others to Mr Stafford-Smith. It had earlier made representations about allegations of ill treatment made by some of the British Nationals to Consular officials when access was ultimately granted to them, and about allegations subsequently made after those detainees, release. The United States authorities have consistently denied any allegations of ill treatment, stating that all interrogations had been conducted on what was described as the established US Army Field Manual, and not using the controversial techniques which were in place for a time.

36. Mr Richmond makes it clear that the first defendant has taken into account all the material available as to the treatment of detainees, in particular the United Nations mandate holders' report. He makes the point that the report was described as "preliminary" as it inevitably was because of the mandate holders' inability to obtain any meaningful access to detainees. He points out that the United States Government has expressed reservations about the report and that it does not consider that it accurately recorded information provided by the United States Government. It points out that it is difficult to assess independently what is actually going on at Guantanamo Bay and that that is in part because of the refusal of the United States Authorities to allow access. He says, however, that:

> "57. ..... The United Kingdom Government also attached 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."

37. He concludes the part of his witness statement dealing with the treatment of detainees in the following terms:

> "59. The conclusion which the UK Government has drawn from the matters referred to in this section of my statement is that they confirm 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.). .."

38. That is a reference back to an earlier paragraph in his statement which is an important part of his evaluation of the position:

> "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 the claimants seek. In my assessment and that of the FCO the US Government would be very likely to resist any intervention on the lines 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 my 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 I have referred in paragraph 20 above."

39. Paragraphs 19 and 20 need to be read together.

> "19. Whilst British Nationals remained at Guantanamo, the UK Government's main diplomatic efforts were focused upon them. However, the United Kingdom 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 policy has concentrated on all the main 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.

21. The UK has also made efforts in relation to Guantanamo in its capacity as a EU Member State. During 2005, first as part of the EU "Troika" with Luxembourg, which then held the EU presidency and the EU Commission, then as the State holding the EU Presidency, the UK Government made repeated representations to the US to agree terms of access to allow a visit by the UN Special Raporteurs. Representations to the same effect were also made bilaterally, on a UK to US Government level.

22. It is my assessment (and that of the FCO and the UK Government) that the US authorities are willing to engage with the points the UK Government is pursuing in relation to detainee policy generally but this has been, and remains, a complex process."

40. The reasons given at the end of his witness statement for declining to make the formal request claimed, as opposed to the humanitarian representations of Baroness Symons, are given in the following paragraphs of the witness statement:

"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 return to the UK of the detainee claimants. He has concluded that such formal requests should not be made. (I should make it clear that the Foreign Secretary has not yet taken decisions in relation to what has been referred to in the proceedings as the "fact-specific" claims by Mr Al-Rawi and Mr Deghayes, which have been stayed by the court and in relation to which he is considering new representations)

70. The principal reasons for this decision are those I 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 para 20 above.

71. The Foreign Secretary considers that the reasons explained above are sufficient in themselves to warrant the course he has adopted. However, he has also had regard to two additional factors, which also tend to support the course he has adopted, as follows:

    1) He 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;

    2) (As a factor of lesser weight) the risk that, by agreeing to act on behalf of the detainee claimants, the FCO's well established and clear policy, only to exercise Consular or Consular-type assistance in relation to persons in custody abroad if they are British Nationals, might become vulnerable to a wide range of claims from persons who are non-nationals but claim some form of link with the UK. If that were to occur, it could have serious implications for the FCO. There are, for example, about 2.6 million non-British nationals in the UK with residence or refugee status. However the Foreign Secretary has not treated this factor as having great weight,

because he recognises that the situation at Guantanamo and in relation to the detainee claimants is an exceptional one.

72. 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 the 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 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 claimant seeks."

41. Paragraph 70 of the witness statement shows that a central plank of the first defendant's case is the fact that because the first three claimants are not British nationals, the United Kingdom cannot provide them with consular protection or support. The basis of this, and its consequences, are set out in more detail in the witness statement in the following terms:

"23. I turn now to the UK Government's relationship with the US Government specifically as regards to the detainee claimants held at Guantanamo (obviously, their interests are also included within the general issues which the UK is pressing with the US Authorities, to which I have just referred). Those individuals were formerly resident in the UK. However, they are not British citizens. 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. It should also be noted that the UK does not have the right to exercise diplomatic protection (in the form of a State to State claim arising from a wrong done to a national of the State asserting the claim); such diplomatic protection is governed by rules of international law, which are reflected in the UK's rules on international claims: see pages 89 to 92. Under those rules, the UK can exercise diplomatic protection only in respect of British nationals and even then the decision whether or not to do so is a matter of discretion. Any representations on behalf of non British nationals would have to be made on a

humanitarian basis rather than as consular assistance or diplomatic protection.

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 right obligations, even if the breach was 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.

25. It is important to emphasise that this is the relief sought by the claimants. However, a formal request for their return on humanitarian grounds is a request which a State would normally make in the exercise of consular functions in relation to its own nationals for whom it has a clear legal locus. Such a request is not one which a State would have any legal right to make in relation to non-nationals. Accordingly, to assert as a matter of humanitarian concern a formal request that would ordinarily be regarded by States as a matter of consular concern would be likely to be regarded as diminishing its legitimacy in the eyes of the State to whom it is addressed. Further, a state making such a request may risk losing credibility with the State to whom it is made, such that it will not be taken seriously when it seeks to influence the behaviour of that State in relation to other matters of legitimate concern. Thus it is only in exceptional cases that the FCO seeks to intervene and make humanitarian representations; and even then, the representations made are not of the type which the Claimants demand in this case.

