Borders of order? Borders of disorder?

Between the State and the Citizen

*Elspeth Guild*

My understanding of the concepts of belonging and foreignness and their reflection in law have been formed and guided by the deeply human analysis of Kees Groenendijk. His constant questioning of the justifications for differential treatment of individuals has provided me with the example for my own work. This investigation into the struggle of one man for the protection which citizenship offers is my way of thanking Kees for his tremendous generosity and academic leadership over so many years. I look forward to continuing to collaborate with him for many years to come.

Introduction

The modern state world depends on hard borders of sovereignty which include strict rules on the acquisition of citizenship so the state can determine for whom it is responsible and territorial borders which establish the territory within which the state is responsible for the treatment of persons. This system of sovereignty is presided over by a bureaucracy which together with the territory and people form the Weberian definition of the state.¹ The agency of the individual in this system of determination of identity and place is excluded as far as possible by European states. As the rules on acquisition of citizenship have changed in most EU Member States over the five year period 2002 – 2007, the direction of the changes has been almost without exception to make it more difficult for the individual to determine or choose his or her citizenship.

The concerns regarding political violence in Europe – commonly called the anti-terrorism measures – have found expression on the issue of the individual as foreigner and the individual as citizen. The state’s control over the identity of the individual in the form of citizenship has become increasingly linked with the question of political violence – the obligation of the individual to be loyal to the state as part of the citizenship package has rise to the fore after a long period of dormancy after WWII.

The relationship of identity, citizenship and political violence has been the centre of a legal debate taking place among courts in a number of jurisdictions including in the UK. In order to understand better the meaning of the relationship I will examine the case of David Hicks an Australian national who was accused (and pleaded guilty before a military tribunal in the US detention camp in Guantanamo Bay) of being the “Australian Taliban”.

* Professor of European Immigration Law, Centre for Migration Law, Radboud University Nijmegen, and partner at the law firm Kingsley Napley, London.

The Strange Case of David Hicks

David Hicks was detained from 11 January 2002 until 30 May 2007 at the US detention centre in Guantanamo Bay. The centre was established hastily at the end of 2001 as a place where the US military could send suspected Al Qaeda/Taliban members or sympathizers for indeterminate periods and without charge or trial. Many countries made representations to the US authorities for the release of their citizens. By mid 2005 the UK had succeeded in obtaining the release of all the UK nationals at the detention centre and they were free in the UK. David Hicks was, however, still there in 2007 although an agreement had finally been reached between the US and Australian authorities for his return to Australia to serve a prison sentence there.

David Hicks was born an Australian citizen on 7 August 1975. His mother was a British citizen who had been born in the UK. Had Hicks been born after 1 January 1983 or had his father been a British citizen (born in the UK), then he would have been born a British citizen. Had he been a British citizen then it would have fallen to the UK authorities to seek his release from the Guantanamo Bay detention centre.

The detention centre at Guantanamo Bay caused substantial problems for the US authorities. The then US Defense Secretary, Donald Rumsfeld who was responsible for the establishment of the centre did so to create a place where persons suspected of being supporters of the Taliban regime which ruled Afghanistan until ousted by a US led but UN sanctioned military intervention in October 2001 could be placed. The US authorities believed that the Taliban regime supported Al Qaeda which it held responsible for the attacks on the World Trade Centre in New York, the Pentagon in Washington and the crash of a plane in Pennsylvania on 11 September 2001. Rumsfeld stated that these persons would not be viewed in legal terms as prisoners of war but as unlawful combatants and as such “they do not have any rights under the Geneva Conventions” (which regulate the position of foreign soldiers held by an enemy army). The way in which individuals found themselves in the detention centre appears to have been highly irregular according to the accounts of those who have been released and the US authorities themselves. The treatment which the detainees received both in their transport to the island based and while there have been characterised as torture.

The detainees were originally held without the intention of bringing them to trial. Under pressure the US authorities established a military tribunal to try at least some of them. Approximately 700 persons had passed through the detention centre by 2006, many were still there, including David Hicks. Fuller accounts of the Guantanamo Bay debacle can be found on the Human Rights Watch website and elsewhere. What is of interest here is what happens to the relationship of responsibility between the state and its citizens in such cases. As mentioned above, because the US authorities refused to

---

5 Rose, supra, p. 3.
categorized the detainees as prisoners of war, they were able to reject the application of international law rules on the treatment of prisoners of war – contained in the 1949 Geneva Conventions. While there was much contention about the legal validity of this decision no court with the power to force the US authorities to act has yet done so.

