THE DAILY STAR
REGIONAL
LAW

No justice from America for torture plaintiff

Dissenting judges decry decision not to compensate

Thursday, December 03, 2009

Editor's note: Professor Owen Fiss alerted The Daily Star law page reader to the importance of the Maher Arar decision, then pending before the US Court of Appeals, 2nd Circuit, in New York (Daily Star, July 7, 2009). Can the plaintiff, a Canadian-Syrian citizen arrested during a stopover flight at JFK airport on (eventually false) charges of Al-Qaeda membership, and forcibly deported to Jordan then Syria, where he was tortured, claim compensation from the US government?

Fiss strongly supported his right to be compensated. The Court of Appeals decided otherwise, by a majority of 7 to 4, with stellar judicial figures like Guido Calabresi and Barrington Parker in the minority.

The excerpts below do not give enough credit to arguments for and against in a 184-pages long decision, which can be read in full at www.ca2.uscourts.gov

The case could be heard before the US Supreme Court, which, in a twist of fate, has seen the elevation to it of the most famous member of the 2nd Circuit Court of Appeals, Sonia Sotomayor.

For Arar, Fiss, and the four judges on the minority, justice has not been served by the decision of the Court of Appeals. One factor no doubt in the majority opinion was the award of over $10 million from the Canadian government in compensation to Arar. In the United States however, he still figures on the list of terrorist suspects. The Court of Appeals ultimately argued a separation of powers argument: Congress may wish to compensate such cases, the majority held, it's not up to the court to impose a remedy.

The question facing justice, however, is how a human being wrongly deported to a country where torture was expected – indeed where US intelligence services rely on information extracted by torture – can be denied compensation for such a grave breach of their basic rights.

So the ball is now in two courts: in the US Supreme Court, which can accept to rule on the case or not, and in Congress, where appropriate legislation could be passed. In hearings on the Arar case, which paradoxically helped the court majority pass the buck to Congress, US Senator Patrick Leahy called the case "a black mark" on the United States: "We knew damn well, if he went to Canada, he wouldn't be tortured. He'd be held. He'd be investigated. We also knew damn well, if he went to Syria, he'd be tortured. And it's beneath the dignity of this country, a country that has always been a beacon of human rights, to send somebody to another country to be tortured."

The Arar Court of Appeals' decision transcribed below may not be the last we hear of the sinister practice of "extraordinary renditions."

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Arar v. Aschcroft

In full court Rehearing: December 9, 2008 Decided: November 2, 2009

Maher Arar, Plaintiff-Appellant, v. John Ashcroft, Attorney General of the United States and others, Defendants-Appellees.
Decision made by a majority opinion, by Chief Justice Jacobs and six other judges.

… Where does that leave us? We recognize our limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition. By the same token, we can easily locate that competence, expertise, and responsibility elsewhere: in Congress.
Congress may be content for the Executive Branch to exercise these powers without judicial check. But if Congress wishes to create a remedy for individuals like Arar, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded.
Once Congress has performed this task, then the courts in a proper case will be able to review the statute and provide judicial oversight to the "Executive and Legislative decisions [which have been made with regard] to the conduct of foreign relations and national security."

Judge Sack's dissent

The majority's artificial interpretation of the complaint permits it to characterize the "context" of Arar's Bivens action [a Bivens actions is a type of constitutional remedy action] as entirely one of "international rendition, specifically, 'extraordinary rendition … Extraordinary rendition is treated as a distinct phenomenon in international law." This permits the majority to focus on the part of the complaint that presents a "new context" for Bivens purposes. But when the complaint is considered in light of all of Arar's allegations, his due process claim for relief from his apprehension, detention, interrogation, and denial of access to counsel and courts in the United States, as well as his expulsion to Syria for further interrogation likely under torture, is not at all "new."

(…)
In one sense, every case presents a new context, in that it presents a new set of facts to which we are expected to apply established law. But a new set of facts is not ipso facto a "new context …" Incarceration in the United States without cause, mistreatment while so incarcerated, denial of access to counsel and the courts while so incarcerated, and the facilitation of torture by others, considered as possible violations of a plaintiff's procedural and substantive due process rights, are hardly novel claims, nor do they present us with a "new context" in any legally significant sense.

Judge Parker's dissent

I join Judge Sack's, Judge Pooler's, and Judge Calabresi's opinions in full. My point of departure from the majority is the text of the Convention against Torture, which provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a

threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 2, cl. 2, December 10, 1984, S. Treaty Doc. No. 100-20, 1465 UNTS. 85 ("Convention against Torture"). Because the majority has neglected this basic commitment and a good deal more, I respectfully dissent …

Finally, contrary to the majority's suggestion, the courts require no invitation from Congress before considering claims that touch upon foreign policy or national security … In fact, the Supreme Court has demonstrated its willingness to enter this arena against the express wishes of Congress. In Boumediene v. Bush, 128 S. Ct. 2229 (2008), the Supreme Court rebuffed legislative efforts to strip the courts of jurisdiction over detainees held at Guantanamo Bay … Scores of decisions have since followed this lead.

(…)

Courts cannot blithely accept every assertion of national security at face-value, and they are entitled to enforce constitutional limits by scrutinizing such claims.

Judge Calabresi's dissent

My colleagues have already provided ample reason to regret the path the majority has chosen. In its utter subservience to the executive branch, its distortion of Bivens doctrine, its unrealistic pleading standards, its misunderstanding of the [Torture Victims Prevention Act] and of § 1983 [of United States Code], as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray.

It does so, moreover, with the result that a person – whom we must assume (a) was totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law – is effectively left without a US remedy.

(…)

This leads to my final point. Whether extraordinary rendition is constitutionally permissible is a question that seems to divide our country. It seems to me obvious, however, that regardless of the propriety of such renditions, an issue on which I won't hide my strong feelings, mistakes will be made in its operation. And more obvious still is that a civilized polity, when it errs, admits it and seeks to give redress.

In some countries, this occurs through a royal commission. In the US, for better or worse, courts are, almost universally, involved. This being so, and regardless of whether the Constitution itself requires that there be such redress, the object must be to create and use judicial structures that facilitate the giving of compensation, at least to innocent victims, while protecting from disclosure those facts that cannot be revealed without endangering national security.

That might well occur here through the application of a sophisticated state secrets doctrine. It does not occur when, at the outset, Arar's claims – though assumed true and constitutionally significant – are treated as lacking any remedy.

And this is just what today's unfortunate holding does. It hampers an admission of error, if error occurred; it decides constitutional questions that should be avoided; it is, I submit, on all counts, utterly wrong. I therefore must regretfully, but emphatically, dissent.