26. Any decision on making humanitarian representations is regarded by the FCO as a matter of discretion for the Foreign Secretary, taking into account a wide range of factors relating to the particular circumstances of the case and wider international relations considerations. Where a request for assistance is made to the FCO, FCO Ministers have to make an informed and considered judgment on the merits of intervening and on the most appropriate way in which the interests of the individual may be protected, including the nature, manner and timing of any diplomatic representation to the country concerned. Such assessments of whether, when and how to press another

State require fine judgments to be made by Ministers, drawing on the FCO's experience and expertise.

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."

42. In this context Mr Richmond referred to the efforts which were required to obtain the return of the British nationals. A witness statement by William Ehrman on behalf of the first defendant in an application for permission to apply for judicial review by two of these British nationals, Feroz Abbasi and Martin Mubanga, who had not been amongst the first tranche of those returned in March 2004, shows not only that the UK Government had made representations at Ministerial level prior to the return of the first five, but that the matter had been specifically raised in July 2003 with the US Government by the Prime Minister; and in May 2004 a further clear and unequivocal request for the return of the remaining four, including the applicants, was made by the Prime Minister personally to President Bush. The point that is made is that if what is required by these claimants is a "clear and unequivocal request" in similar terms to that which eventually resulted in the return of the British nationals, the claimants are asking for the expenditure of political credit at the highest levels. Implicit also in the witness statement of Mr Richmond is the assertion that the lack of response from the US authorities to the representations made by Baroness Symons, followed up thereafter by officials, supports the assessment of the FCO, and the first defendant, that any formal request in the terms of the claim would be ineffective.

R(Abbasi –v- Anr) –v- Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department [2003] UKHRR 76.

43. Feroz Abbasi had made a previous claim for Judicial Review to the application that we have referred to above, in 2002. He, as we have already indicated, is a British national. He was captured by US Forces in Afghanistan and in January 2002 was transported to Guantanamo Bay. He had, in accordance with the regime to which we have referred, been held captive without access to a court, or any other form of tribunal or a lawyer. His claim was brought on his behalf by his mother on the grounds that one of his fundamental human rights, the right not to be arbitrarily detained, had been infringed. The claim asked for relief in similar form to that claimed in the instant proceedings. After the application for permission had been refused by Richards J, the Court of Appeal granted permission and heard the substantive application. The application was dismissed. The first defendant submits that the reasoning of the Court of Appeal in dismissing that claim applies with equal force to the present claim, and essentially makes it clear that the present claim is unsustainable. It seems to us that, in these circumstances, the judgment of the Court of Appeal in Abbasi needs to be set out at this stage, bearing in mind the fact that we are bound by it, in order to identify what issues have indeed been determined already

by the Court of Appeal, the extent to which they are relevant to the instant case, and the extent to which such differences as can be identified, enable this court to come to a different conclusion in this case.

44. In paragraph 25 of the judgment, the court described the appellant's case in the following terms:

> "The essence of his [the appellants' 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 appellants' counsel's] 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."

45. In paragraph 26, the court described the case for the respondent in the following terms;

> "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."

46. Mr Greenwood did not challenge the proposition that arbitrary detention violated a fundamental human right. But he submitted that the legality of that detention was not justiciable in an English Court. The argument in fact ranged wider than these two issues. In particular, there was the necessary consideration of the relationship between the State and its nationals where a national complained of injury suffered as a result of the actions of a foreign State. That was the critical step in the applicants submission that the state owed any duty to him. As to that step in the argument, the court accepted the primary rule of international law expressed in the following passage from *Barcelona Traction Company* [1970] ICJ Reports at page 44:

> "The Court would here observe, that within the limits prescribed by international law, the State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is

> resort to national law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad and may also confer upon the national a right to demand the performance of that obligation and clothe the right with corresponding sanctions."

47. The court referred to the First Report on Diplomatic Protection by Professor D Dugard which proposed that a State should have the legal duty (under general international law), to exercise diplomatic protection on behalf of the injured national upon request, if the injury results from a grave breach of "a jus cogens norm attributable to another State". But it noted that this was merely a proposal and had not yet been accepted by all parties and that included the USA and the UK. Its conclusion in that respect was expressed in paragraph 69:

> "It is clear that international law has not yet recognised the 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."

