Nos. 10-1687, 10-2442

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD VANCE, ET AL.,

Plaintiffs-Appellees,

v.

DONALD RUMSFELD and THE UNITED STATES OF AMERICA,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, HON. WAYNE R. ANDERSEN

BRIEF FOR APPELLANTS

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STATEMENT OF THE FACTS

A. Plaintiffs' Arrest and Allegations of Harsh Treatment.

Plaintiffs, Donald Vance and Nathan Ertel, are two United States citizens who were working in Baghdad's "Red Zone" in the latter part of 2005, as civilian contractors for a privately-owned Iraqi security services company, Shield Group Security ("SGS"). App. 77-79. Plaintiffs allege that, during the course of their employment, they became suspicious that SGS officials and persons associated with them were involved in massive illegal arms trading, stockpiling of weapons, kickback schemes, bribery, fraudulent contract procurement, and suspicious meetings with government officials. App. 80-90.

According to the complaint, Vance relayed his suspicions to an agent of the Federal Bureau of Investigation during a visit to Chicago, and agreed to continue to report any suspicions. App. 80. The agent put Vance in touch with several government officials in Iraq, and Vance and Ertel continued to provide information to them. Plaintiffs claim that, at some point, officials at SGS began to doubt plaintiffs' loyalty to the company. App. 80-81. On April 14, 2006, armed SGS agents allegedly confiscated plaintiffs' access cards which permitted them freedom of movement into the "Green Zone" and United States compounds. This action effectively trapped plaintiffs in the "Red Zone" and within the SGS compound. App. 92-93, ¶¶ 117-19.

Plaintiffs described this situation as being held "hostage," and claim that their government contacts instructed them to arm themselves and barricade themselves in a room in the SGS compound until United States forces could "rescue" them. App. 94, ¶¶ 124. They allege that United States military forces then came to the SGS compound to "rescue" them. *Id*. ¶ 125.

At that time, U.S. military personnel allegedly seized plaintiffs' property, which plaintiffs claim include "their personal laptop computers, Mr. Ertel's cell phone and Mr. Vance's digital and video cameras, as well as the associated data contained in these items." App. 94, ¶ 127. In addition, "one or more large weapons caches" were discovered on SGS' premises. App. 155.

Plaintiffs were initially taken to the United States Embassy. App. 94, ¶128. Plaintiffs subsequently were detained on suspicion of "supplying weapons and explosives to insurgent/criminal groups through [their] affiliation with [SGS]" and receiving stolen weapons and arms from coalition forces. App. 96-97, 149-55. Plaintiffs allege that these charges were fabricated and that, in reality, unknown government officials caused their "arrest" in retaliation for plaintiffs' "whistleblowing" activity. App. 95-96, ¶¶ 132-37.

Plaintiffs were sent to Camp Prosperity immediately after their "arrest," where they remained for approximately two days. App. 97-98, ¶¶ 140-43. Plaintiffs assert

that they were threatened with "excessive force" upon their arrival, and that during their short stay, they were held in solitary confinement and that the lights in their cells were kept on at all times. App. 97, ¶¶ 142.

Plaintiffs were then taken to Camp Cropper, a military facility near Baghdad International Airport. *Id*. ¶ 144. Plaintiffs allege that they were held in solitary confinement, housed in tiny and unclean cells, and "mostly deprived of stimuli and reading material." *Id*. ¶ 146. They allege that "[t]he cells were kept extremely cold, and the lights were always turned on, except when the electric generators at the camp would fail." *Id*. ¶ 147. They further allege that they were "purposefully deprived of sleep" that the cells were filled with loud heavy metal or country music, and that "[g]uards would pound on the cell doors" when they observed plaintiffs sleeping. App. 99, ¶ 149. Plaintiffs also complain that the drinking water was "often withheld," and that they "often were denied food and water completely, sometimes for an entire day." *Id*. ¶ 151.

