

REDRESS

Seeking Reparation for Torture Survivors

**JONES V. THE MINISTRY OF THE INTERIOR OF SAUDI ARABIA
& LT. COL. ABDUL AZIZ and
SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS, THE
REDRESS TRUST (INTERVENORS) and
MITCHELL, WALKER AND SAMPSON V. IBRAHIM AL-DALI & OTHERS**

**COMMENTS ON THE DECISION OF THE COURT OF APPEAL
28 OCTOBER 2004**

What is this case about?

The 28 October decision of the Court of Appeal concerns systematic torture, which the Appellants, all British nationals and one dual British/Canadian national, allege they experienced while in custody in Saudi Arabia. The Appellants were falsely accused of involvement in a bombing campaign in Riyadh in 2000 and 2001, a campaign now widely believed to have been launched by Saudi opposition groups. During their time in prison, all Appellants allege that they were regularly subjected to torture and were forced to confess under torture. In a “trial” with no fair trial guarantees, Mitchell, Walker and Sampson were convicted of involvement in the bombing campaign and Sampson and Mitchell were sentenced to death by crucifixion and partial beheading.

The Applicants are seeking to bring in England a claim for damages including aggravated and exemplary damages for assault and battery, trespass to the person, torture and unlawful imprisonment. Jones has made this claim against the Saudi Ministry of Interior and one named official, whereas Mitchell, Walker and Sampson have restricted their claim to named officials.

The Saudi Government has claimed immunity in its capacity as State as well as in respect of its officials also named in the civil action. The Secretary of State for Constitutional Affairs intervened to support the Kingdom of Saudi Arabia’s claim of immunity. REDRESS intervened to provide legal argument on the inapplicability of immunities to crimes of *jus cogens*, such as torture, and on the importance of civil claims and other forms of reparation for survivors of torture.

Why is this case important for survivors of torture?

This case recognises the importance of reparation for survivors of torture and confirms that it can no longer be appropriate to give blanket effect to a foreign state’s claim to state immunity *ratione materiae* (functional immunity) in respect of a state official alleged to have committed acts of systematic torture.

It has been REDRESS' experience in working with torture survivors for the past twelve years, that justice and other forms of reparation are extremely important for survivors. Probably one of the worst aspects of torture is that the State and its officials – those with the responsibility to protect the rights of individuals – have abused their positions of power and been responsible for the perpetration of serious crimes. For the victims, this can be an especially disorienting experience and worst of all, there is usually nowhere for them to go to lodge a complaint or to seek assistance, certainly not to those who perpetrated the torture. The process of seeking and obtaining reparation can be an empowering experience for survivors – for once, finally, it is the perpetrators who are forced to explain their actions and to make amends, it can finally be acknowledged that what was done to them was wrong.

As noted by Mance LJ,

“Civil proceedings have established a positive role in a domestic context where criminal proceedings have never been brought, or have been brought and have for some reason failed. The importance of civil redress is acknowledged by Article 14 of the Convention against Torture, which focuses on their compensatory function. But there are cases, and torture is among them, where the value of civil redress may be suggested to lie as much in terms of the ability to establish the truth and so to assist rehabilitation or closure as in terms of the prospect of any financial recovery.” [para. 80]

What are the key findings of the Court of Appeal?

The Court of Appeal made a number of important findings highlighted below:

- 1. There can be no blanket immunity for a State's claim of immunity *rationae materiae* of its officials alleged to have committed systematic torture.** The Court distinguishes the principle in *Propend* that state officials should be entitled to immunity under the same cloak as the State itself. It notes the difference in origin of a state's own immunity *ratione personae* and the immunity available to it to claim in respect of its officials, which is *rationae materiae* only. The Court of Appeal goes on to hold that it can no longer be appropriate to give blanket effect to a foreign state's claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of systematic torture. To do so would deprive the right of access to a court under Article 6 of the European Court of Human Rights of real meaning in a case where the victim of torture has no prospect of recourse in the state whose officials committed the torture.
- 2. A gap in the State Immunity Act should not necessarily be interpreted as providing for further immunities to state officials.** The State Immunity Act 1978 does not expressly cover the civil liability of state officials against whom conduct is alleged constituting serious international crime. The gap cannot be filled by a simple assertion that the immunity possessed by a state should be mirrored by an immunity possessed by the official whose act or omission has given rise to the state's immunity.
- 3. The Court recognises that Article 14(1) of the Convention against Torture requires, at the least, redress from the offending official(s) or others acting in an official capacity and from the State.** Article 14(1) provides for an enforceable civil remedy. The Court recognised that while Article 14(1) of the Convention of Torture (which provides for redress and an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible), has no explicit jurisdictional ambit, the redress it refers to must at least mean redress from the offending “public official or other persons acting in an official capacity” who cannot invoke superior orders as a justification. Mance LJ further notes, that “I am also ready to assume that it means

redress from the State whose public official or other person acting in an official capacity committed the act of torture.”

- 4. The Court finds that in the present case, the Kingdom of Saudi Arabia (as opposed to its officials) is immune from English courts.** While the Court noted that the prohibition of systematic torture in international law constitutes *jus cogens*, a peremptory norm, and that international law is in the course of continuing development, it confirmed the decision in *Al Adsani* that the *jus cogens* nature of the prohibition on torture did not mean either necessarily or (as yet) in general practice that a state should no longer be treated as enjoying immunity from civil proceedings in the courts of another state to that in which the torture occurred. It noted that “The recognition under general principles of international law of civil immunity on the part of a State from civil suit in a state other than that of the alleged torture does not sanction the torture or qualify the prohibition upon it. It qualifies the jurisdictions in which and means by which the peremptory norm may be enforced.” [para. 17]

The Court of Appeal also commented as follows:

1. The challenges of English courts in determining the appropriate extent of jurisdiction should not be resolved by extending blanket immunity. Mance LJ notes that: “*I do not see the difficult jurisdictional issues which such claims raise as a justification for possession by the foreign state of a blanket claim to immunity in respect of such an official or agent in a case of alleged systematic torture.*”[para. 81]
2. Article 6 of the European Court of Human Rights is prima facie engaged when a claimant is denied access to English courts on the basis of immunity. Whether this is proportionate may depend on, *inter alia*, whether there is an adequate remedy in the state where the systematic torture occurs. The Court noted that a proportionate approach in pursuit of a legitimate aim is, by definition, not the same as an approach requiring all states to either assume universal civil jurisdiction or to forego all discretionary qualifications on the breadth of their technical jurisdictional rules. In order to determine whether a claim for systematic torture should be allowed to proceed in the English courts, it would thus, on any view, be necessary for the court to consider and balance all relevant factors, including any evidence before it as to the availability or otherwise of an effective remedy for the torture in the state responsible for it. This exercise would have to be undertaken at the same time as considering any other jurisdictional issues which arise (including thereby issues of discretion and *forum non conveniens*)

What happens next?

The Court of Appeal has remitted this case back to the Master for further argument on the application to serve outside of the jurisdiction. Furthermore, the Master will consider other jurisdictional issues such as *forum non conveniens* and discretion.

Also, it is expected that the decision of the Court of Appeal will be appealed to the House of Lords.