48. The court then went on to consider whether domestic law imposes such a duty. It considered the extent to which the European Convention on Human Rights and the Human Rights Act 1998 could impose such a duty where it was alleged that the national's human rights, particularly fundamental human rights such as a breach of Article 3, was alleged. Having considered *Al-Adsani –v- United Kingdom* (2002) EHRR 11, it concluded that the concept of jurisdiction under the provisions of the Convention is essentially territorial, but acts within the territory of the United Kingdom which caused an individual to suffer violation of his human rights outside the United Kingdom may infringe the Convention. This of course has now become familiar jurisprudence in relation to the treatment of asylum claims: see in particular *R (Razgar) –v- Secretary of State for the Home Department* [2004] 2 AC 368 and *R(Ullah) –v- Special Adjudicator* [2004] AC 323. But the court went on to say in paragraph 71 that it was a considerable extension of that principle to impose a duty on a State to take positive action to prevent or mitigate the effects of a violation of human rights that are taking place outside the State's jurisdiction and for which the State has no responsibility. It followed that the appellant had not identified any act of the UK Government of which complaint could be made that it violated the appellants human rights because it had no control or authority over the appellant's treatment at Guantanamo Bay. Although the appellant was a "victim" he was not a victim of any breach of the Convention by the United Kingdom Government, see *Bertrand Russell Peace Foundation –v- United Kingdom* [1978] 14 DR 117.

49. The court, however, did not accept the broad proposition that the courts of this country would abstain in any circumstance from reviewing the legitimacy of the actions of a foreign sovereign state: see para 53 and its reference to the asylum cases which ultimately culminated in *Razgar and Ullah*. It held that one route by which a court could impose a duty such as that contended for by the appellant was the doctrine of legitimate expectation. It discussed two cases in which the courts had held that a litigant could rely on a legitimate expectation which was founded on a statement of policy by the UK Government, and that in principle a legitimate expectation could be created by the UK entering into a treaty, so long as it was clear that the UK

Government had asserted a settled policy that it would act in accordance with that treaty. In relation to diplomatic protection, the United Kingdom Government has set out a clear policy, in the British Year Book of International Law (1999) in which Rule VIII provides:

> "If, in exhausting any municipal remedies, the claim is met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf in order to secure justice."

50. It is however to be noted that Rule 1 of these rules states:

> "HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury."

51. The Rules were affirmed by Baroness Scotland on the 16th December 1999 in a Parliamentary Answer, in which she said:

> "The UK Government would also consider making direct representations to third Governments on behalf of British citizens where we believed they were in breach of International obligations."

52. The court concluded this part of its judgment by agreeing with Taylor LJ in *R –v- Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1QB 811 that it must be the "normal expectation of every citizen" that, if subjected abroad to a violation of a fundamental right, the British government will not simply wash their hands of the matter and abandon him to his fate.

53. However, the court considered that such policy statements as had been made indicated the restricted nature of any legitimate expectation. It was simply that in certain circumstances the United Kingdom 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. In 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."

54. Accepting that the court was not inhibited from scrutinising any decision in this area merely because it was an exercise of the prerogative, the limits of the court's scrutiny were clearly set by the nature of the decision under consideration. The court noted the width of the discretion enjoyed by the executive in the field of foreign relations by reference to the decision of the German Federal Constitutional Court in the case of *Rudolph Hess* (Case No 2 BVR 4 19/80) 90 ILR 386. In that case the court accepted that the Federal Republic of Germany was under a constitutional duty to provide diplomatic protection to German nationals but nonetheless stated that the Government enjoyed "wide discretion in deciding whether and in what manner to grant such protection in each case". Applying that to domestic decisions, the Court of Appeal concluded that, whilst a decision in relation to diplomatic intervention was not immune from judicial scrutiny, that scrutiny had to take into account the very special nature of foreign policy considerations which are not in themselves justiciable.

55. The conclusions of the Court of Appeal were set out 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 Foreign Office 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 the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this Court.
>
> (iii) However the Foreign Office 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 Foreign and Commonwealth Office 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 Foreign and Commonwealth Office 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 Foreign and Commonwealth Office 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 Raseul. 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 Commission's intervention will be. It is not yet clear that any activity on behalf of the Foreign, Commonwealth Office would assist in taking the matter further while it is in the hands of that International body."

The Case for the First Three Claimants

56. The first three claimants accept that this court is bound by this decision of the Court of Appeal. It is accepted on their behalf that it presents a significant hurdle for them to overcome. Stripped to its essentials, the submission on behalf of these claimants can be expressed in the following propositions:

i) Contrary to the clear stance taken by the 1st Defendant, no proper distinction can or should be made between the position of the claimants and the position of British Nationals.

ii) In the absence of any proper justification for drawing a distinction between the claimants and British nationals, the basis for the decision as expressed in correspondence, by Baroness Symons, and by Mr Richmond is irrational and discriminatory, and accordingly the claimants have a legitimate expectation to be treated in the same way as the British nationals.

iii) There is in any event a difference between the case of *Abbasi* and that of the claimants in that the claimants have been subjected to, or at the least are at risk

of, torture as defined by the United Nations Convention Against Torture 1984 and Article 3 of the European Convention on Human Rights, and the former imposes positive obligations upon States to take action to prevent torture or other inhuman or degrading treatment.

iv) The discrimination between the treatment of the claimants and that of Abbasi and the other British nationals amounts to unlawful discrimination under the Race Relations Act 1976.

v) In all the circumstances, the conclusion of the Secretary of State that a formal request would be ineffective and counterproductive is irrational, or at the least must have failed to take into account the very clear desire expressed by the United States to release prisoners from Guantanamo Bay, so far as possible.