Plaintiffs further complain of inadequate shoes and lack of access to necessary medical care. App. 99-100, ¶¶ 152-54. They allege, for instance, that delays in treating Vance's tooth problem resulted in having the tooth extracted, and that guards confiscated antibiotics and pain killers prescribed by the dentist, leading to an infection. *Id*. ¶¶ 153-54. They further allege that antacids to alleviate Ertel's ulcer

were "often withheld from him." App. 100, ¶155. Plaintiffs also allege that guards would conduct sham "shake downs" of their cells "apparently to keep them off-balance mentally." *Id*. ¶ 156.

The complaint also alleges that the guards at Camp Cropper "physically threatened and assaulted Plaintiffs" by, for example, purposefully steering them into walls when they were being transported while blindfolded. *Id*. ¶ 157. Plaintiffs also state that they "were constantly threatened that guards would use 'excessive force' against them if they did not immediately and correctly comply with every instruction given them." *Id*. ¶ 158. Plaintiffs alleged that they were "continuously interrogated by military and civilian United States officials" while at Camp Cropper, and that their requests for an attorney were denied. App. 149-53, ¶ 165-66.

Ten days after plaintiffs' arrival at Camp Cropper, a military detainee status review board was convened to determine whether plaintiffs should be detained as security internees. App. 104, 149-53. That board ultimately recommended Ertel's immediate release as an "innocent civilian" and recommended Vance's continued detention as a security detainee. App. 111. Ertel was released approximately six weeks after his initial detention. App. 111-12. After additional investigation, on July 20, 2006, the military also released Vance, whose detention lasted approximately three months. App. 112.

Plaintiffs subsequently requested the return of the property seized at the time they were taken into custody. Military personnel stationed in Iraq conducted an extensive search for plaintiffs' property, resulting in the return of Vance's laptop computer, but could not locate any additional property. App. 156-59.

B. The Complaint Against Former Secretary Rumsfeld.

Plaintiffs brought this action against former Secretary of Defense Rumsfeld (in his individual capacity) and numerous unidentified defendants, alleging myriad constitutional violations. In regard to Rumsfeld, the complaint asserted three counts: a claim (apparently based on substantive due process) for "dictating torture, cruel, inhuman and degrading treatment" (Count I); a procedural due process claim based on the denial of various procedural rights (Count II); and a claim for denial of access to courts and counsel (Count III). App. 125-33. The district court dismissed counts II and III, and those counts are not at issue in this appeal.

In Count I, plaintiffs characterize their treatment as "torturous, cruel, [and] inhuman," asserting that it included "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, *incommunicado* detention, falsified allegations, and other psychologically-disruptive and injurious

techniques." App. 125-26, ¶ 259. Plaintiffs allege that this treatment "was intentionally used on Plaintiffs for its perceived value as an interrogation tactic." App. 126, ¶ 261. They also allege that many persons detained at Camp Cropper "were treated far better and more humanely." *Id*. ¶ 260.

According to plaintiffs, their alleged treatment was the result of "policies and practices" initiated by then-Secretary Rumsfeld. *Id*. ¶ 262. Plaintiffs cited two instances in which Secretary Rumsfeld authorized the use of certain interrogation techniques for detainees at Guantanamo Bay, Cuba, rather than at Camp Cropper. App. 118-19, ¶¶232, 234. They acknowledged, however, that even those authorizations were rescinded *before* their detention. *See id*. ¶ 233.

Plaintiffs also alleged that Secretary Rumsfeld sent Major Geoffrey Miller to Iraq in August 2003 to "Gitmo-ize" Camp Cropper, and by doing so "tacitly" authorized the use of harsh interrogation techniques. App. 119, ¶¶ 236-37. Plaintiffs also cited a memorandum signed in September 2003 by Lieutenant General Ricardo Sanchez, Commander of the Coalition Joint Task Force, authorizing the use of interrogation techniques such as "yelling, loud music, light control, and sensory deprivation." App. 119-20, ¶ 238. According to plaintiffs, General Sanchez modified the order one month later, but "continued to allow interrogators to control the lighting, hearing, food, shelter and clothing given to detainees." App. 120, ¶ 239.