**Whose Law Applies? What authority must provide protection?**

If international law does not protect persons in this position and the national authorities which are holding the individual do not provide any remedy, where can the individual look for relief? Citizenship comes into the picture here – the duty of the state to protect its citizens against abuse at the hands of foreign governments which is the counter part of the citizen’s duty of allegiance. David Hicks sought, through his lawyers, the intervention of the Australian authorities. They refused against which refusal David Hicks brought legal proceedings in Australia to force his government to seek his return to Australia and out of what the UK’s highest court, the House of Lords, had described as a “legal black hole”.

On 8 March 2007 the Federal Court of Australia found that David Hicks’ claim that the Australian government owed him some duty (though exactly what duty is not yet clear) was accepted in so far as the judge ordered that the matter proceed to full trial. According to the decision, the Australian authorities while acknowledging that David Hicks is an Australian national declined making any request to the US authorities for his repatriation. The reasons for this refusal was, according to Hicks’ statement of claim, “because Mr Hicks had committed no offence against any law of the Commonwealth [of Australia] or of any of the States or Territories, or against or under the common law in the Commonwealth, and because no Australian Court would have jurisdiction to try Mr Hicks for any criminal offence for which he may be punished in accordance with any such law” (para 23). In other words, the Australian authorities accepted or were unwilling to challenge the argument of the US authorities that Mr Hicks was a terrorist threat and could be held indefinitely without trial in the Guantanamo Bay detention centre.

**Loyalty, Protection and the Individual – the UK courts and David Hicks**

Mr Hicks sought to register as a British citizen in October 2005 under the UK law which permits the children of British mothers who had not been able to acquire citizenship from them because of discrimination on the basis of gender in British nationality law before 1983. As the application is one which does not involve discretion by the state – that is to say so long as the individual fulfils the objective criteria he or she is entitled to register as a British citizen, the UK authorities decided that they must accept the application but:

---

8 Abbasi v Secretary of State [2002] EWCA Civ 1598.  
“The Secretary of State proposes to proceed as follows. He is considering acceding to the application for British citizenship but at the same time making an order for the deprivation of citizenship under section 40 of the British Nationality Act on the grounds that your client has done things seriously prejudicial to the vital interests of the UK. Having taken legal advice, it appears to the Secretary of State that this is the proper method under the legislation to balance the competing interests in this case, and it means that your client would have the procedural protection of being able to appeal to the Special Immigration Appeals Commission in respect of any decision that he should be deprived of citizenship” (para 3).10

Mr Hicks sought judicial review of the decision of the UK authorities on the basis that it was illegal. The UK court accepted that the only reason Mr Hicks sought British citizenship was because he considered that he had a better chance of being released from Guantanamo Bay detention if he were a British citizen. The judge noted that the UK authorities had, by April 2006, successfully negotiated the release of all British nationals at the centre – effectively indicating that Mr Hicks was correct in his supposition that the UK authorities were more solicitous of the freedom of their nationals than their Australian counterparts. The case turned on the legal measures on the basis of which an individual can be deprived of British citizenship – what are the legitimate grounds and what are illegitimate. The same law which permitted Mr Hicks to register as a British citizen also permitted the UK authorities to deprive any British citizen of their citizenship (however acquired) on the grounds that “the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of: (a) the United Kingdom, or (b) a British overseas territory.”11

The UK court found against the authorities on the ground that anything which an individual did before he or she became British could not justify deprivation of citizenship after the individual acquired it. Only acts undertaken after an individual acquired citizenship could warrant deprivation. In order to reach that decision the court had to consider the basis on which the state can withdraw citizenship. At the heart of the argument is the concept of disloyalty and disaffection. In a decision shortly after WWII the UK courts had upheld the principle that a non-citizen can be guilty of disloyalty and hence treason in a judgment which has been much criticized.12 However, in this case the court held that the defendant by holding and using a British passport asserted and maintained a claim to continued protection of the Crown and thereby pledged the continuance of his fidelity. The principle is one of reciprocal duties – on the one hand the pledge of fidelity by the individual on the other protection by the state. In the case of Hicks, the UK authorities did not seek to argue that David Hicks had done anything which constituted disloyalty. Instead they argued that the second historical legal ground for withdrawal of citizenship applied – disaffection. The court defined disaffection as wider than disloyalty. It occurs

10  R v SSHD ex p Hicks.
12  Joyce v DPP [1946] AC 347.
“when an individual has by word or deed displayed active hostility to Her Majesty (as representing the United Kingdom) by showing himself unfriendly to the Government of the United Kingdom or hostile to its vital interests”.  

