



17 January 2017

PRESS SUMMARY

**Rahmatullah (No 2) (Respondent) v Ministry of Defence and another (Appellants);
Mohammed and others (Respondents) v Ministry of Defence and another (Appellants)**
[2017] UKSC 1

On appeals from [2014] EWHC 3846 (QB) and [2015] EWCA Civ 843

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hughes

BACKGROUND TO THE APPEALS

This appeal concerns the nature and content of the doctrine of Crown act of state.

The question arises from proceedings brought against the Ministry of Defence and the Foreign and Commonwealth Office ('the Government') by a large number of people ('the respondents') who claim to have been wrongfully detained or mistreated by UK or US forces in the course of the conflicts in Iraq and Afghanistan. Insofar as the proceedings include claims based on the Iraqi or Afghan law of tort, the Government has (along with other defences) raised the doctrine of Crown act of state. The question of whether the doctrine is applicable in these cases was ordered to be determined as a preliminary issue, before the individual cases are heard by the lower courts.

The Government argues that certain acts of high policy committed by a sovereign state are not susceptible to adjudication in the courts (they are 'non-justiciable'), but also that Crown act of state is a defence to an action in tort where a foreigner seeks to sue the Government in the courts of this country in respect of certain acts committed abroad, pursuant to UK policy in the conduct of its foreign affairs. The respondents argue that the doctrine of Crown act of state is only a narrow rule of non-justiciability for acts of high policy in the conduct of foreign relations, which does not extend to decisions made to detain or transfer particular individuals.

In the High Court, Leggatt J held that the claims were justiciable, but declared that the Crown act of state doctrine provided a defence to the tort claims. The Court of Appeal allowed the respondents' appeals. It held that the doctrine provided a tort defence as well as a non-justiciability rule, but that the defence would only apply when the Government could establish that there were compelling grounds of public policy to refuse to give effect to the local tort law. No such grounds arose in the case of Mr Mohammed, which is the only claim so far in which the relevant facts and evidence have been pleaded.

JUDGMENT

The Supreme Court unanimously allows the Government's appeals, holding that, insofar as the respondents' tort claims are based on acts of an inherently governmental nature in the conduct of foreign military operations by the Crown, these were Crown acts of state for which the Government cannot be liable in tort. Lady Hale (with whom Lord Wilson agrees) gives the main judgment. Lord Mance, Lord Sumption, Lord Neuberger and Lord Clarke each give concurring judgments. Lord Hughes agrees with Lady Hale, Lord Mance and Lord Neuberger. The court will seek further submissions from the parties as to the appropriate form of declaration in each of these cases.

REASONS FOR THE JUDGMENT

A Crown act of state is a prerogative act of policy in the field of international affairs performed by the Crown in the course of its relationship with another state or its subjects [2]. The principle that there is no general defence of state necessity to a claim of wrongdoing by state officials has been established since the eighteenth century [4]. The early cases, however, indicated that there was an exception in the case of acts committed abroad against a foreigner which were authorised or ratified by the Crown [6]; it was also suggested that this doctrine encompassed two rules: one of non-justiciability for certain prerogative acts of the Crown in sphere of foreign affairs and a second providing the Government or its servants with a defence to claims arising from acts of state committed abroad [19]. There is no reason to doubt that the first rule exists but the question for the Supreme Court is whether, as the Government submits, the doctrine also provides a defence to a claim which is otherwise suitable for adjudication for a court [22].

If the doctrine is to be confined to a non-justiciability rule, a broader concept of non-justiciability is required, which encompasses aspects of the conduct of military operations abroad as well as the high policy decision to engage in them. The courts may need to hear evidence and find facts in order to determine whether the acts in question fall within this category [33]. But the doctrine must be narrowly confined to a class of acts which involve an exercise of sovereign power, inherently governmental in nature, committed abroad, with the prior authority or subsequent ratification of the Crown, in the conduct of foreign relations of the Crown. The class of acts must be so closely connected to that policy to be necessary in pursuing it. It extends at least to the conduct of military operations which are themselves lawful in international law. The Government accepts that it cannot apply to acts of torture or to the maltreatment of detainees [36-37, 72, 81]. On the presently assumed facts, the respondents' detention by Her Majesty's forces and transfers out of British custody were steps taken pursuant to deliberately formed policy against persons reasonably suspected to be insurgents, in the context and furtherance of foreign military operations during a time of armed conflict, and were thus Crown acts of state for which the Government cannot be held liable in proceedings for common law damages [75, 95].

Lord Mance considers that the underlying principle of Crown act of state is one of non-justiciability (or judicial abstention or restraint) and it creates unnecessary confusion to suggest that it has two branches [47]. Lord Sumption's analysis is that Crown act of state does offer a defence, but he doubts whether it helps to treat the doctrine as comprising two rules, and in any event in the present context the two rules merge into one [80]. Lord Neuberger agrees with Lord Sumption that the doctrine is ultimately based on the need for consistency or coherence in the distribution of functions between the executive and the judiciary in the United Kingdom's constitutional arrangements. It is not that a judge lacks the information or expertise to resolve the issue, but rather that there are certain governmental acts which owing to their nature or circumstances are not susceptible to judicial assessment [104].

The doctrine was not abolished by the Crown Proceedings Act 1947, which preserved the previous law by the proviso in section 2(1) [41]. It is also compatible with the right to a fair trial protected by article 6 of the European Convention on Human Rights, as it is clearly a rule of substantive law rather than a procedural bar [45].

The appeal is therefore allowed and a declaration substituted to the effect that, in proceedings in tort governed by foreign law, the Government may rely on the doctrine of Crown act of state to preclude the court passing judgment on the claim if the circumstances are such as stated in paragraphs 36-37 of this judgment [46].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>