

09-4958-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN DOE, in his capacity as the executor of the Estate of JANE DOE, in his
personal capacity, and as the personal representative of JANE DOE,

Plaintiff-Appellee,

v.

SHEIKH USAMA BIN LADEN, *et al.*,

Defendants,

ISLAMIC EMIRATE OF AFGHANISTAN, ALSO KNOWN AS ISLAMIC STATE OF
AFGHANISTAN,

Defendant-Appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUE

Whether the district court correctly applied the noncommercial tort exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5), to Plaintiff-Appellee's civil conspiracy and wrongful death claims Defendant-Appellant.

STATEMENT OF THE CASE

Plaintiff-Appellee John Doe ("Plaintiff") initiated this action on December 4, 2001 in the U.S. District Court for the District of Columbia. The case arises from the September 11, 2001 terrorist attacks, in which Plaintiff's wife was killed. Plaintiff brought claims against Defendant-Appellant Islamic Emirate of Afghanistan ("Afghanistan") and other defendants for conspiracy and wrongful death under the noncommercial tort exception of the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1605(a)(5). Plaintiff served process upon Afghanistan through diplomatic channels as permitted by 28 U.S.C. § 1608(a)(4) and, when Afghanistan failed to timely answer, a default was entered by the clerk on January 29, 2003. Afghanistan eventually entered an appearance on February 27, 2004 and moved to vacate the default and dismiss the complaint. On September 11, 2007, Plaintiff filed a motion for default judgment against Afghanistan and other defendants.

On September 30, 2008, the District Court denied without prejudice Afghanistan's motion to dismiss the case for lack of subject matter jurisdiction. (A-50); *Doe v. Bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008). The Court noted that the noncommercial tort exception applied to "all tort actions for money damages" and "seems facially to apply to Doe's factual allegations." *Id.* at 97. The District Court noted that if Plaintiff was precluded from bringing a claim under § 1605(a)(5), then no U.S. citizen would be able to assert "tort claims against any foreign state arising from acts of terrorism other than the handful designated as state sponsors of terrorism." *Id.* The Court observed that such an interpretation would be "peculiar" and lead to an "absurd" result Congress could not have intended. *Id.* The District Court then concluded that the noncommercial tort exception of the FSIA applied to Plaintiff's tort claims against Afghanistan. *Id.* at 99.

Subsequently, Afghanistan filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") regarding the September 30, 2008 order of the District Court and its finding relating to the noncommercial tort exception of the FSIA. Plaintiff moved to dismiss the appeal as premature, asserting that the collateral order doctrine does not permit an interlocutory appeal until jurisdiction is determined by the district court.

On November 29, 2009, the D.C. Circuit transferred the case to this Court, without having ruled on Plaintiff's motion to dismiss the appeal. (A.70-71.) On April 29, 2010, this Court denied the motion to dismiss the appeal, ruling that the collateral order doctrine affords appellate jurisdiction.

STATEMENT OF THE FACTS

Consistent with the findings of countless investigations and authoritative reports, Plaintiff's Complaint asserts a civil conspiracy and wrongful death tort claims against Afghanistan because of its role in the terrorist attacks of September 11, 2001. Afghanistan argues it is entitled to immunity from Plaintiff's tort claims pursuant to the FSIA. Plaintiff alleges that the noncommercial tort exception of the FSIA defeats any claim of immunity.

The noncommercial tort exception provides that a foreign state shall not be immune from the jurisdiction of courts of the United States in any case

not otherwise encompassed in paragraph (2) above in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official on or employee of that foreign state while acting within the scope of his office or employment; except

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights.

28 U.S.C. § 1605(a)(5).

SUMMARY OF THE ARGUMENT

The District Court correctly held that Plaintiff’s ordinary tort claims arising from the September 11, 2001 attacks can proceed against Afghanistan under the noncommercial tort exception of the FSIA. This Court’s decision in a prior case, which concerned a very different set of legal claims, is not determinative of the issue before this Court.

ARGUMENT

I. The District Court Correctly Applied the Noncommercial Tort Exception of the FSIA.

The District Court properly ruled that Afghanistan may not be entitled to immunity from Plaintiff’s tort claims under the “noncommercial tort exception” to the FSIA, 28 U.S.C. § 1605(a)(5). *Doe*, 580 F. Supp. 2d at 99. That exception authorizes claims seeking “money damages . . . for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of [a] foreign state[.]” *Id.* As the District Court recognized, the plain language of this

provision, and Plaintiff's Complaint, demonstrates that Afghanistan's actions fall well within this exception.

A. Afghanistan's Reliance on This Court's Decision in Another Case Arising From the September 11 Attacks Is Misplaced.

Afghanistan relies solely on this Court's decision in another case for its assertion that the District Court erred in its application of the noncommercial tort exception. Brief of Defendant-Appellant at 6; see *In Re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 130 S. Ct. 2278 (June 1, 2010) ("*In re Terrorist Attacks*"). The outcome of this case, however, is not controlled by the decision in *In Re Terrorists Attacks*.