57. Whilst we have set out these points as separate points they clearly interconnect. They depend in the first instance upon the claimants being able to establish that the first defendant had no proper basis for making a distinction between them and the British nationals. For if that distinction is unjustified, as a matter of law, it seems to us that the first defendant's decision not to make a formal request is flawed and must, at the least, be revisited. There is no doubt from the witness statement of Mr Richmond that the first defendant's stance is predicated on there being such a distinction. That would not, of itself, mean that the main relief which the claimants seek would follow. *Abbasi* itself makes that clear. But it would mean that the first defendant would have to consider the matter on the basis that the claimants were entitled to the same rights as to diplomatic protection as British nationals. And that, quite clearly, has not so far been done.

58. The first defendant's stance is firmly based upon the orthodox principle that nationality is the principal link between an individual and the State in international law: *Oppenheim's International Law 9th Ed*, 1992 Vol 1 Part 2 Para 379. Accordingly it is only through the connection of the individual to the State by reason of nationality that the State has any locus or status to make any claim in international law on that persons behalf. In *Abbasi* the discussion as to consular rights was entirely in the context of those being available to nationals and not to non-nationals. Further, international rights are not simply rights amongst nations generally, but also rights given by treaty or convention by one State to another. And in this context the Consular Convention between the United Kingdom and the United States of America under the heading "Protection of Nationals" is of critical importance. It states in Article 15:

> "(12) A consular official shall be entitled within his District to –
>
> (a) Interview, communicate with and advise any national of the sending state;
>
> (b) Inquire into any incidents which have occurred affecting the interests of any such national;

(c) Assist any such national in proceedings before or in relations with the authorities of the territory and or where necessary arrange for legal assistance for him.

(3) For the purposes of the protection of the Nationals of the sending state and their property and interests, a Consular Officer shall be entitled to apply to and correspond with the appropriate authorities within his district and the appropriate departments of the central government of the territory."

59. Prima Facie, therefore, the stance of the first defendant is entirely justified as a matter of legal principle. And as far as the first claimant is concerned, despite the fact that he has good humanitarian arguments for being treated in the same way as a British national, by reason of his long residence here, and the fact that all his family are British nationals, the only argument for saying that it would be wrong to treat him differently from a British national is that it could be said that to do so would substitute formality for reality. But the fact is that he is not a British national; and international law and the Convention to which we have referred, clearly accept that what is described as a formality is a matter of substance. Nothing said or done by the UK government could have given him any expectation otherwise.

60. The position is however different as far as the second and third claimants are concerned. They are refugees; they have both been granted asylum in the United Kingdom. And there is respectable academic support for the proposition that refugees should be accorded diplomatic protection by the State which has accepted that status: see Hathaway in *The Rights of Refugees under International Law* [2nd ed., 2005] pages 23 to 42 and 91 to 93. As long ago as 1951, Grahl-Madsen advocated such an approach in his Commentary on the Refugee Convention 1961; and *Hathaway* in The Rights of Refugees Under International Law has argued persuasively that the provisions of the Refugee Convention can only have meaning if the States which have granted asylum are required to exercise rights in relation to those to whom they have granted asylum sufficient to enable the refugee to obtain the full benefits of the Convention. In the context of this case, the best example of an article which could be said to give rise to such a duty on the State is Article 16(1) dealing with access to courts, which states:

> "A refugee shall have free access to the courts of law in the territory of all contracting states."

61. This provision is in clear terms. It affects all contracting states, not merely the State which has granted refugee status. It follows that in relation to the second and third claimants, they are being denied access to the courts of the United States in contravention of that Convention, the United States being one of the contracting States. Professor Hathaway asserts that that can only be an effective right if the State granting refugee status is prepared to provide the necessary protection or support for the refugee denied that right, which in reality can only be achieved by the contracting States accepting that the refugee is entitled to the same protection and support, at least in relation to his rights under the Convention, as that afforded to nationals.

62. There are two difficulties with that argument. The first relates to the strict legal position. Article 25 of the Convention deals with administrative assistance apparently intended to give effect to that argument, but the United Kingdom has entered a reservation in relation to the application of this Article, and has never considered that it imposed on the United Kingdom the like obligation in relation to consular assistance as it owes to a British national. Second, the drafting committee of the International Law Commission has adopted in 2004 a proposal relating to diplomatic protection which in Article 8 deals with Stateless Persons and Refugees in the following terms:

> "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."

63. It is clear from the material with which we have been provided that those proposals are considered to be lex ferenda, that is that they are indeed proposals and not statements as to the present position in International Law. It follows that whatever the merits of these proposals may be, they are not yet part of international law. And even if it were clear that they would become accepted, that would not change the current legal position.

64. The important question, ultimately, in relation to the basis upon which the first defendant has made the decision in relation to the level and content of representing to the United States authorities must be his assessment of the likely reaction of those authorities to such representations. Leaving aside for the moment the question of whether or not any request as contended for by the claimants would be counterproductive, the first defendant must be entitled to consider the extent to which it would be effective. And that must depend on an evaluation of the way any request would be received. Whilst we have been referred to material which suggests that international lawyers in the United States may well take the view that the proposals for change are welcome, there is nothing to suggest that that is the view of the relevant United States Authorities. In this context the bilateral Convention is of obvious significance. There is no evidence of any move to amend its provisions.