The court rejected the UK authorities’ argument that there could be a duty in citizenship to refrain from disloyalty or disaffection which predates the reciprocal duty of the state to protection of the citizen. The judge giving the lead opinion stated baldly

“What none of these propositions establish [i.e. the arguments of the UK authorities] or come close to establishing, is that conduct of an Australian in Afghanistan in 2000 and 2001 is capable of constituting disloyalty or disaffection towards the United Kingdom, a state of which he was not a citizen, to which he owes no duty and upon which he made no claims” (para 37).

UK higher courts are composed of more than one judge and each judge is entitled to write an opinion as part of the decision. In the Court of Appeal judgment on David Hicks, all three judges agreed on the outcome but one judge added a further consideration. The other British detainees at the Guantanamo Bay detention centre were also dual nationals holding citizenship of a country other than the UK as well as that of the UK. The judge notes that the UK authorities at no time sought to withdraw their British citizenship from them. The lawyers for David Hicks argued that seeking to deprive David Hicks of British citizenship constituted discrimination. The UK authorities argued that they have a discretion which they are entitled to exercise on this point (i.e. whether to seek to withdraw citizenship or not) and that in the exercise of that discretion the Secretary of State is entitled to take into account the extent of the links, including family links, which those British citizens have with the UK. Further, as David Hicks is an Australian citizen he is entitled to the protection of the Australian government. His links with the UK were weak according to the UK authorities. Indeed, the UK authorities argued that the other British citizens who had been held in Guantanamo Bay had held that citizenship before they were captured and taken there. The second judge in the UK court approved of this argument confirming his opinion that the UK authorities were entitled to distinguish between David Hicks and the other British citizens and to provide them with a higher level of protection. The only basis for this difference of treatment is the way in which and the time when David Hicks obtained British citizenship.

This leads to the conclusion that the UK authorities are entitled to a discretion to provide greater or lesser protection to British citizens abroad depending on how they acquired their citizenship and when. However, it seems clear that the judge’s reasoning was much influenced by the fact that David Hicks holds also Australian citizenship and that on account of his family and social links that country ought to take responsibility for him not the UK.

---

13 Para 24.
Sovereignty, the State and David Hicks in the Australian Court

David Hicks was captured by the Northern Alliance in Afghanistan in November 2001 while he was at a taxi stand and he was handed over to the US authorities in December 2001 on the basis that he was a supporter of the former Taliban regime there. When he was detained there was an armed conflict between the Northern Alliance and other groups against the Taliban which had been in power in the country. US forces were participating in the conflict on the side of the Northern Alliance. He states that he took no part in this conflict. He was taken to the Guantanamo Bay detention centre by the US authorities around 11 January 2002. As the judge pointed out in his judgment the US authorities

“have never announced any intention to try Mr Hicks in relation to any offence against United States municipal law, or with any offence allegedly committed by him within the territory of the United States or within the jurisdiction of any of the civil courts of the United States” (para 8).

The US authorities stated that David Hicks committed a belligerent act for the Taliban in the Afghan conflict but pressed no charges against him until 2007. David Hicks’ case was caught up in the US Supreme Court decisions on the lawfulness of the Military Commissions constituted to try persons detained in Guantanamo Bay, but this part of the history is beyond the remit of this article.14

The Australian authorities which endorsed the US led intervention in Afghanistan and later participated as well in the US led invasion of Iraq refused publicly to request David Hicks return to Australia. David Hicks family and friends began a substantial campaign to seek to persuade the Australian authorities to protect David but there was great resistance for a substantial period of time. A movie was made and commercially released on the plight of David Hicks – Hastings v Bush – which provided substantial information about the life of David Hicks and his activities in Afghanistan.

David Hicks brought a challenge in the Australian High Court demanding that the Australian authorities seek his return to Australia. He claimed that his wrongful internment was the responsibility of the Australian authorities, not only the US ones. Various Australian authorities had made statements to the effect that the Australian government would not seek the return of David Hicks because if he were brought back to Australia he may not be able to be prosecuted under Australian law (which begs the question whether he has committed any crime under Australian law and if the answer is negative why should he be convicted of anything in that country?). Secondly, the Australian authorities had confirmed that they have encouraged the US authorities to charge and try David Hicks even though the rules and standards of those trials before the Military Commissions which apply to those persons detained in Guantanamo Bay do not conform to international law fair trial standards to which the US is bound and have been repeatedly struck down for fair trial shortcomings by the US Supreme Court.

The Australian authorities obtained a judgment at first instance that the proceeding should be stopped because there was no reasonable prospect of success. This decision

was overturned on appeal and it is that appeal judgment decision which is of interest here as it reveals the tensions in the relationship of sovereignty, the state, the individual and the role of the courts in that tension.15

The Australian authorities made two main arguments on why the court should not determine the matter. First, it stated that to consider that matter would require the Australian court to pass judgment on the legality of acts of a foreign sovereign government, something which under the doctrine of Act of State courts must refrain from doing. Secondly the Australian authorities argued that the issue impacts on or relates to foreign relations and gives rise to non-justiciable questions such that there is no matter on which the court can or should adjudicate – in other words, the affair is one of foreign relations and negotiation not court justice.

