



D.C. Circuit: USAID Worker Jailed in Cuba Can't Recover Damages from the Government

Insights

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On November 14, 2014, in *Alan Gross and Judith Gross v. U.S.A.*, a three-judge panel of the United States Court of Appeals for the D.C. Circuit unanimously held that a humanitarian aid worker, who sub-contracted with the United States Agency for International Development ("USAID"), could not recover damages that stemmed from his incarceration in Cuba. Relying on Supreme Court and D.C. Circuit precedent, the Court ruled that the foreign country exception to the waiver of sovereign immunity in the Federal Tort Claims Act ("FTCA") foreclosed the worker's negligence claims, as well as his wife's claims for loss of consortium, because his injuries arose in a foreign country. (*Alan Gross and Judith Gross v. U.S.A.*, D.C. Cir., Docket No. 13-5168, Decided November 14, 2014).

The Cuban Liberty and Democratic Solidarity Act of 1996 aimed "to assist the Cuban people in regaining their freedom and prosperity, as well as joining the community of democratic countries that are flourishing in the Western Hemisphere." USAID was one of the agencies of the federal government tasked with implementing this law. In furtherance of that goal, USAID entered into a contract with Development Alternatives, Inc. ("DAI"), which in turn contracted with Mr. Gross to train the Jewish community in Cuba to use and maintain information and communication technologies, such as mobile phones, wireless technologies, and personal computers. To complete this contract, Mr. Gross allegedly traveled to Cuba on several occasions, reporting back about the riskiness of this covert work. Mr. Gross alleged that on his fifth trip to Cuba in November 2009, he was apprehended by Cuban authorities and held as a political prisoner, where he was extensively interrogated and psychologically abused. In February 2011, he was charged with and convicted of committing "acts against the independence or territorial integrity of the state," and was sentenced to serve fifteen years in prison.

At the time the complaint was filed in D.C. District Court, Mr. Gross had been imprisoned in Cuba for almost three years. Gross alleged that DAI and USAID had negligently failed to warn him about the risks of his work in Cuba, to provide adequate protection to him, or heed his warnings about the dangers he was facing. Additionally, Gross alleged that USAID ignored various manuals, directives, and agreements on disclosure and training.

USAID and DAI both moved to dismiss Gross's claims, but DAI settled with Gross shortly thereafter. In its motion to dismiss, USAID argued that the court lacked subject-matter jurisdiction over the matter because it was entitled to sovereign immunity, under which the federal government and its

agencies are immune from suit unless that immunity is waived. In suing USAID, the plaintiffs relied on the Federal Tort Claims Act (“FTCA”) which makes the federal government liable for tort claims “in the same manner and to the same extent as a private individuals under like circumstances.” 28 U.S.C. §2674. However, the FTCA explicitly retains sovereign immunity for “[a]ny claim arising in a foreign country.” 28 U.S.C. §2680(k).

The Grosses made several statutory arguments for why the foreign-country exception to the FTCA should not apply. First, they argued that Gross’s injuries were the result of his work on a U.S. government project which was funded and overseen entirely from Washington, D.C. The Court rejected this argument, relying on the United States’ Supreme Court’s decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) which rejected this “headquarters analysis” which would “swallow the foreign country exception whole, certainly at the pleadings stage.” The Grosses also argued the exception should not bar Judith Gross’s claim for loss of consortium because her injuries took place entirely within the U.S. However, this argument had been rejected by the D.C. Circuit in *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), which held that the widow of a Guatemalan rebel killed by the CIA “cannot plead around the FTCA’s foreign-country exception simply by claiming injuries such as ‘emotional distress’ that are derivative of the foreign-country injuries at the root of the complaint.”

The Grosses also made a “novel” constitutional argument, invoking the Fourteenth Amendment’s Equal Protection Clause; they argued that “the Government has no justification for excluding them from the FTCA because ‘the sole basis for the foreign-country exception—is wholly inapplicable.’” Applying rational basis scrutiny, the District Court held that the FTCA’s “distinction between domestic and foreign injuries clearly has that rational basis: protecting the United States’ coffers from the whims of foreign law.” The District Court held further that even if domestic law applied, as the Grosses argued, the distinction would survive as rationally connected to the goal of limiting the government’s exposure to burdensome foreign litigation.

Having rejected all of the Grosses arguments, the District Court dismissed the complaint without prejudice as to the U.S. The Grosses then appealed to the D.C. Circuit, which unanimously upheld the District Court’s dismissal. In her opinion, Judge Judith W. Rogers adopted the District Court’s reasoning on the statutory argument and expanded on the constitutional argument. Taking on the Grosses contention that FTCA’s foreign-country exception fails to pass rational scrutiny as applied to their case because domestic, rather than foreign law applies, the Court held that distinction drawn by Congress need only be rational under the “‘current conditions’ that were before Congress when it enacted the statute.” The Court also noted that not all as-applied constitutional challenges require that the “fact-specific” analysis sought by the Grosses and that the Grosses had failed to identify any discovery needed to defend the jurisdictional grounds of the claim.

But perhaps the most important lesson to be drawn from this case is a practical one. Even though both the District and Appeals Court recognized the seriousness of the Grosses’ injuries, the government’s sound legal arguments based on well-established precedent won out. In a statement later endorsed by the Appeals Court, the District Court wrote that “the Court is in no way condoning

later endorsed by the Appeals Court, the District Court wrote that “the Court is in no way condoning what happened to Gross or implying he is to blame. Sympathy with his plight, however, is not a basis on which to circumvent clear precedent concerning the FTCA.”