New York Law Journal
Date: Tuesday, November 03, 2009
Location: NEW YORK, NY
Circulation (DMA): 12,565 (1)
Type (Frequency): Magazine (D)
Page: 1,7
Keyword: Center for Constitutional Rights

Full Circuit Denies Claims Over Rendition

BY MARK FASS

A CANADIAN engineer who claims he was sent by the United States to Syria to be tortured in 2002 cannot sue U.S. officials in federal court, the U.S. Court of Appeals for the Second Circuit said yesterday in an in banc ruling.

The 7-4 majority held that the Canadian, Maher Arar, failed to state a claim under the Torture Victim Protection Act and that his remaining claims did not satisfy the test for "implied" constitutional causes of action under the 1971 U.S. Supreme Court decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388.

"Applying our understanding of Supreme Court precedent, we decline to create, on our own, a new cause of action against officers and employees of the federal government," Chief Judge Dennis G. Jacobs wrote in his 59-page majority opinion.

"Rather, we conclude that, when a case presents the intractable 'special factors' apparent here... it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress—and not for us as judges—to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation."

In a statement yesterday, David Cole, the Georgetown University Law Center professor who argued Mr. Arar's appeal in cooperation with the Center for Constitutional Rights, said the ruling "effectively places executive officials above the law."

"This decision says that U.S. officials can intentionally send a man to be tortured abroad, bar him from any access to the courts while doing so, and then avoid any legal accountability thereafter," he said. "It effectively places executive officials above the law, even when accused of a conscious conspiracy to torture."

In June 2008, a three-judge Second Circuit panel found the district court had personal jurisdiction over the defendants but found Mr. Arar failed to state his claims under the torture act. A split panel dismissed his *Bivens* claims.

Yesterday's in banc decision affirmed a February 2006 ruling by Eastern District Judge David Trager, which dismissed the complaint.

Judges Joseph M. McLaughlin, José A. Cabranes, Reena Raggi, Richard C. Wesley, Peter W. Hall, and Debra Ann Livingston joined the majority.

» Page 7

Four judges—Guido Calabresi, Rosemary S. Pooler, Robert D. Sack and Barrington D. Parker—dissented, each writing a separate opinion and joining the other three dissents. The dissents totalled 124 pages.

"In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the [Torture Victim Protection Act] and of §1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray," Judge Calabresi wrote. "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 U.S. remedy."

The case, *Arar v. Ashcroft*, 06-4216-cv, is considered by many to be a harbinger for the legal rights of terror suspects sent via "extraordinary rendition" to foreign jurisdictions and subjected to torture since the Sept. 11, 2001, attacks.

According to Mr. Arar's complaint, while on vacation in Tunisia in September 2002, he was called back to Montreal by his employer, a Massachusetts software developer and supplier. After changing planes at John F. Kennedy International Airport, Mr. Arar was held for 12 days in U.S. custody on the basis of a warning from Canadian authorities that he was a member of al-Qaida. He was then sent to Syria to be interrogated and tortured by Syrian officials.

Mr. Arar was held in Syria for one year, the first 10 months in a six-by-three-foot underground cell. He was beaten with both bare fists and a two-inch-thick electric cable.

After being released by the Syrian government in October 2003, Mr. Arar pursued legal action against both the United States, for rendering him to Syria, and Canada, for providing faulty intelligence to the United States and acquiescing to his removal to Syria.

In January 2007, Prime Minister Stephen Harper formally apologized for Canada's role and announced an $11.5 million compensation award.

Mr. Arar's U.S. complaint listed as defendants, among others, former Attorney General John Ashcroft and former Secretary of Homeland Security Tom Ridge. Mr. Arar asserted violations of the Torture Victim Protection Act and of his Fifth Amendment due process rights.

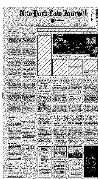
On Feb. 16, 2006, Judge Trager dismissed all four counts, holding that Mr. Arar lacked standing to bring a claim for declaratory relief.

Mr. Arar appealed the dismissal of the torture victim claim and two of the Fifth Amendment claims.