As the complaint acknowledged, all of the policy directives, even assuming *arguendo* they applied to U.S. citizens in Iraq, were superseded by the Detainee Treatment Act (DTA), Pub. L. No. 109-148, enacted on December 30, 2005 (prior to plaintiffs' detention). App. 121, ¶ 242. The DTA provided that no person in Department of Defense ("DoD") custody could be subject to any treatment or interrogation technique that is not authorized in the Army Field Manual. *Ibid*. According to plaintiffs, the Army Field Manual on Intelligence Interrogation "limited the allowable techniques to those consistent with international norms which forbid cruel, inhuman and degrading treatment." *Id*. ¶ 243. Plaintiffs allege, however, that on the same day Congress enacted the DTA, Secretary Rumsfeld secretly added "ten pages of classified interrogation techniques" to the Manual that "apparently authorized, condoned, and directed the very sort of violations that Plaintiffs suffered." App. 121-22, ¶ 244. The complaint states that, "[t]o the best of plaintiffs' knowledge, the December Field Manual was in operation during their detention." App. 122.

Finally, the complaint states that, "alternatively," Secretary Rumsfeld "reserved the use of the harsher interrogation techniques to his prior, case specific approval." App. 127, ¶ 267. Plaintiffs "therefore infer that Defendant Rumsfeld specifically authorized some or all" of their mistreatment. *Ibid*. In addition, on the basis of alleged policies requiring the prior approval of Secretary Rumsfeld prior to releasing

a detainee, plaintiffs "infer" that Secretary Rumsfeld had "actual knowledge that they were being detained and mistreated" and "failed to intervene sooner to terminate this mistreatment." *Ibid*.

Plaintiffs sought judgment against Secretary Rumsfeld for unspecified "actual and punitive damages," as well as costs and fees and "any and all other relief to which they may appear entitled." App. 127.

C. The Complaint Against The United States.

Plaintiffs' amended complaint also included a claim against the United States under the APA, seeking return of the laptops and other material taken while they were placed in custody. Plaintiffs allege that they "have tried to secure the return of their property . . . by petitioning the United States Army . . . and by working with the United States Department of Justice." App. 147, ¶ 383. They claim that, with the exception of Vance's laptop (which had been returned), the Army "refused to produce" any of their property and the Department of Justice ("DOJ") has said "that the government does not intend to return any other property." *Id*. ¶¶ 383-84. Characterizing the Army's "ruling" and DOJ's "statement" concerning their property as "final agency actions" that were arbitrary and capricious, plaintiffs asked the court to order "the return of all of [their] personal property including computers, other electronics, and the data included therein." App. 147-48.

D. The District Court's Decision on Secretary Rumsfeld's Motion to Dismiss.

Secretary Rumsfeld moved to dismiss the three counts against him, arguing: (1) that "special factors" preclude recognizing a *Bivens* action for policies involving the detention and interrogation of detainees in a foreign war zone; and (2) that Secretary Rumsfeld is entitled to qualified immunity because plaintiffs had not sufficiently alleged his personal involvement in the alleged constitutional violations, and had not sufficiently alleged the violation of clearly established constitutional rights. The district court granted the motion in part and denied it in part. The court dismissed count II (procedural due process) and count III (denial of access to the Courts). App. 34-39. However, the court denied the motion to dismiss Count I, the substantive due process count.

The court held that special factors do not preclude the creation of a *Bivens* remedy. The court rejected the contention that the political branches, and not the courts, should determine whether the creation of a money damage remedy is warranted in the context of military judgments in a war zone. The court based this conclusion on two considerations it deemed "important" to the special factors analysis.

First, the district court observed that Count I of the complaint "requires us only to determine whether the judiciary may properly provide a *post hoc* remedy to American citizens who allege that, during a period of war, they were tortured." App. 29. Accordingly, the court reasoned, Count I "does not require this court to govern the armed forces" and does not "require that we challenge the desirability of military control over core warmaking powers." App. 30.