65. It follows, in our judgment, that the first defendant was entitled to conclude that it had no duty either in domestic or international law to accord the same rights to the three claimants as non-nationals as to nationals such as Mr Abbasi. As we have said, the fact that that position may change, at least in relation to those who have refugee status in the future, does not affect that position. The first defendant has a discretion as to whether, and if so, how to make representations on behalf of these claimants but against the background that they do not have the same claim as nationals to any international law right of the State to make the representations on their behalf.

66. The first defendant has not denied these three claimants any protection at all. Their cases have been specifically raised at Ministerial level, albeit not with a request in the form claimed in these proceedings. But nonetheless the first defendant has recognised that, on humanitarian grounds, there is a proper connection between the three claimants and this country to justify such representation. At one point it seemed to be suggested that the first defendant had denied that he had any status or locus, to make any representations at all. That is not borne out by the evidence.

67. The next submission is that the first defendant is under a duty to make representations in relation to the detained claimants because the evidence establishes that they have either been tortured, or are at risk of torture. This, it is said, imposes a positive obligation on the UK Government to take such steps as it can to forestall the risk of torture, and the appropriate step is to make a formal request for the claimants' return.

68. The legal basis of this submission is the acceptance by the House of Lords in *A and Others –v- Secretary of State for the Home Department (No 2)* 2005 3WLR 1249, that the prohibition on torture recognised in the United Nations Convention Against Torture, 1984 has a special place in international law. In the opinion of Lord Bingham, he cited a lengthy passage from the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor –v- Furundzija* (Unreported) 10 December 1998 Case at No IT-95-17/T 10, which he described as authoritative. For our purposes, the relevant paragraphs are as follows:

> "(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 fulfilment 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 punishment and torture, and, if they have not, in calling upon that state to fulfil 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 <u>jus cogens</u>

> 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 the rules of the international normative orders. 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."

69. It is submitted on behalf of the claimants that this sets out in the clearest possible terms the special nature of the prohibition against torture, and supports their submission that it is the obligation of States to take steps to forestall or prevent torture wherever it occurs. The claimants have not, however, been able to point to any material which supports this wide obligation save in relation to the prevention of torture in a State's own territory. The material clearly establishes a State's right to take appropriate steps, by way of diplomatic intervention or otherwise where another State is practising or threatening to practise torture, and that right clearly exists even if no nationals of the intervening State are involved. That is not contentious; and has always been accepted by the first defendant. But it is submitted by him that the only obligation, where torture or a risk of torture is established, is contained in the International Law Commission's Articles on State Responsibility which includes the following:

> "Serious breaches of obligations under peremptory norms of general International Law.
>
> Article 40.
>
> <u>Application of this Chapter</u>
>
> 1. This chapter applies to the international responsibility which is entailed by a serious breach of a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.

2. No State shall recognise as lawful the situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."

70. In my view that submission is correct. Even if, therefore, torture or a real risk of torture were established on the evidence, that would impose no duty on the United Kingdom Government to do other than cooperate with other States to bring to an end through lawful means the circumstances giving rise to that situation. International law imposes no further duty on an individual State to intervene. The European Convention on Human Rights does not assist the claimants in this respect. The present predicament of the claimants is not under the control or authority of the United Kingdom. In our judgment the question which arises in relation to the allegations of torture or risk of torture is whether the first defendant's evaluation of the facts is a justifiable basis for his conclusion that the circumstances do not require him to exercise any discretion he may have to make requests or representations beyond those that have been and are already being made in relation to these claimants, and Guantanamo Bay generally. We shall return to that later in the judgment. For these reasons, despite the special place in the international legal order of the prohibition on torture, we do not consider that the fact that torture is an issue in the present case, takes this case outside of any of the principles identified in paragraph 106 of *Abbasi*.

71. The remaining issue of law in relation to these claimants is whether the distinction that has been made between them as non-nationals and the detainees who are nationals, is discriminatory within the meaning of the Race Relations Act 1976. The following are the relevant provisions:

"1. (1) A person discriminates against another in any circumstances relevant for the purposes of any of the provisions of this Act if –

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons…..

"

3(1) "racial grounds" means any of the following grounds ..... nationality.....

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

19B (i) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.

.....

41(2) Nothing in parts II to IV shall render unlawful any act whereby a person discriminates against another on the basis that others nationality or place of ordinary residence or the length of time 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"

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.

73. Before turning to the remaining issue in relation to the detained claimants, we propose to deal with the claims of the family claimants because consideration of their position is relevant to the question of whether or not the decision of the first respondent is one which can be justified either in conventional judicial review terms, or when subjected to anxious scrutiny bearing in mind, as we do, the nature of the breaches of fundamental rights which are in issue in this case.

The case for the 4th to 7th Claimants (the family claimants)

74. The evidence supporting the claim of the family claimants consists of witness statements from the fourth claimant, a witness statement from the first claimant's sister on behalf of the fifth claimant, who is the mother of the first and fourth claimants, which is confirmed by a short witness statement from the fifth claimant, a witness statement from the sixth claimant, the wife of the second claimant, and a witness statement from the seventh claimant who is the brother of the third claimant. We have also been provided with a report from a clinical psychologist in relation to the second claimant's family. These show, not surprisingly, that the continued detention of the three detained claimants has caused very substantial distress and concern to the families.