The plaintiffs' claims in *In re Terrorist Attacks*, though also arising from the September 11 attacks, were distinctly different from the ordinary tort claims here. The allegations in *In re Terrorist Attacks* predominantly involved financial support by various defendants, including the Kingdom of Saudi Arabia and several Saudi princes, to certain Muslim charities, that, in turn, allegedly provided funding to al Qaeda. See 538 F.3d at 76. The district court characterized the plaintiffs' claims in *In re Terrorist Attacks* as arising "predominantly from misconduct of ostensible charities under the [sovereign defendant's] control." *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 802-03 (S.D.N.Y. 2005) (*In*

re Terrorist Attacks I). The plaintiffs themselves characterized their allegations of financial support to various charities as essentially “money-laundering,” which obviously constitutes criminal activity but is not a recognized tort. *Id.* at 793 (“The *Federal* Plaintiffs allege that the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki financed terrorism by contributing to or supporting charities known to support terrorist activities.”)

These undefined nature of the plaintiff’s claims in *In re Terrorist Attacks*, vague allegations of financial support/money laundering in support of terror-related activities – required the Court to analyze whether the plaintiffs’ claims even constituted claims sounding in tort. The Court specifically stated that “[a]s to the exception for personal injury or death caused by a foreign sovereign’s tortious act, [28 U.S.C.] § 1605(a)(5), (“Torts Exception”), *we decline to characterize plaintiff’s claims—expressly predicated on a state-sponsored terrorist act—as sounding in tort.*” 538 F.3d at 75 (emphasis added). From this finding that the plaintiffs’ claims did not constitute torts, the Court then concluded that plaintiff’s claims could only be brought under 28 U.S.C. § 1605A(1)(previously codified at 28 U.S.C. § 1605(a)(7). *Robinson v. Gov’t of Malay.*, 269 F.3d 133, 142 (2d Cir. 2001) (holding that the test for determining whether a claim falls within § 1605(a)(5) is whether the defendant’s conduct is “tortious”).

In contrast, Plaintiff's claims against Afghanistan plainly sound in tort and cannot be characterized fairly as anything other than ordinary tort claims. Plaintiff asserts ordinary tort claims of civil conspiracy (Count V) and wrongful death (Count VI). (A-43–A-44.) In contrast to the plaintiffs' vague allegations of financial support to third parties, which the Court in *In re Terrorist Attacks* declined to even recognize as torts, the claims asserted by Plaintiff directly and undeniably are traditional tort claims. Plaintiff plainly alleges that Afghanistan conspired with the other defendants for their specific role in the September 11 attacks, by tacitly and/or expressly agreeing with Bin Laden and al Qaeda to commit tortious acts including assault and battery (Count I), false imprisonment (Count II), and intentional infliction of emotional distress (Count III). (A-40–A-44.) These traditional tort claims are far different than the undefined claims of financing/money laundering asserted in *In Re Terrorist Attacks*.

Because Plaintiff's claims here can only be characterized as ordinary tort claims, the claims fall squarely within the FSIA's noncommercial torts exception.

B. An Ordinary Tort Claim Against a Foreign Sovereign Is Entirely Proper Under the Plain Language of § 1605(a)(5).

Recognizing Plaintiff's claims as being ordinary tort claims asserted against a foreign sovereign, the District Court correctly held that Plaintiff could proceed under the noncommercial tort exception. As the District Court noted, "[s]ection 1605(a)(5) is cast in general terms pertaining to all tort actions for money damages and seems facially to apply to Doe's factual allegations." 580 F. Supp. 2d at 97 (*citing Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839-40 (D.C. Cir. 1984) (*citing therein* H.R. Rep. No. 94-1487, at 20-21 (1976))). The plain and unstricted language of the statute provides compelling support for finding the noncommercial tort exception applicable to the Plaintiff's claims in this case.

In contrast, there is no textual support in the FSIA for Afghanistan's argument that § 1605(a)(7) provides the sole basis for obtaining subject matter jurisdiction over a foreign sovereign or any claims arising from terrorist attacks, and there exists in fact considerable evidence in the text of the FSIA to the contrary. To begin with, by its plain language, the noncommercial tort exception applies to all torts. *Robinson*, 269 F.3d at 142 ("If those activities could not render the [foreign sovereign] liable for a tort under New York law, then it remained immune under § 1606(a)(5)."). To the extent there are particular tort claims that

Congress intended to exclude from the noncommercial tort exception, Congress identified them expressly in § 1605(a)(5)(B). *See* 28 U.S.C. § 1605(a)(5)(B) (exempting from the scope of the tortious act exception “any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights”). The omission of any reference to tort claims arising from terrorist incidents in § 1605(a)(5)(B) plainly indicates that Congress did not intend to exclude such claims under § 1605(a)(5)(A), under the canon of *expressio unius est exclusio alterius* (expressing one item excludes others).