Second, the district court found "important" the "American citizenship of plaintiffs Vance and Ertel." App. 31. The court therefore distinguished cases refusing to recognize a *Bivens* remedy to challenge wartime interrogation or detention policies, characterizing those cases as "directed at the prospect of a judicial remedy by non-citizens engaged in battle against the United States." App. 31-32.

The court also found the allegations in the complaint sufficient to allege Secretary Rumsfeld's personal involvement in the plaintiffs' alleged injuries. The court observed that "plaintiffs' complaint against Rumsfeld at this stage can proceed only if it properly alleges that Rumsfeld created a policy that expressly authorized those under his command to carry out a constitutional violation." App. 9. The court then cited "a number of key dates and facts" that it said supported plaintiffs' allegations of Secretary Rumsfeld's personal involvement. These included the superseded Guantanamo policies, the policy issued by General Sanchez, and the

allegation that Secretary Rumsfeld had added "ten pages of classified interrogation techniques" to the Army Field Manual. App. 9-11. The court then held that, although plaintiffs' allegations of Secretary Rumsfeld's "supposed knowledge of cruel and inhumane treatment of detainees in Iraq" is insufficient to demonstrate his personal involvement, these allegations "give some support to the core assertion regarding Rumsfeld's role as the architect of the detainee treatment methods at issue in this case." App. 11.

The court also held that Secretary Rumsfeld is not entitled to qualified immunity, concluding that "the allegations set forth by plaintiffs are comprehensive enough to merit an invocation of the line of cases assessing torture in a constitutional light." App. 17. The court held that, accepting the fact that the treatment methods alleged by plaintiffs were in fact used, a court "might plausibly determine" that the conditions were torturous. *Id*. Even if some of the alleged conduct may not shock the conscience, the court held, "plaintiffs have set forth the cumulative allegations necessary to state a claim of mistreatment." App. 17-18.

The court also held that the right of a citizen to the protection of the due process clause, even in a foreign war zone, was well established. App. 21-22. The court then concluded that a reasonable person in Secretary Rumsfeld's position would

know "that the application of torturous treatment methods against American civilians in Iraq might give rise to a constitutional violation." App. 24-25.

E. The District Court's Decision on the United States' Motion to Dismiss.

In a separate motion, the United States moved to dismiss the APA claim, asserting, among other things, that the action was barred by 5 U.S.C. § 701(b)(1)(G). That provision states that an "agency" subject to suit does not include "military authority exercised in the field in time of war or in occupied territory." The district court denied the motion, concluding that "the record does not contain sufficient facts to demonstrate whether the military authority exception applies * * *." App. 46. Characterizing the issue as "fact intensive," the court declared that the statute does not "exempt the military as a whole or exempt all wartime military activities unrelated to armed conflict." App. 45. The district court reasoned that the "in the field" requirement may not be met because "[p]laintiffs have not challenged the seizure of their property, but rather the United States' decision not to return it when asked to do so." *Id*. The decision not to return property, the court held, "is not inherently an exercise of authority from the field of battle." *Id*. The court then stated that "further discovery is needed to sort out the details" of the location of the property. *Id.*

The district court also stated that "it is not clear (and there are no facts in the record) that a commander in the field is causing the refusal to return Plaintiffs' property, another fact specific question that the courts have found to be determinative." App. 45. Finally, the court reasoned that "there is no evidence to suggest where Plaintiffs' property is and whether some or all of Plaintiffs' property is outside the military's possession." App. 46. The court held that "if discovery demonstrates that Plaintiffs' property has been transferred to a non-military agency or is no longer in the field, then the APA's 'military authority' exception would not apply." *Id*.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision denying a motion to dismiss on the basis of qualified immunity. *Alvarado v. Litshcer*, 267 F.3d 648, 651 (7th Cir. 2001). The question whether special factors preclude a *Bivens* claim also is subject to *de novo* review. *See Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009). The question whether the action against the United States is precluded by the APA's "military authority" exception is a question of law subject to *de novo* review. *See Thomas v. GMAC*, 288 F.3d 305, 307 (7th Cir. 2002).