75. In his witness statement, the fourth claimant states that he has become sick since his return from the Gambia. He has had long bouts of depression and his asthma has worsened, so that he was fainting several times a day. He has started to drink. His condition, in his view, has been exacerbated by the attitude of the United Kingdom Government. He feels betrayed by its attitude.

76. In her witness statement on behalf of the fifth claimant, the first claimant's sister describes her mother as being "in a state of bereavement". The first claimant had always lived with her; and it was her intention to continue to live with him. Since he was detained in the Gambia, she has, according to her daughter, rapidly deteriorated both mentally and physically and appears, to her and to the family to be suffering from major depression. She cries continuously, and has no capacity for joy. Her condition is exacerbated by the fact that she feels betrayed by the United Kingdom Government. She has become completely dependent on her daughter.

77. The sixth claimant describes in her statement how she and the children have been affected. She suffers from stress-related problems such as palpitations and heart pains. She has lost her appetite and although she feels depressed, is determined not to become incapacitated as a result for her children's sake. She is clearly greatly distressed by the fact that letters to her husband are not being allowed through on a regular or reliable basis. She describes how the absence of their father has affected the children, she is extremely concerned that they will grow up angry and bitter. Exhibited to her witness statement are a number of letters and other documents written by the eldest son Anas, which eloquently tell of the pain and heart ache that is the result of being parted from his father. He has made his feeling plain in a letter written directly to the court.

78. The clinical psychologist, Maria Mars, has provided a report on the effects of the second claimant's detention on his family report. It has clearly had a significant affect not only on the sixth claimant, but on the children. The conclusion is in the following terms:

> "Mr El Banna's separation from his children has impacted on their emotional development and their psychological well being. The children have expressed mixed emotions of anger and fear. They have also expressed feelings of rejection, uncertainty and despair. The attachment breaks over the last three years appear to have created within the children reduced ability to develop a sense of security and trust. The children are emotionally fragile particularly Abdul Rahman (who is six years old)."

79. In his witness statement, the seventh claimant describes how his brother's continued detention and the refusal of the British Government to do anything to help him has made him very depressed. He describes the effect on his mother as extreme. The third claimant used to live with her; and they were accordingly very close. She spends much of her time now at the home of another son in Dubai. She cries all the time. The family distress has been exacerbated by the refusal of the British Government to provide the same assistance to the third claimant as to British nationals.

80. In these circumstances, the claimants complain that the attitude and inaction of the United Kingdom Government has subjected them to inhuman or degrading treatment, contrary to Article 3 of the Convention. Further, it amounts to an interference with the claimants' rights to respect for their private and family life. They also claim discrimination, in breach of Article 14, in the context of Article 3 and Article 8 being engaged.

81. As far as Article 3 is concerned, the family claimants rely on the decision of the European Court of Human Rights in *Orhan –v- Turkey* (2002) Application No 25656/94 (6th November 2002). In that case the applicant alleged, inter alia, breaches of Articles 2 and 3 in relation to the disappearance of his two brothers and his eldest son. The court found that these three had disappeared during the course of a counter insurgency operation carried out by Turkey's security forces in the course of which the houses of the two brothers were deliberately destroyed. Whilst unable to make any finding as to precisely what happened to the three who disappeared, the court found that they had last been seen in the hands of the security forces.

82. On the facts, the court concluded that there had been a breach of Article 2 in that Turkey had failed to carry out any or any effective investigation into the disappearance of the applicants' two brothers and son. Having heard evidence as to the distress occasioned to the applicant as a result of the uncertainty and apprehension suffered by him over a prolonged and continuing period it concluded that he had been subjected to inhuman and degrading treatment contrary to Article 3. In dealing with this aspect of the claim, the court said as follows:

> "357. The court observes that in the above cited Kurt case which concerns the disappearance of the applicant's son during unacknowledged detention, it found that the applicant's mother had, in the circumstances, suffered a breach of Article 3. It referred in particular to the fact that she was the mother of the victim of a serious human rights violation and herself the victim of the authorities complacency in the face of anguish and distress....
>
> The *Kurt* case does not, however establish any general principle that a family member of a "disappeared person" is thereby the victim of treatment contrary to Article 3.
>
> 358. Whether a family member is such a victim will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context a certain weight will be attached to the parent – child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family members in the

> attempts to obtain information about the disappeared person and the way in which the authorities responded to those inquiries. The court would further emphasise that the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes when the situation is brought to their attention. It is especially in respect of the latter that a relative may make a claim to be a direct victim of the authorities' conduct."

