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EUROPEAN COURT OF HUMAN RIGHTS

HASSAN V. THE UNITED KINGDOM

On a foggy day in Strasbourg, December 11, 2013, the European Court of Human Rights (ECtHR) heard arguments from both the applicant and the U.K. government in its last scheduled hearing for the calendar year, *Hassan v. the United Kingdom*. A number of dignitaries attended including judges from the highest courts of Poland, Montenegro, and Moldova, as well as delegations from Georgia, Latvia, Russia, Japan, Korea, and Turkey.

Mr. Khadim Resaan Hassan, an Iraqi national, lodged an application with the Court on June 5, 2009 under Article 34 of the European Convention on Human Rights (ECHR, Convention). The application was then allocated to the Grand Chamber under Article 30, which allows a Chamber to relinquish jurisdiction of a pending case to the Grand Chamber when the case raises a serious question affecting the interpretation of the Convention or might result in an inconsistency amongst judgments.

Under the regime of Saddam Hussein, Mr. Hassan was a high-ranking official in Iraq's ruling party, the Ba'ath Party, as well as a General in its private army, El Quds. When the British army occupied Basra and began arresting high-ranking Ba'ath Party members in April 2003, Mr. Hassan went into hiding. Members of the British Army arrived in search of Mr. Hassan at his home and found instead Mr. Hassan's brother, Tarek, who was according to the Government, on the roof wielding an AK-47. The U.K. Government first asserted that he was mistaken for his brother, but later discovered reports that he had admitted being Mr. Hassan's brother and that under the circumstances, the soldiers suspected him of being a combatant. Both parties assert that he was then taken to Camp Bucca, a U.S. operated detention facility that is used by both British and Australian forces under a Memorandum of Understanding.

The U.K. government claims that Tarek was interviewed twice within thirty-eight hours — once by British and once by United States forces — and determined

to be a non-combatant. The government claims he was then placed in non-combatant holding cells for release. While the government vehemently denies it, Mr. Hassan alleges that Tarek was used as a “bargaining chip” and that British forces informed both Mr. Hassan's two sisters and his neighbor that Tarek was being held until Mr. Hassan surrendered. In contrast, the Government has asserted three different dates of his actual release, all by mid-May 2003. Tarek, however, was found dead about 700 kilometers from the detention facility almost four months after his alleged release, in early September 2003. He had eight bullet wounds in his chest from a Kalashnikov rifle, his hands were tied behind his back with plastic wire, and in his pocket was his identity bracelet from the detention facility.

Because of these circumstances, Mr. Hassan's application alleges violations of Articles 2, 3, 4, and 5, and he seeks a declaration of the existence of a breach of his rights under the ECHR as an indirect victim, compensation, and an independent investigation into the death of his brother.

Mr. James Eadie argued on behalf of the U.K. government and made several points relating to jurisdiction and the relationship between the ECHR and International Humanitarian Law (IHL). The government argued that Camp Bucca was under U.S. jurisdiction, but British jurisdiction. Therefore, the ECHR, to which the United States is not a party, will only apply under extraterritorial jurisdiction under exceptional circumstances. Such an exception, the Government argued, should not apply in hostilities of international armed conflicts outside the state in question. The government also rejected the application of the exclusive control because the United Kingdom could not have had total exclusive control over jointly controlled facilities. It further argued that the Geneva Conventions displace Article 5's right to a fair trial under the principle of *lex specialis*, and that finding for the applicant would effectively dictate that armed forces could kill but not capture and detain suspected combatants.



Courtesy of Sydney Pomykata

Mr. Tim Otty, on behalf of Mr. Hassan, emphasizing that Tarek was in fact under U.K. jurisdiction because British forces captured, processed, interrogated, detained, and released him. Mr. Otty emphasized the lack of investigation into the matter, pointing to the fact that the government took no witness statements, and the contradictory evidentiary documents put forth by the Government, documents that only recently surfaced after years of delay. The Applicant further argued that protections were not displaced by IHL. On the contrary, IHL creates a safety net applicable even in derogation, and was not meant to water down already existing rights. He pointed out that such rights were not derogable at this point in time because the Hussein Regime had already fallen, thereby ending the conflict and the application of IHL as the *lex specialis*. Additionally, Mr. Otty pointed to the Inter-American Commission on Human Rights's assertions of primacy of Human Rights Law over IHL. Mr. Otty reminded the Grand Chamber that its obligation is to apply the Convention.

The Judges posed many questions at each of the parties, many of which were directed at the government to clarify facts and explain certain discrepancies. Both parties were asked pointed questions of law, including a deeper explanation of whether IHL qualified or displaced Article 5. It remains to be seen which interpretation of IHL the Grand Chamber favors until it releases its decision in coming months.

Sydney Pomykata, a staff writer for the Human Rights Brief, monitored the hearing on Hassan v. the United Kingdom before the European Court of Human Rights.

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