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ENGLISH COURT RULES ON DEFINITION OF PUBLIC OFFICIAL/OFFICIAL CAPACITY IN TORTURE CASE

R v TRA [2018] EWCA Crim 2843 (21 December 2018)

Introduction

In a decision handed down on 21 December 2018 in *R v TRA* [2018] EWCA Crim 2843, the Court of Appeal considered which persons were covered by the words “A public official or person acting in an official capacity” in the context of torture allegations arising out of the first Liberian civil war.

In the case of *R v. Zardad* (judgment handed down in 2004), the English Court was the first ever domestic Court to witness a prosecution for torture (of an Afghan warlord) in respect of crimes committed in Afghanistan between 1994-1998. Khawar Qureshi QC (then an "A" Panel UK Government Treasury Counsel) was junior to Lord Goldsmith, the Attorney General of England & Wales, who was Prosecution Counsel in the 3 month criminal trial and dealt with the Public International Law issues which led to Colman Treacy J finding that Zardad was a "public official or a person acting in an official capacity".

Background

The case related to events which took place in 1990, during the early stages of the first Liberian civil war, when an armed group called the National Patriotic Front of Liberia (“NPFL”) (led by Charles Taylor, who became President after the uprising was successful) sought to take control of the country and depose the then President.

The issue for the Court of Appeal was whether the appellant, who had been charged with torture, fell within the class of perpetrators of torture whose conduct is made criminal by section 134(1) Criminal Justice Act 1988.

Section 134(1) of the Criminal Justice Act 1988 was enacted in order to give effect to the obligations of the United Kingdom under the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984 (the “Torture Convention”), and provides:

“134. — *Torture.*

(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance of purported performance of his official duties.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence—

(i) of a public official; or

(ii) of a person acting in an official capacity; and

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

.....”

The appellant’s case was that the term “person acting in an official capacity” is limited to those acting for or on behalf of a government authority of a recognised state, and that *R v Zardad* (unreported, Case T2203 7676), on which the Prosecution relied and the judge at first instance accepted, was incorrectly decided.

The Prosecution submitted that section 134 covers the conduct of non-state actors who seek to depose a government and who exercise de facto authority over individuals in the territory which they control.

Decision

The Court of Appeal (Lord Burnett of Maldon, Lord Justice Popplewell and Mrs Justice Whipple DBE) dismissed the appeal.

In considering the approach to be taken to construction of the relevant section, the Court of Appeal considered the international law background to the Torture Convention, noting that the prohibition on torture exists not merely as a treaty obligation, but as a customary rule of international law. It was clear from its origin, preamble and content that the Torture Convention was intended to give effect to, and support, the human rights jus cogens against torture, not the international humanitarian law rule, and accordingly it was the international human rights law which the Court must primarily take into account in interpreting the Torture Convention, in accordance with article 31.3(c) of the Vienna Convention. As the Torture Convention applied irrespective of whether there was an armed conflict or a widespread or systematic attack directed at a civilian population, and also recognised the criminality of a single incident of torture outside the context of armed conflict, concepts which only apply in international humanitarian law in the context of armed conflicts were of little assistance in the interpretation of an instrument whose operation was not confined to times of hostilities.

As to the interpretation of section 134(1), the expression “public official” seemed designed to define a person’s status, whereas “acting in an official capacity” defined his or her activity. The Court considered that the wording was very wide, and only appeared to exclude activity in a private or individual capacity –

the ordinary and natural meaning was apt to include someone who held an official position or acted in an official capacity in an entity exercising governmental authority over a civilian population in a territory over which it held de facto control.

The Court of Appeal concluded that the common language of section 134 and article 1 of the Torture Convention, their international law background, their object and purpose, the travaux préparatoires, along with the anomalies and inconsistencies in the appellant's arguments all support the conclusion that the category of perpetrator defined as "a public official or person acting in an official capacity" in section 134 was not confined to those acting on behalf of a recognised state. Rather, the section covered any person who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body which exercises or purports to exercise the functions of government over the civilian population in the territory which it controls and in which the relevant conduct occurs. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict.