



Neutral Citation Number: [2023] EWCA Civ 796

Case No: CA-2023-000726

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT**  
**THE HONOURABLE MR JUSTICE SWIFT**  
**[2023] EWHC 652 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/07/2023

**Before :**

**LORD JUSTICE BEAN**  
**LORD JUSTICE COULSON**  
and  
**LORD JUSTICE WILLIAM DAVIS**

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**Between :**

**THE KING**

**Appellant**

**(on the application of KANU)**

**- and -**

**THE SECRETARY OF STATE FOR FOREIGN,  
COMMONWEALTH AND DEVELOPMENT AFFAIRS**

**Respondent**

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**Charlotte Kilroy KC, Tatyana Eatwell and Isabel Buchanan (instructed by Bindmans LLP)**  
**for the Appellant**

**Sir James Eadie KC, Malcolm Birdling and Jagoda Klimowicz (instructed by GLD) for the**  
**Respondent**

Hearing date : 22 June 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.00am on 7 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Bean:**

1. This appeal from a decision of Swift J (“the judge”) raises important issues concerning the scope of the obligation on the Foreign Secretary in relation to requests for consular assistance in respect of British nationals detained abroad and the proper interpretation and application of the decision of the Court of Appeal in *R (Abbasi) v Secretary of State for the Foreign and Commonwealth Office* (2003) UKHRR 76. I gratefully adopt the judge’s narrative of the essential facts.
2. The Appellant is the brother of Nnamdi Kanu (“Mr Kanu”). Mr Kanu is the leader of a group called the Indigenous People of Biafra (“IPOB”). IPOB was founded in 2012 and is a separatist group that aims at the restoration of a Biafran Republic. Mr Kanu holds both Nigerian and British nationality.

*What has happened to Mr Kanu.*

3. Since 27 June 2021, Mr Kanu has been detained in Nigeria pending trial on criminal charges. Mr Kanu's case is a matter of significant public controversy in Nigeria. He was first arrested, charged and detained in October 2015. The lawyer representing him in the criminal proceedings, Aloy Ejimakor, has made a statement in these proceedings explaining that the criminal charges all arise from Mr Kanu's activities as leader of IPOB.
4. On 28 April 2017, Mr Kanu was granted bail, and from that time lived with his parents in Abia State. On 10 September 2017, his parents' home was subject to what was later described by the High Court of Abia State as a "military invasion". In those proceedings, in a judgment given on 19 January 2022, the High Court concluded that the Nigerian state had attempted to kill Mr Kanu. Sometime after 10 September 2017, Mr Kanu fled Nigeria. In March 2018 an amended indictment was prepared in the criminal proceedings outstanding in Nigeria. Mr Kanu remained outside Nigeria, first in Israel, then in the United Kingdom. By May 2021, Mr Kanu was in Kenya.
5. What happened then has been the subject of proceedings in Nigeria: civil proceedings determined by the Umuahia Judicial Division of the Federal High Court, in a judgment given on 26 October 2022; and criminal proceedings decided by the Abuja Judicial Division of the Federal Court of Appeal of Nigeria on 13 October 2022. The findings reached in those proceedings (taken together) are that on 19 June 2021 at Nairobi International Airport, Mr Kanu was abducted by agents of the Nigerian state. The kidnappers held Mr Kanu in Kenya for some eight days. During that time, he was subject to inhuman and degrading treatment. On 27 June 2021, he was illegally moved from Kenya to Nigeria and detained in Nigeria.
6. On 29 June 2021 Mr Kanu was taken to court and remanded. Thereafter, the indictment against him was amended on three further occasions: first on 13 October 2021 and 20 October 2021 when it expanded from 4 charges to 7 charges; and then on 17 January 2022 when it expanded again to cover 15 charges. Mr Kanu has pleaded not guilty to all charges.
7. In its judgment of 13 October 2022, the Court of Appeal ruled on preliminary objections raised by Mr Kanu. The court unanimously concluded that he had been illegally removed from Kenya. In his judgment Oludotun Adefope-Okojie JCA said:

"It is clear ... that the Respondent, having removed [Mr Kanu] from another country without complying with the processes for his removal, was in flagrant breach of these laws and the fundamental human rights of [Mr Kanu].