83. The submission on behalf of the family claimants is that they each have a special relationship with the detained claimants which brings them within the principle enunciated in paragraph 358 above. They refer in particular to the, last two sentences and submit that it is the attitude of the United Kingdom Government about which they complain in particular and which gives them their right to bring this claim. For the purposes of this argument, we are prepared to accept that the family claimants have suffered sufficiently to meet the Article 3 threshold. The problem seems to us to be to identify the extent to which it could be said that any wrongful actions of the United Kingdom Government have been the cause of the distress which is said to have resulted when the treatment about which complaint is primarily made is the detained claimants' continued detention in Guantanamo Bay as set out in Maria Mars' conclusion, for which the United Kingdom is not responsible. The *Orhan* Case was one in which the State was implicated in the disappearance of the applicant's brothers and son in circumstances which gave rise at the least to a duty to make enquiries, as the disappearance had taken place within the territory of the State and in circumstances which gave rise to a prima facie inference that the State was responsible. It was in those circumstances that the response of the State had to be gauged in relation to the alleged violation of Article 3. The evidence before us does not put this case into that category. We do not think that the claimants have established, therefore, that the United Kingdom Government's actions amounted to a breach of Article 3.

84. As far as the alleged breach of Article 8 is concerned, this is also based on the fact of separation from the detained claimants, and its effect on the families is clearly demonstrated in the report of Maria Mars. It is accepted on behalf of the family claimants that a necessary ingredient of their claim is that a request made in the form claimed would probablyhave been successful. If that cannot be established, the interference about which they complain was not caused by the United Kingdom Government. In our view, it is extremely difficult for the family claimants to overcome this hurdle. We would have to be prepared to find on the evidence before us that, had a formal request been made for the return of the detained claimants at or at any time after the time the request was made for the return of the British nationals, the request would probably have been acceded to. We would have to be prepared to conclude not only that the assessment by Mr Richmond and the first defendant that such a request would be ineffective was irrational or otherwise unsustainable, in the sense that it is a conclusion that should be revisited, but is clearly wrong. We do not consider that the evidence enables us to do so, as we explain later in this judgment.

85. So far as Article 14 is concerned, we are prepared to accept that, because the family claimants' Article 8 rights are engaged, Article 14 is also engaged. It is clear that the difference in status, which is the answer to the Race Relations Act claim in relation to the detained prisoners, cannot of itself be a sufficient answer to an allegation of discrimination under Article 14: See *A & Others –v-v Secretary of State for the Home Department* [2005] 2 AC 68. It is clear that the difference in treatment must be properly justified.

86. That brings us back to a careful consideration of the justification for the decision of the first defendant as set out in Mr Richmond's witness statement. We are required to do so with some care, whilst respecting the clear principle that this court has a limited function in relation to matters where foreign policy considerations are in issue, as explained in *Abassi.*

Can the decision withstand scrutiny?

87. The claimants' case has much to commend it. It can, we think, be set out as follows:

a. The detained claimants, on all the evidence before the court, are being detained unlawfully or at the very least detained in breach of their fundamental right to have the lawfulness of their detention determined by a court;

b. Whilst in detention they have all been subjected to torture and inhuman and degrading treatment contrary to the Torture Convention; at the least, the evidence shows that they are at risk of such treatment. All the objective evidence supports this. The attitude of the first defendant as disclosed in the witness statement of Mr Richmond displays undue, if not, supine, deference to the assurances given by the United States authorities, particularly bearing in mind the way the United States Authorities seek to confine the definition of torture;

c. The connections which the detained claimants have with the United Kingdom are such as to give them a strong moral, if not legal, claim to the protection of the United Kingdom. This is particularly so in the case of the second and third claimants by reason of their refugee status. And as far as the first claimant is concerned, it is unrealistic to expect that Iraq will provide him with any protection;

d. There is no recognition in the evidence of Mr Richmond of the clear movement of international legal opinion towards assimilating the rights of refugees with those of nationals. In particular, there is no recognition of the fact that the United States has expressed no opposition to that movement; indeed there are indications that it supports it;

e. There is no material, save for the subjective assessment of the Foreign and Commonwealth Office, that the United States authorities would treat a formal request for the return of the three detained claimants any differently from the request it made on behalf of the British nationals. Even if it did, as a matter of formality, treat it as a representation made

on humanitarian grounds, rather than in the exercise of consular rights under the bilateral convention, there is no objective justification for the view that the result would be different;

f. The assertion that a request would be counterproductive is wholly inconsistent with the evidence which shows that the United States authorities are anxious to return as many detainees at Guantanamo as they can.

88. As far as f. is concerned, this is based on a number of statements by US officials, but in particular a statement by the US Deputy Assistant Secretary of State Colleen Graffy, who told Reuters on the 12th March 2006:

> "We have no intention of operating Guantanamo any day longer than we have to. If there is another viable alternative to deal with these detainees then that is something we are obviously always looking at."

89. These arguments are strong arguments in the context of political debate. But the question which we have to determine is not whether these arguments would or should prevail in the political arena, but whether or not they are sufficient to justify the conclusion that the first defendant has failed to exercise his judgment in a proportionate way, bearing in mind the fundamental human rights at stake. In determining that question, we have to bear in mind that the context is one in which the courts have consistently trod cautiously. As was said in *Abbasi*, decisions affecting foreign policy are a forbidden area. This has been reiterated albeit in moderated form, by Lord Bingham in *R –v- Jones et al* [2006] UKHL16 at para 30 where he said*:*

> "But there are well established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and are very slow to adjudicate upon rights arising out of transactions entered into by sovereign states on the plane of international law."