David Hicks’ lawyers argued that Hicks was subject to unlawful detention by a foreign power which had no intention of bringing him before a lawfully constituted court on lawful criminal charges. Further, the Australian authorities have been aware of this since his arrival in Guantanamo Bay in 2002 but have done nothing to seek his return from this unlawful captivity. He argued that Australia owes a duty of protection to him or has a function to protect as an Australian citizen overseas. He accepted that the Australian authorities have a discretion with respect to the state’s protective duty. However, the exercise of that discretion is subject to the law and to review by the Australian courts.

The judge disagreed with the Australian authorities about how and where the obligations owed by the state to a citizen abroad are to be determined. Notwithstanding the issues of negotiations among states, he found that the court was entitled to hear evidence and review the situation of David Hicks and the arguments of the authorities. He considered that neither the doctrine of Act of State nor the principle of non-justiciability were sufficient to justify rejecting the claim of David Hicks at that point in the proceedings. Thus he did not rule out the possibility that at some future point in proceedings the Australian authorities might succeed in such an argument. Further, the judge found that David Hicks’ claim to the Australian state protection against unlawful detention was justified. While the Australian authorities argued that as they had no control over the detention of David Hicks they should be under no duty as regards that detention. The judge was not persuaded – noting that the UK had succeeded in repatriating its citizens from Guantanamo Bay.

On the question of the right of an Australian judge to find the acts of foreign governments illegal, the judge was persuaded that as deprivation of liberty is by definition unlawful until it is rebutted by evidence of lawful authority it must be accepted in law that David Hicks detention is unlawful (para 53). As to the discretion of the Australian authorities regarding how and in what way they protect their citizens abroad, the judge found that the exercise of that discretion was subject to judicial control. In particular, where there is evidence that the exercise of the discretion has been tainted by irrelevant considerations such as whether the individual could be tried in Australia, it is for the judge to determine what is relevant and what is not. Further, the fact that the Australian authorities were encouraging their US counterparts to try David Hicks under a procedure which offends against the rules of fair trial both in Australia and internationally and

15 Hicks v Ruddock [2007] FCA 299.
fails to comply with the Geneva Conventions is not a consideration which should determine the exercise of the discretion of the authorities on how to protect the citizen.

While the judge accepted that the duty of the Australian authorities to protect their citizens abroad is not one on which an individual can rely in a court, nonetheless this does not mean that the duty has no legal consequences (para 65). It is the scope of this legal consequence for the state which is subject to judicial control.

Conclusions

When the citizen is abroad, in the international community he or she remains attached to his or her state through the duty of protection which is part of citizenship rights and practices. The activities of the individual may disrupt international relations, for instance when individuals engage in political violence on the territory of a state other than that of their nationality. The extent to which the state is obliged to provide protection to their citizens often then becomes contested. If interstate relations depend on the individual citizen's interest in protection being subordinated to the claim of a foreign state to act in a certain way towards the individual, what protection exists for the individual?

To examine this problem I have taken the example of three states which strong sovereignty claims, the USA, Australia and the UK. I have followed the movement of one individual through the authority of these three states on the basis of citizenship claims. The US authorities claim to treat David Hicks in a certain way (ie indefinite detention) is based on his status as a foreigner. The US authorities have accepted that they have no such right to hold US citizens indefinitely in Guantanamo Bay. The UK authorities sought to avoid responsibility for David Hicks by depriving him of citizenship. By so doing they would then have no obligation to set about trying to convince the US authorities to release him. The Australian authorities placed the interests of interstate relations with the USA above their duty to protect their citizen, effectively subordinating his position to the wider Australian interests in good relations with a powerful ally.

In this case, the claim of David Hicks to liberty based on citizenship was rejected by the two states which were liable under the principle of reciprocity of rights and duties of citizenship. In both cases David Hicks turned to the courts to determine whether the state's lack of protection to him was lawful. In the UK case, the court thwarted the state's claim to be entitled to deprive David Hicks of citizenship but left open the door that even with British citizenship the UK authorities were entitled not to protect him in the same way that they would be required to protection British citizens who had been born as such and had strong links with the UK. In the Australian case, the judge held that the claim of sovereignty by the Australian authorities could not survive the claim of the citizen to protection. The state was answerable to the courts for the way in which it protects the citizen abroad, even where this may result in discomfort in international relations.