It was incumbent on the Respondent, who was the arresting authority, to prove the legality of [Mr Kanu's] arrest, abduction in this case ... This has however not been done by the Respondent.

...

The consequence of [section 15 of the Nigerian law on extradition], I hold, is that [Mr Kanu] is prohibited from being detained, tried or otherwise dealt with in Nigeria for or in respect of any offence allegedly committed by him for his extraordinary rendition to Nigeria. The lower court thus has no jurisdiction, I further hold, to try [Mr Kanu] on Counts 1, 2, 3, 4, 5, 8 and 15 which were retained by it, being charges allegedly committed by [Mr Kanu] prior to his extraordinary rendition.

In addition, by the forcible abduction and the extraordinary rendition of Mr Kanu from Kenya to this country on the 27th day of June 2021, in violation of international laws and state laws, the lower Court or indeed any Court in this country is divested of jurisdiction to entertain charges against [Mr Kanu] and I so hold."

The other judges of the court gave concurring judgments.

8. On its own terms, the decision of the Court of Appeal brought the criminal proceedings against Mr Kanu to an end. However, on 18 October 2022, the prosecutor filed an appeal with the Nigerian Supreme Court against the decision of the Court of Appeal. On 28 October 2022, the Court of Appeal granted the prosecutor's application to stay the effect of its judgment pending that appeal. The appeal has not yet been heard.
9. Mr Kanu remains in detention. He is held in solitary confinement in Abuja. Mr Ejimakor explains that Mr Kanu is being held in "dire" conditions which are affecting his physical and mental health. Mr Ejimakor says that Mr Kanu appears increasingly frail; that the heart condition that has affected him for a number of years has got worse; and that he has been denied access to specialist medical treatment.
10. Mr Kanu's detention is the subject of attention by the UN Working Group on Arbitrary Detention ("UNWGAD"), part of the Office of the UN High Commissioner for Human Rights. On 4 April 2022 the Working Group adopted Opinion 25/2022 which concerns Mr Kanu's treatment in both Kenya and Nigeria. The Working Group had previously, on 30 December 2021, raised concerns about Mr Kanu's treatment, in particular his removal from Kenya, with the government of the Republic of Nigeria.

The Opinion concluded, among other matters, that Mr Kanu was being arbitrarily detained and should be released.

11. In two sets of civil proceedings, Mr Kanu was awarded substantial damages: by the High Court of Abia State in respect of the events of 10 September 2017; and by the Federal High Court for what happened in Kenya in June 2021.

*The decisions challenged*

12. The decisions under challenge are contained in letters from the Secretary of State dated 14 April 2022 and 9 June 2022. The Appellant's solicitors have been in correspondence with the Secretary of State since shortly after Mr Kanu's rendition. The initial focus of the correspondence was whether officials from the British High Commission could obtain permission to visit Mr Kanu. The British High Commission requested permission by a *note verbale* sent on 1 July 2021 but, for a significant period, the Nigerian authorities provided no response. On 22 July 2021, the Appellant's solicitors sent a letter before action to the Secretary of State contending that the failure to provide consular assistance, and in particular the failure to take steps to do so beyond simply asking the Nigerian authorities, was unlawful.
13. In a letter dated 24 September 2021, the Government Legal Department, for the Secretary of State, summarised the steps taken with the Nigerian authorities in respect of Mr Kanu's case.

"Our client would like to reassure you that Mr Kanu's case is regularly being raised with the Nigerian Authorities. The steps which have been taken since we last updated you on this in our letter of 26 July include:

- a. On 28 July 2021, Mr Kanu's case was raised during a meeting between Minister Duddridge and Nigerian Foreign Minister Onyeama.
- b. On 29 July 2021, the Prime Minister raised Mr Kanu's case with President Buhari during a bilateral meeting.
- c. On 6 August 2021, Minister Duddridge raised Mr Kanu's case in a letter to Nigerian Foreign Minister Onyeama.
- d. On 12 August 2021, British High Commission officials met with the Nigerian Ministry of Foreign Affairs Consular Director and raised Mr Kanu's case.
- e. On 19 August 2021, the Acting High Commissioner met Nigerian Foreign Minister Onyeama.
- f. On 27 August 2021, British High Commission officials met with the Nigerian Ministry of Foreign Affairs Consular Director and raised Mr Kanu's case.

g. On 13 September 2021, the British High Commissioner raised Mr Kanu's case during a meeting with Nigerian Foreign Minister Onyeama.

h. On 17 September 2021, the Deputy National Security Advisor spoke with Nigerian Chief of Staff Gambari and raised Mr Kanu's case.

i. On 23 September 2021, a note verbale raising concerns about Mr Kanu's solitary confinement was issued to the Nigerian Ministry of Foreign Affairs."

On 19 November 2021, with permission of the Nigerian authorities, representatives from the British High Commission visited Mr Kanu.

14. On 8 December 2021, the Appellant's solicitors wrote asking the Secretary of State to consider a range of further steps: to consider whether those responsible for Mr Kanu's mistreatment met the requirements for imposition of sanctions under the Global Human Rights Sanctions Regulations 2020; to obtain regular consular access to Mr Kanu; to make representations to the Nigerian authorities at ministerial level, either that Mr Kanu be released or that as a minimum he should be detained in humane conditions and should be permitted access to appropriate medical treatment; that British High Commission personnel should attend the hearing then due to take place in the Nigerian Federal Courts; and that Mr Kanu's circumstances should be raised with the UN Committee Against Torture for consideration or enquiry in exercise of that Committee's powers under article 20 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.
15. The Secretary of State replied by letter dated 12 January 2022 (sent by the Government Legal Department). That letter included the following:
  - "3. In the period since our last update (in our letter of 24 September 2021), the action which the FCDO has taken includes the following:
    - a. On 4 October 2021, the British High Commissioner raised Mr Kanu's case during a meeting with the Attorney General of Nigeria. The British High Commission subsequently followed-up in writing, in order to provide additional information requested by the Attorney General.
    - b. On 21 October 2021 the British High Commissioner met with Nigerian Foreign Minister Onyeama and raised Mr Kanu's case with him. A representative from the High Commission also attended the court hearing on this date.
    - c. On 25 October 2021, the Minister for Africa, Latin America and the Caribbean, Vicky Ford MP, met Mr Kingsley Kanu, Mr Kanu's brother.

d. On 1 November 2021 the Minister for Africa, Vicky Ford MP, raised Mr Kanu's case with Nigerian Foreign Minister Onyeama.

e. During October and November 2021, FCDO officials raised Mr Kanu's case with Nigerian Ministry of Justice and Ministry of Foreign Affairs officials and the Department of State Services.

f. On 10 November 2021, a representative from the British High Commission attended the court hearing in Abuja.

g. On 3 December 2021, the British High Commissioner met with the Chief of Staff to President Buhari and raised Mr Kanu's case.

h. On 9 December 2021, the British High Commission in Abuja delivered a letter to the Department of State Services raising specific welfare requests following our consular visit with Mr Kanu. This letter made clear the UK Government's support for Mr Kanu's transfer out of solitary confinement.

i. On 14 December 2021, a Note Verbale was sent to the Nigerian Ministry of Foreign Affairs formally requesting an explanation of how Mr Kanu was transferred to Nigeria. It also contained a request that Mr Kanu be transferred out of solitary confinement.

4. As we have explained in our previous correspondence, the FCDO agrees there are a range of diplomatic tools which could be deployed in any case where a British National is detained in another jurisdiction. As we explained in our letters of 8 and 24 September 2021, Ministers have given specific consideration to a range of alternative options, including the possibilities which you raised at paragraph 12 of your letter of 24 August 2021. The FCDO has kept its options under review in light of developments.

5. You now raise a number of further options at paragraph 20 of your latest letter. As explained above, many of the options you suggest either have or are being pursued by the FCDO. Our client considers that the course of action which it is pursuing is the most appropriate means of assisting Mr Kanu. However (for the reasons previously explained) our client does not consider that it is either necessary or appropriate (even if this were possible) to provide "detailed reasons" as to why any individual action will or will not be pursued. This is because what Ministers (with the advice of their officials) must do is to determine what approach is appropriate in the particular circumstances of an individual case at a particular time."

16. The Appellant's solicitors wrote again on 23 March 2022, requesting that the Secretary of State reconsider her policy. The letter concluded as follows:

"11. Despite the FCDO recognising the serious breaches of international law, there has been virtually no progress in providing consular assistance to Mr Kanu and/or securing his release or transfer out of detention. Being granted access to Mr Kanu once in over 9 months does not count as progress in circumstances where no further access has since been granted and there has been no material change in Mr Kanu's situation.

12. As you are well aware, we have written to you on numerous occasions, setting out various options that the FCDO could consider pursuing to assist Mr Kanu. On each occasion, you have responded to state that the FCDO will take the action it deems appropriate and will not provide any reasons for not taking any other actions.

13. However, this response is simply not good enough in circumstances where all the available evidence demonstrates that Mr Kanu, a British National, has been rendered and where he is continuing to be detained in conditions amounting to torture. Accordingly, we now request that the FCDO will commit to reconsidering its strategy to assist Mr Kanu and to setting out what alternative actions it is prepared to pursue, including steps to escalate pressure on Nigeria."

17. The response to this, the letter of 14 April 2022, was the first target in these judicial review proceedings. That letter included the following:

"4. We turn next to your request that the FCDO reconsider its strategy for assisting Mr Kanu, and set out what alternative actions the FCDO is prepared to pursue. Here, as we have explained in our previous correspondence, the FCDO acknowledges there are a range of diplomatic tools which could be deployed in any case where a British National is detained in another jurisdiction. As we explained in our previous correspondence, Ministers have given specific consideration to a range of alternative options, including those suggested by or on behalf of your client.

5. The FCDO continues to keep its options under review and officials continue to meet regularly to review Mr Kanu's case. However (for the reasons previously explained) we do not consider it is either necessary or appropriate to provide an account of which specific actions it may or may not be prepared to pursue. This is because what Ministers (with the advice of their officials) must do is to determine what approach



is appropriate in the particular circumstances of an individual case at a particular time.

6. Steps which have been taken in respect of Mr Kanu's case since our letter of 12 January 2022 include the following:

6.1 On 13 January 2022, the British High Commissioner, Catriona Laing, met Foreign Minister Onyeama and raised concerns about Mr Kanu's ongoing solitary confinement; his health and welfare and also pressed for a response to HMG's Note Verbale of 14 December 2021;

6.2 On 18 January 2022, FCDO Minister Vicky Ford met with the Kenyan Cabinet for Foreign Affairs and raised concerns regarding the transfer of Mr Kanu from Kenya to Nigeria;

6.3 On 21 January 2022, the British High Commissioner, Catriona Laing met the President of Nigeria's Chief of Staff, Professor Ibrahim Gambari and raised Mr Kanu's ongoing solitary confinement and alleged illegal transfer from Kenya to Nigeria;

6.4 On 1 February 2022, FCDO Minister Vicky Ford met with the Nigerian National Security Advisor and requested further consular access to Mr Kanu, raised concerns over detention conditions and sought an explanation on his transfer from Kenya to Nigeria.

6.5 During the week commencing 21 February 2022, during an official visit to Nigeria, FCDO Minister Vicky Ford raised Mr Kanu's case during a meeting with Foreign Minister Onyeama, raising HMG's request for further consular access, concerns over the conditions in which Mr Kanu is detained, and sought an explanation on his transfer from Kenya to Nigeria.

6.6 On 28 February 2022, the British High Commission in Nairobi issued a Note Verbale requesting a response to HMG's previous Note Verbale which raised allegations of human rights violations, including torture and mistreatment and unlawful transfer.

6.7 On 1 March 2022, FCDO Minister Vicky Ford raised the case of Mr Kanu with the Kenyan High Commissioner to London, again requesting a response to our Notes Verbales.

7. While the FCDO will keep its options under review in light of developments, at present it considers the approach that is currently being followed is appropriate."