90. Clearly this could not deflect us from giving relief in restricted terms, for example requiring the first defendant to reconsider his decision, if we were to conclude that he would appear to have failed to take into account either appropriately or at all any relevant material. We would undoubtedly have been entitled to intervene in the same way if we had considered that he had made an error of law. But these principles certainly make it difficult for the claimants to succeed in their primary submission which is that the court should require the first defendant to make a formal request in the terms claimed. It seems to us that whatever view the court were to take as to the stance so far taken by the first defendant, it could not require the first defendant to make a formal request. That would be an interference in the relationship between sovereign states which could only be justified if a clear duty in domestic or international law had been identified; for the reasons that we have already given, there is no such duty in the present case.

91. The question of what, if any, representation should be made on behalf of these claimants remains therefore a matter of discretion. The witness statement of Mr

Richmond makes it clear that the first defendant has not, as we have already said, misunderstood the law. He has taken into account the personal circumstances of the detained claimants and the family claimants. He has accepted that he has the right to make representations, albeit described as at the humanitarian level.

92. The real problem facing the claimants is the judgments expressed by Mr Richmond that any formal request as claimed would be ineffective and counter productive. Prima facie these are judgments which are quintessentially judgments taken in the context of a foreign policy decision which the court simply does not have the tools to evaluate. In relation to the first, this must to a significant extent depend upon the subjective assessments of Foreign Office officials who have dealt face to face with their United States opposite numbers. What is said publicly is inevitably only part, and probably a small part, of the diplomatic dialogue. In the absence of an unequivocal policy statement of the United States authorities contradicting Mr Richmond's assessment, it is not possible for this court to conclude that it was an assessment to which Mr Richmond, and the first defendant were not entitled to come. The same applies to the second statement. Even if, as appears to be the case, the United States authorities are anxious to divest themselves of the embarrassment of Guantanamo Bay, that does not mean that it would welcome a request from the United Kingdom for the return of these detainees. There may be sensitivity as to implied criticism of the regime at Guantanamo Bay, which even if justified, could impede the progress of the general discussions which we refer to again below, on closing Guantanamo Bay entirely.

93. We would, however, be prepared to interfere in order to require reconsideration of the decision if we thought that those views might have been affected by an approach to the question of status which manifestly failed to take into account the present proposals for assimilation of refugee status with that of nationals; and we would also be prepared to interfere to require reconsideration if the decision had been based upon a wholly unrealistic approach to the conditions of detainees in Guantanamo Bay.

94. As to the former, the fact that the present stance of the first defendant is based on a distinction in status which may disappear, or at least be significantly modified, does not in our view justify the conclusion that it is wrong. Nor, in particular, does it necessarily mean that the first defendant has failed to take into account, or has ignored, the fact that there are proposals for such assimilation. It would be surprising if that were the case. As far as the attitude to the allegations of torture are concerned, it seems to us that the words of the court in *Abbasi* in paragraph 107(i) are of significance. The court there recognised that as we have said above, in diplomatic relations it may not always be sensible to express judgments, at least openly, about the legality or otherwise of the actions of a friendly State if that could affect discussions, particularly in related areas. As the Court of Appeal said: "in particular, if the Foreign and Commonwealth Office was to make any statement of its views of the legality of the detention of the British prisoners, or any statement as to the nature of the discussions held with US officials, this might well undermine those discussions".

95. That seems to us to be particularly apposite in the present case. 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. In the same Reuter's article which dealt with Colleen Graffy's interview, she is recorded as having said, when asked

about whether there had been discussions between Washington and Britain about how to repatriate prisoners and close the camp:

> "There is continuous discussion about that."

96. This confirms what Mr Richmond has said in his witness statement. The United Kingdom Government is in continuous dialogue with the United States authorities with a view to securing a solution to the problems presented by Guantanamo Bay which include the allegations of breaches of human rights including torture. Those discussions, whilst not specific to the three detained claimants, affect them. It is impossible for this court, without knowledge of how those discussions have progressed to make a judgment about the way in which they can best be progressed in order to achieve the aims of United Kingdom foreign policy, which is clearly to secure closure of Guantanamo Bay. In our view, the powerful submissions made on behalf of the claimants founder, perhaps uncomfortably and unsatisfactorily, on the rock which prevented the *Abbasi* claim from succeeding, and for the same reasons.

97. Whether the three claimants have been tortured or are at risk of torture is undoubtedly a matter of great importance to both them and their families. But equally important, perhaps even more important, if that be the case, is that they be released from Guantanamo Bay as soon as possible. The thrust of the evidence of Mr Richmond is that that is best achieved in the context of a solution in relation to all the detainees. That may not be a judgment with which we agree. But the court simply does not have, for the reasons that have already been given, the means to make a proper evaluation of that bearing in mind all the ramifications which are clearly involved in this delicate area.

The claim against the 2nd Defendant.

98. The claimants seek a declaration (the fourth paragraph of their claim) that the detainee claimants will be entitled to immediate return to the United Kingdom in the event of their release from Guantanamo Bay. 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.

99. The claims argued before us on the 22nd to 23rd March are therefore dismissed.