A three-judge circuit panel upheld the dismissal on June 30, 2008. It found that Mr. Arar in fact had personal jurisdiction over several defendants, but that he failed to state a claim under the Torture Victim Protection Act and that he failed to establish subject matter jurisdiction for his claim for declaratory relief. By a vote of 2-1, the panel also dismissed Mr. Arar's Fifth Amendment claims.

The circuit voted to rehear the case in banc, and oral arguments were heard on Dec. 9, 2008.

In yesterday's decision, the majority ruled that although Mr.



© 2009 NLPIP Co.
All Rights Reserved.

Account: 9376B (475)
-4830
For reprints or rights, please contact the publisher

New York Law Journal
Date: Tuesday, November 03, 2009
Location: NEW YORK, NY
Circulation (DMA): 12,565 (1)
Type (Frequency): Magazine (D)
Page: 1,7
Keyword: Center for Constitutional Rights

Arar in fact had personal jurisdiction to sue several of the defendants, he failed to state a claim under the Torture Victim Protection Act—namely, he failed to "adequately allege that the defendants possessed power under Syrian law, and that the offending actions (i.e., Arar's removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power."

'Bivens' Precedent

The majority also dismissed the two remaining claims, which both relied on *Bivens*.

In *Bivens*, after a plaintiff had been subjected to an unlawful, warrantless search, the U.S. Supreme Court allowed him to state a cause of action directly under the Fourth Amendment. The purpose of a *Bivens* remedy, the Supreme Court has since held, "is to deter individual federal officers from committing constitutional violations."

Yesterday, the majority found that no such implied cause of action exists for extraordinary renditions.

The U.S. Supreme Court "has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts. ...The context of this case is international rendition, specifically, 'extraordinary rendition,'" Judge Jacobs wrote.

To satisfy *Bivens*, Judge Jacobs said, the cause of action must satisfy a two-part test: "whether there is an alternative remedial scheme available to the plaintiff; and whether 'special factors counsel...hesitation' in creating a *Bivens* remedy."

Here, both factors favored rejection of the claims.

"There are several possible alternative remedial schemes here. Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration," Judge Jacobs wrote, citing the Immigration and Nationality Act.

After acknowledging that Immigration and Nationality Act claims may present jurisdictional "difficulties," Judge Jacobs found that the "special factors" nonetheless required rejection of the *Bivens* claims.

Such special factors include security, foreign policy, classified information and "open courts"—i.e., the dilemmas posed by courts relying on information that cannot be introduced into the public record.

"Here, we need not decide categorically whether a *Bivens* action can lie against policymakers because in the context of extraordinary rendition, such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation," Judge Jacobs concluded. "Our holding need be no broader."

'Dubious Law'

In his dissent, Judge Sack described the majority's reasoning as strained.

"We fear that the majority is so bound and determined to declare categorically that there is no *Bivens* action in the present 'context,' that it unnecessarily makes dubious law," Judge Sack wrote in his 73-page dissent.

"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 Calabresi wrote the most literary, and emotional, of the four dissents.

"[B]ecause I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay, I add a few words of my own, 'more in sorrow than in anger,'" he wrote, quoting Act I, Scene 2, of "Hamlet."

"[The majority] has engaged in what properly can be described as extraordinary judicial activism. It has violated long-standing canons of restraint that properly must guide courts when they face complex and searing questions that involve potentially fundamental constitutional rights. It has reached out to decide an issue that should not have been resolved at this stage of Arar's case."

Mr. Arar released a statement through the Center for Constitutional Rights.

"After seven years of pain and hard struggle it was my hope that the court system would listen to my plea and act as an independent body from the executive branch," Mr. Arar said. "Unfortunately, this recent decision and decisions taken on other similar cases, prove that the court system in the United States has become more or less a tool that the executive branch can easily manipulate through unfounded allegations and fear mongering. If anything, this decision is a loss to all Americans and to the rule of law."

Deputy Assistant Attorney General Jonathan F. Cohn represented the government. A Justice Department spokesman declined to comment.

Maria Couri LaHood, Jules Lobel and Katherine Gallagher of the Center for Constitutional Rights and Joshua S. Sohn of DLA Piper drafted Mr. Arar's appellate brief.

@ Mark Fass can be reached at mfass@alm.com.

© 2009 NLPIP Co.
All Rights Reserved.

Account: 9376B (475)
-4830
For reprints or rights, please contact the publisher