18. The Appellant also challenges a decision in a further letter from the Government Legal Department dated 9 June 2022. That letter responded to a further pre-action protocol letter sent on 25 May 2022. In that letter, the Appellant's solicitors described his proposed challenge as follows:

"1.4 The basis of this challenge is that you have failed, in your capacity as Secretary of State, to lawfully determine what further steps you should be taking to assist Mr Kanu, because you have failed to reach a view on whether Mr Kanu has been subject to extraordinary rendition, in breach of international law. Reaching a view on that central question is a legally necessary prerequisite to deciding what steps to take in such a case."

That letter ran to some 19 pages. Towards the end, under the heading "Details of the Action Required", it stated:

"6.1 The Secretary of State is required to reach a view, based on the evidence available to her, including that summarised above, on whether or not Mr Kanu has been subject to extraordinary rendition to Nigeria, in breach of international law, and communicate her view to the Claimant by way of the pre-action response to this letter.

6.2 As far as we are aware, the FCDO is still awaiting a response to a Note Verbale sent on 14 December 2021, raising allegations in respect of Mr Kanu's unlawful transfer and a further Note Verbale sent on 28 February 2022, requesting a response to the previous Note Verbale. For the avoidance of doubt, we do not consider that any ongoing lack of response from the Nigerian Government provides a basis for Secretary of State not to now form a view on Mr Kanu's rendition, given that it has been nearly five months since the first Note Verbale was sent."

19. By way of response, the 9 June 2022 letter included the following:

"12. In the course of the Secretary of State's consideration of what steps are appropriate, she has appraised herself (on the basis of the information available to her) as to the position in international law. That view is subject to reassessment in light of changing information and evidence available to her. There is no obligation on the Secretary of State to share that view, the Secretary of State does not consider that it would be appropriate to do so and the Claimant (or Mr Kanu) could not have had any legitimate expectation that this would occur.

...

17. In particular, the Secretary of State has considered what steps would most assist Mr Kanu, with regard to her

provisional view as to the legality and gravity of Mr Kanu's treatment as well as the representations submitted by your client alongside advice from the FCDO. The steps which have been taken to date have been set out in successive letters (most recently in paragraph 6 of our letter dated 14 April 2022), and include notes verbales and discussions at Ministerial and Prime Ministerial level. Since our previous letter, those steps have continued, with consular officials visiting Mr Kanu in detention on 29 April 2022, the Minister for Africa raising Mr Kanu's case with the Nigerian Foreign Minister Geoffrey Onyeama on 5 May 2022 and (the same day) the UK High Commissioner raising Mr Kanu's case in a meeting with Professor Gambari, Chief of Staff to the President of Nigeria, setting out concerns on a number of welfare issues including solitary confinement.

18. For these reasons, the Secretary of State is satisfied she has acted appropriately and lawfully ..."

20. The Respondent's case is that the Foreign Secretary has carefully considered whether it would be appropriate to make a public statement concerning Mr Kanu's treatment but that his view remains that this would not be appropriate, not least because of the risk that doing so may result in adverse consequences for Mr Kanu.

*The decision of Swift J*

21. The judge rejected the argument that *Abbasi* required the Secretary of State to form a concluded view as to whether Mr Kanu has been the victim of extraordinary rendition. He stated at [28]-[29] that:

"It is important to have well in mind that the relevant expectation is that requests for assistance will be considered. Even though the policy in issue in this case differs from the policy identified by the Court of Appeal in *Abbasi*, it was not part of the Claimant's case that the present policy gave rise to any expectation in any other form<sup>[1]</sup>. This provides context for the Court of Appeal's references to "... a formulated view" and "... formed some judgment as to the gravity of the miscarriage". These references do no more than make it clear that the Secretary of State's consideration of any request of assistance must rest on an appreciation of relevant considerations. There is no 'first step' that Secretary of State must form, let alone publish his 'concluded view' on the circumstances affecting the relevant British national. Rather, he must be sufficiently informed (by reference to relevant and reasonably available information) to undertake the consideration required of him. In practice what is required will be akin to the standard referred to by the House of Lords in the *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 per Lord Diplock, at page 1065 A – B: "... did the Secretary of State take reasonable steps to acquaint himself with the relevant information ...?".

In the present case it is clear – evidenced by the ministerial submissions and by the steps that had been taken in practice since July 2021 – that the Secretary of State has considered what steps to take to assist Mr Kanu on the basis of a proper appreciation of his circumstances. It is apparent from Miss Broughton's witness statement that the 'provisional view' (as the Claimant describes it) is a properly informed opinion. While the Secretary of State has declined the Claimant's request to state an 'unequivocal view' either privately or publicly, this does no more than reflect the Secretary of State's opinion on how best to conduct his affairs with the Nigerian authorities, to secure the greatest chance of providing practical assistance to Mr Kanu. In other words, this is part of the conduct of international relations – an exercise that is pre-eminently the responsibility of the executive, and is rarely likely to be amenable to judicial direction. No doubt the Secretary of State's approach will now also be informed by the conclusion set out in the judgments of the Court of Appeal of Nigeria, given on 13 October 2022, post-dating the evidence filed in these proceedings. I have seen reference in correspondence to a note verbale sent on 24 October 2022, presumably sent in light of the Court of Appeal's conclusions. But here too, it is not for this court to direct how or when or in what way, the significant conclusions contained in those judgments should be utilised.”

22. As for the Appellant’s argument that it was irrational for the Foreign Secretary to maintain a ‘provisional’ view, Swift J held that the refusal to state a view “reflects his opinion on what steps should be taken best to assist” Mr Kanu and was part and parcel of the Secretary of State’s assessment of how to conduct foreign relations. The distinction the Appellant drew between reaching a view privately and stating it publicly was “artificial”. Nor was the Respondent exercising a power that attracted an obligation of procedural fairness. The judge therefore dismissed the claim.

#### *Grounds of appeal*

23. The Appellant sought permission to appeal on three grounds:-

“Ground 1: Legitimate expectation

The Court erred in its conclusion that (i) applying the Court of Appeal’s judgment in *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 159, the Appellant had no legitimate expectation that, in the consideration of the Appellant’s requests to assist Mr Kanu, the Respondent would start from a firm view as to whether Mr Kanu has been the victim of extraordinary rendition in violation of international law; (ii) all that is required is akin to the standard in *Secretary of State for Education v Tameside MBC* [1977] AC 1014 at p.1065 A-B, namely that R “take reasonable steps to acquaint himself with relevant information”; and (iii) foreign policy considerations underpinned the Respondent’s

maintenance of a provisional view, and refusal to reach a concluded view.

#### Ground 2: Rationality

The Court erred in concluding that the Respondent's decision not to reach a firm view was rational, and in particular erred in suggesting that the Appellant has drawn an artificial distinction between the Respondent's assessment as to whether there has been a breach of international obligations and his subsequent exercise of discretion in deciding whether to make diplomatic representations or take other steps based on that assessment.

#### Ground 3: Fairness

The Court erred in its conclusion that the Respondent does not have an obligation to comply with the standards of procedural fairness when considering requests to assist British citizens whose fundamental rights are at serious risk abroad, and consequently erred in rejecting the Appellant's claim that those standards had not been complied with."

24. On 9 May 2023, Lewis LJ granted permission to appeal on all three grounds and ordered an expedited hearing. He wrote that the importance of the issues raised was a compelling reason for the appeal to be heard, within the meaning of CPR 52.6(1)(b). He said nothing about the prospects of the appeal succeeding.
25. Since the decision of this court (Lord Phillips MR, Waller and Carnwath LJJ) in *Abbasi* is at the heart of the dispute between the parties it is necessary to consider it in some detail.

#### *Abbasi*

26. Feroz Abbasi, a British national, had been captured by US forces in Afghanistan. In January 2002, he was transported to Guantanamo Bay in Cuba. By the time of the hearing in this court he had been held captive for eight months without access to a court or any other form of tribunal or even to a lawyer. His mother brought proceedings on his behalf in the High Court contending that one of his fundamental human rights, the right to not be arbitrarily detained, was being infringed. The Claimants sought, by judicial review, an order to compel the Foreign Office to make representations on his behalf to the US Government or to take other appropriate action or at least to give an explanation as to why this had not been done. Richards J refused permission to seek judicial review. On appeal this court granted such permission and retained the substantive hearing for itself.
27. There is an obvious difference between the *Abbasi* case and the present one. This court in *Abbasi* said at [64]:-

"... we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by

international law, Mr Abbasi is at present arbitrarily detained in a “legal black hole”.”

