

Panel Rejects Claims by Aliens Of Unlawful Prolonged Detention

BY MARK FASS

THE U.S. Court of Appeals for the Second Circuit has upheld the dismissal of a central claim in a high-profile putative class action filed on behalf of Arab and Muslim non-citizens who were subjected to prolonged, abusive detention by immigration officials in the wake of 9/11.

The panel affirmed Eastern District Judge John Gleeson's rejection of the plaintiffs' claim that they were illegally detained for periods longer than necessary to effect their removal.

The eight named plaintiffs had contended that the federal government used their immigration violations as a "cover" or "excuse" to investigate possible ties to terrorism.

The men, who were held between three and seven months before being cleared of terrorism ties, have been deported. Seven are Muslim, and one is Hindu.

On Friday, the panel ruled that the government's motivation for holding the detainees was irrelevant because their seizures were lawful.

"To the extent plaintiffs challenge their prolonged detention after final orders of removal (or voluntary departure) were entered against them, it is clear from the complaint that such detention was supported by the [immigration judges'] findings of removability, which constitute a good deal more than probable cause," the two-judge panel wrote in *Turkmen v. Ashcroft*, 06-cv-3745.

"Because plaintiffs were thus lawfully detained as aliens subject to orders of removal (or voluntary departure) they could not state a claim for unconstitutionally prolonged detention without pleading facts plausibly showing 'no significant likelihood of removal in the reasonably foreseeable future.'"

However, the per curiam dec-

sion also allowed the possibility that the plaintiffs' claims against several high-level federal officials, including former U.S. Attorney General John Ashcroft, will go forward, notwithstanding the government's recent \$1.26 billion settlement with five key named plaintiffs.

The panel remanded the matter to Judge Gleeson to consider whether the remaining

two plaintiffs should be allowed to submit a fourth amended pleading preserving the claims asserted by only the settling plaintiffs. Those claims center on the abusive conditions of the plaintiffs' detention.

If Judge Gleeson denies the plaintiffs' motion to replace the case, the panel held, he should evaluate the sufficiency of the third amended complaint in light of the recent settlement and the heightened pleading standard of the U.S. Supreme Court's decisions *Iqbal v. Ashcroft*, 574 U.S. 820, and *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, both of which were decided after Judge Gleeson's June 2006 ruling in the present case.

To survive a motion to dismiss under *Iqbal* and *Twombly*, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."

The case was decided by Chief Judge Dennis Jacobs and Judge Regina Raggi.

The original panel's third judge, Sonia Sotomayor, was elevated to the U.S. Supreme Court in August.

The plaintiffs initiated the lawsuit in 2002 on behalf of Arab and Muslim aliens who were held on immigration violations following the 9/11 terror attacks and subjected to abuse, mistreatment and lengthy detentions.

The abuse included beatings, strip searches and sleep deprivation. The allegations have been substantiated by two reports by

the Office of the Inspector General.

Five of the men settled with the government in November. A sixth plaintiff withdrew his claims several years ago.

Rachel Meeropol of the Center for Constitutional Rights served as lead counsel for the plaintiffs. She called Friday's ruling a "mixed bag."

"By dismissing [the equal protection] claim, the circuit has endorsed using religion and ethnicity as a proxy for suspicion of terrorist activity. That's the part of the decision we're disappointed in," Ms. Meeropol said.

On the other hand, she noted, the court allowed the possibility of the case continuing against Mr. Ashcroft and FBI Director Robert Mueller, notwithstanding the settlement.

"We're trying to hold the architects responsible," Ms. Meeropol said, "not just the foot soldiers."

Deputy Assistant Attorney General Jonathan Cohn represented Mr. Ashcroft and Mr. M. Waller.

Michael Martinez of Crowell & Moring argued on behalf of two Metropolitan Detention Center officials.

Bassel Bakhos represented former Immigration and Naturalization Service Director James Ziglar.

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