Similarly, there is no indication that Congress intended the noncommercial tort exception and the “state sponsors of terror exception” to be mutually exclusive. Where Congress intended to limit the various exceptions of the FSIA, it included express language to that effect. In this regard, the noncommercial tort exception and “state-sponsored terror exception” are both expressly limited to cases “not otherwise encompassed” in the scope of the FSIA’s commercial activity exception. 28 U.S.C. §§ 1605(a)(5), (a)(7). The fact that the noncommercial tort exception does not include any limitation for claims “not otherwise encompassed” in § 1605(a)(7) demonstrates that Congress did not intend these two exceptions –

§§ 1605(a)(5), (a)(7) – to be mutually exclusive. *See In re Terrorist Attacks 1*, 349 F. Supp. 2d at 796.

Because the FSIA includes no express language precluding consideration of claims for terrorist attacks under § 1605(a)(5), the canons of statutory construction also preclude the constricted interpretation advocate by Afghanistan. In this regard, it is important to note that the noncommercial tort exception predates the “state sponsored terror exception” by approximately 20 years. Thus, there can be no credible dispute that the noncommercial tort exception, as enacted by Congress in 1976, created a comprehensive structure for determining the availability of subject matter jurisdiction for all tort claims against foreign sovereigns, including tort claims arising from terrorism. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 610 (1992) (the FSIA “establishes a comprehensive framework” for sovereign immunity determinations). Indeed, other courts interpreting the FSIA prior to the adoption of the state sponsor exception confirm that the noncommercial tort exception is not so limited. *See Liu v. Republic of China*, 892 F.2d 1419, 1425-31 (9th Cir. 1989) (finding subject matter jurisdiction under the tortious act exception for claim arising from extrajudicial killing); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 674 (D. D.C. 1980) (same); *see also Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D. D.C. 1998) (“28 U.S.C. §

1605(a)(5) already provides jurisdiction for state-sponsored terrorists acts in the United States”).

Moreover, it cannot be reasonably disputed that Congress designed the “state sponsored terror exception” to *expand* the scope of recovery for victims of terrorism. As the D.C. Circuit held, the state sponsored terror exception was designed to remedy the fact that “[u]nder the original FSIA, . . . terrorism, torture, and hostage taking *committed abroad* were immunized forms of state activity.” *Price v. Libyan Arab Jamahiriya*, 294 F.3d 82, 88 (D.C. Cir. 2002) (emphasis added). Terrorism committed in *this* country, however, was never so immune because it “occurr[ed] in the United States” and was thus subject to the noncommercial tort exception. The state sponsored terror exception, in contrast, applies to certain terrorist action regardless of where they occur: “the only required link between the defendant nation and the territory of the United States is the nationality of the claimant.” *Price*, 294 F.3d at 90; *Flatow*, 999 F. Supp. at 15.

Moreover, as the District Court correctly observed, the construction of the FSIA advanced by Afghanistan would lead to absurd results, which Congress most certainly did not intend when it adopted § 1605(a)(7). *Doe*, 590 F. Supp. 2d at 97. For example, because § 1605(a)(7) applies not only to terrorist attacks, but also acts of kidnapping, torture and extrajudicial killing, Afghanistan’s interpretation

of the FSIA would permit foreign sovereigns to kill, torture and hold hostage U.S. citizens on American soil with impunity, so long as they are not designated state sponsors of terrorism. Furthermore, because jurisdiction under § 1605(a)(7) is available only where the claimant or victim was a national of the United States at the time of the underlying incident, Afghanistan's theory of the interplay between these two exceptions would leave aliens killed or injured in terrorist attacks on American soil with no basis for obtaining subject matter jurisdiction over a responsible foreign sovereign for their injuries, even where the responsible foreign sovereign is a designated state sponsor of terrorism. Likewise, because § 1605(a)(7) does not apply to claims for "property damage," Afghanistan's construction of the FSIA would leave victims of property damage caused by terrorist attacks in the United States without any means for obtaining jurisdiction over a responsible foreign sovereign, even if those victims are U.S. nationals and the responsible foreign sovereign is a designated state sponsor of terrorism. Congress simply could not have intended such absurd results when it provided additional rights to victims of terrorist attacks through the adoption of § 1605(a)(7).

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court affirm the judgment entered below.

July 9, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(A)

I, Paul J. Orfanedes, hereby certify that the foregoing Brief of Plaintiff-Appellee complies with the requirements of F.R.A.P. 32(a)(7) and contains 2,907 words according to the word-count function of the word-processing system used to prepare this brief.

July 9, 2010

/s/ Paul J. Orfanedes