28. Similarly, they said at [66]:-

“What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory to which the USA has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.”

29. The court went on to reject the argument for Mr Abbasi that under the European Convention on Human Rights and the Human Rights Act 1998 the Foreign Secretary owed Mr Abbasi a duty to exercise diplomacy on his behalf. However, they also rejected the proposition put forward by the Respondents that there was no scope for judicial review of a refusal to render diplomatic assistance to a British subject suffering violation of a fundamental human right as the result of the conduct of the authorities of a foreign state.

30. At [30], the court said there were three considerations which led them to that conclusion. The first was the development of the law of judicial review in relation to the doctrine of legitimate expectation and also to what they described as the “invasion” of areas previously immune from review such as the exercise of the prerogative. Under the latter heading they cited the “landmark” *GCHQ* case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374) and, among other cases, the decision in *R v Secretary of State for Foreign and Commonwealth Affairs ex p Everett* [1989] 1 QB 811.

31. The second consideration was that “to a degree, the Foreign and Commonwealth Office have promulgated a policy which, so it seems to us, is capable of giving rise to a legitimate expectation” (see [87]). They cited a number of statements of Government policy. Among these was a Parliamentary answer given by Baroness Scotland QC (then a minister at the Foreign and Commonwealth Office) on 16 December 1999:

“We are very conscious of the other government's obligations to ensure the respect of the rights of British citizens within their jurisdiction. This includes the right to a fair trial. In cases where a British citizen may have suffered a miscarriage of justice we believe that the most appropriate course of action is for the defendant's lawyers to take action through the local courts. If concerns remain, their lawyers can take the case to the United Nations Human Rights Committee, where the State in question has accepted the right of individual petition under the ICCPR. *The UK Government would also consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations.* [emphasis added]”

32. The court continued:-

“92. Taken together, these statements indicate a clear acceptance by the government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice. In the present case none of the avenues suggested in the last quotation is available. The words emphasised contain no more than a commitment "to consider" making representations, which will be triggered by the "belief" that there is a breach of the international obligations. This seems to imply that such consideration will at least start from a formulated view as to whether there is such a breach, and as to the gravity of the resulting denial of rights.

...

98. These statements reflect the fact that, to use the words of *Everett*, it must be a 'normal expectation of every citizen' that, if subjected abroad to a violation of a fundamental right, the British Government will not simply wash their hands of the matter and abandon him to his fate.

99. What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold in relation to the response of the government to a request for assistance? The policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the government will "consider" making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State. That gives free play to the "balance" to which Lord Diplock referred in *GCHQ*. The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be "considered", and that in that consideration all relevant factors will be thrown into the balance.

100. One vital factor, as the policy recognises, is the nature and extent of the injustice, which he claims to have suffered. Even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted.

...

104. The extreme case where judicial review would lie in relation to diplomatic protection would be if the Foreign and

Commonwealth Office were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such, unlikely, circumstances we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case.

105. Beyond this we do not believe it is possible to make general propositions. In some cases it might be reasonable to expect the Secretary of State to state the result of considering a request for assistance, in others it might not. In some cases he might be expected to give reasons for his decision, in others he might not. In some cases such reasons might be open to attack, in others they would not.

106. We would summarise our views as to what the authorities establish as follows:

i. It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.

ii. Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen. The European Convention on Human Rights does not impose any such duty. Its incorporation into the municipal law cannot therefore found a sound basis on which to reconsider the authorities binding on this court.

iii. However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy.

iv. It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country's foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

v. The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a



request for assistance will depend on the facts of the particular case.”

33. At [107] the court recorded again their “deep concern” that in apparent contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention in territory over which the USA has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. Nevertheless they rejected the claim. Among their reasons was:-

“ii. On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.”

### *Discussion*

34. There is no dispute that *Abbasi* is binding on us. Ms Kilroy therefore realistically accepts that – much as the Appellant would wish it otherwise – this court cannot require the Foreign Secretary to make a public statement on Mr Kanu’s case, nor even to make specific representations. Nevertheless she relies in particular on the last sentence of [92] as showing that consideration of whether a British citizen may have suffered a miscarriage of justice in a foreign jurisdiction “will at least start from a formulated view” as to whether the relevant state is in breach of its international obligations and as to the gravity of the resulting denial of rights. She also points to the last sentence of [100] which, after referring to the balance between the recognition of gross miscarriages of justice and possible overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene says that “unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly considered”.
35. I cannot accept that either of these passages will bear the weight that Ms Kilroy seeks to put on them. A “formulated” view is not necessarily a final or concluded view. The Respondent’s evidence shows that this case is being regularly reviewed in the light of evolving circumstances. Similarly [100] of *Abbasi* says that the Secretary of State should form *some* judgment as to the gravity of the miscarriage of justice, not a definitive judgment. Neither of these phrases is authority for the proposition that the court can require the Foreign Secretary to reach a firm or concluded view, whether on the basis of the doctrine of legitimate expectation or otherwise.
36. As to rationality, Ms Kilroy understandably emphasised to us that the treatment of Mr Kanu by the Government of Nigeria has been strongly criticised by the Federal High Court, the Federal Court of Appeal and UNWGAD. As I have already noted, the opinion of UNWGAD published in July 2022 concluded that all the requirements of international law for a lawful extradition had been ignored in Mr Kanu’s case; that he had been extraordinarily rendered from Kenya to Nigeria in violation of international law; and that his detention was arbitrary. UNWGAD considered that the only appropriate remedy would be Mr Kanu’s immediate and unconditional release. The judgment of the Federal Court of Appeal given on 13 October 2022 is similarly emphatic. They noted that the Nigerian Government’s evidence constituted an

admission that Mr Kanu was abducted in Kenya and transferred to Nigeria without any formal extradition proceedings and that this was an unlawful extraordinarily rendition in clear and egregious violation of international law. Ms Kilroy submits that there can no longer be any room for doubt or hesitation, and that any rational Secretary of State would come to the firm view that Mr Kanu is the victim of a gross miscarriage of justice.

37. I agree that the judgment of the Federal Court of Appeal is clear and emphatic but it is also of significance that that court, on 20 October 2022, granted a stay of the effect of the judgment pending the Government's appeal to the Supreme Court. It is regrettable that, more than eight months later, that appeal has not been heard, but the fact remains that it is pending. Ground 3 of the prosecutor's appeal argues that:-

"The court below erred in law when it failed to be bound by established judicial precedent on mode of entry of a defendant charged with commission of an offence established by the Supreme Court"; and that "the court below occasioned a miscarriage of justice when it held that the rendition of the Respondent is unlawful".

38. Ms Kilroy submits that this contention is effectively hopeless because of what she says is the plain violation of international law. But I do not think that we can say, particularly where the Federal Court of Appeal has itself granted a stay pending an appeal to the Supreme Court, that the appeal must be treated as manifestly unfounded.
39. I consider, therefore, that it is not irrational for the Foreign Secretary to refrain from reaching a firm view while the matter is still properly before the Nigerian courts. I suggested to Sir James Eadie that the situation might well be different if the Supreme Court were to affirm the judgment of the Federal Court of Appeal and to order Mr Kanu's discharge, but such an order was then defied by the Nigerian authorities. Sir James replied that such a situation might indeed be different because, as he put it, this would "become a lawlessness debate". However, if such a lamentable sequence of events were to occur, and the Secretary of State were not to respond to it, that would have to be the subject of a fresh claim.
40. Turning finally to procedural fairness, I do not consider that this ground adds anything to the Appellant's case. The only reference to procedural matters in *Abbasi* is at [105], where the court said that in some cases the Secretary of State might reasonably be expected to state the result of considering a request for assistance, but in others it would not; and likewise in whether to give reasons for his decision. Here the Respondent has given information about the steps which have been taken on Mr Kanu's behalf; and has explained why he is unwilling to make public statements. The real complaint in this case is substantive (refusal to reach a firm view) rather than procedural.
41. To adopt the phrase used by Lord Phillips MR in *Abbasi*, I have deep concern about the treatment of Mr Kanu. Nevertheless, for the reasons I have given, I would dismiss the appeal.

**Lord Justice Coulson:**

42. I agree.

**Lord Justice William Davis:**

43. I also agree.