No. 24-1411

United States Court of Appeals for the First Circuit

DAVID BONIFACE; NISSANDERE MARTYR; JUDERS YSEME,
Plaintiffs - Appellees,

v.

JEAN MOROSE VILIENA,
Defendant - Appellant.

On Appeal from a Judgment of the United States District Court
for the District of Massachusetts, Boston

REPLY BRIEF FOR THE DEFENDANT - APPELLANT JEAN MOROSE VILIENA

Peter J. Haley (CA1 #21304)
peter.haley@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
One Financial Center, Suite 3500
Boston, MA 02111
p. (617) 217-4714
f. (617) 217-4710

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I. THE APPLICATION OF THE TVPA TO THIS ACTION EXCEEDS THE CONSTITUTIONAL LIMITS OF THE LAW OF NATIONS

The Plaintiffs in their advocacy of federal question jurisdiction admit to no limits on such jurisdiction. The Plaintiffs argue that the acts which form the basis of the Complaint are universally bad acts and that Congress in enacting the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note) ("TVPA") intended that the statute would have extraterritorial reach. There is nothing, however, about either of those facts that assures the court of the constitutionality of the statute as applied to actions which, as the District Court held, do not touch or concern the United States. "The interpretation of the meaning of statutes, as applied to justiciable controversies," is "exclusively a judicial function." Loper Bright Enterprises v. Raimondo, ___ U.S. ___, 144 S.Ct. 2244, 2258, 219 L.Ed.2d 832 (2024) quoting United States v. American Trucking Assns., Inc., 310 U.S. 534, 544, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940).

In assessing the constitutional limits of the TVPA as applied to acts which do not touch or concern the United States, both the District Court and the Plaintiffs rely upon the Law of Nations as the source of constitutional authority. Conversely, the Law of Nations also acts to establish the outer limits of such authority. In Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739 (2004), in the context of analyzing a

claim under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the Supreme Court reviewed those limits. The court noted that offenses against the law of nations were "principally incident to whole states or nations." 542 U.S. at 714, quoting Blackstone, Commentaries on the Law of England 68 (1769) (hereinafter "Commentaries"). In other words, the law of nations concerns itself not so much with the actions or rights of individual citizens as it does with the rights of sovereign nations to protect their interests. Blackstone, the court noted mentioned three specific offenses addressed by the criminal law of England at the time, violation of safe conducts, infringement of the rights of ambassadors, and piracy. Id. at 715. The Court noted that the history of the ATS was a history in which Congress meant to underwrite litigation of a narrow set of common law actions derived by the law of nations, id. at 720, and went on to note that "the possible collateral consequences of making international rules privately actionable argue for judicial caution." Id. at 727. The Court also cited to Judge Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (expressing doubt that the ATS should be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. ") Sosa at 727.

In Sosa, the Court acknowledged the express mandate in the TVPA providing a basis for federal claims of torture and extrajudicial killing. Id. at 728. The Court did not, however, purport to imbue the TVPA with a scope that exceeds the Law of

Nations. Plaintiffs cite to the Defendant's brief to argue that the Defendant does not dispute that torture and extrajudicial killing are within the offences against the Law of Nations. Plaintiffs Brief (hereinafter "Pl. Br.") at p. 29 citing to "Def.Br. 14." The Defendant makes no such concession. The Law of Nations as it existed at the time of enactment of the Constitution was a concept that served to protect the sovereignty and rights of individual nation states and to provide support for claims "incident to whole states or nations" Commentaries, 68. It was not a framework that licensed one sovereign state to adjudicate the rights of another country's citizens between each other. It is entirely consistent to believe that extrajudicial killing offends international norms and yet at the same time adhere to the belief that the courts of the United States are not meant to serve as a forum for the resolution of disputes between the citizens of other countries over claims that do not touch or concern the United States and that to hold otherwise would be contrary to the Law of Nations.

The Plaintiffs cite to a number of international treaties that prohibit torture and extrajudicial killing, but there has been no reliance in this action by the District Court or the Plaintiffs on rights arising under any treaty. The sole basis for the assertion of jurisdiction is section 1331, 28 U.S.C. § 1331, and the TVPA. The Plaintiffs in their Complaint in this action alleged that the Defendant "[f]rom his base in Massachusetts … continued to participate in a conspiracy…" Complaint, ¶ 13 (RA 36). The Plaintiffs were unable to establish those facts at the time of the summary judgment

motion dismissing the ATS claims and adduced no evidence at trial to support them. There is no treaty conduct involved. There are no domestic acts that took place. The question remains whether the Law of Nations supports the adjudication by the United States of tort claims between citizens of a foreign country that took place wholly within that other country. It does not.

The Plaintiffs argue, consistent with the holding of the District Court, that the constitutional authority of Congress to enact the TVPA and authorize its enforcement outside the limits of the ATS is consistent with the Law of Nations, Pl. Br. at 29, but subsequently revert, Pl. Br. at 34, to the argument that Congress's power is not limited by the Law of Nations or "international law," citing to a Second Circuit decision, United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1983). In Pinto-Mejia, however, the court was addressing claims against a "stateless" vessel, flying the flag of no other nation. The court's holdings were based on the premise that "international law provides no bar to an assertion of jurisdiction over a stateless vessel by the United States." Id. at 262. The quotation relied upon by the Plaintiffs that Congress is not bound by international law relies for support on a 1914 treaty case, Rainey v. United States, 232 U.S. 310, 34 S.Ct. 429 (1914), in which the Court was addressing whether Congress could pass a law that otherwise abrogated the terms of a treaty as it related to the taxation of a foreign vessel. Congress' power to levy a tax is well supported by the Constitution, the power of Congress to authorize

jurisdiction over matters in a foreign country that do not touch or concern the United States is reliant on the Law of Nations. The Law of Nations does not support the assertion of jurisdiction in this case.

Finally, Plaintiffs misread the record by arguing that the TVPA has been deployed in this case to prevent the Defendant from using the United States as a safe haven for torturers, reverting to the allegation that the Defendant carried out a scheme of intimidation from Massachusetts. The record the Plaintiff rely upon is a citation of a phone call (RA 398-401), an approach by a person who was not the Defendant (RA 455-56) and an encounter in Haiti (RA 679). That testimony falls far from establishing the use of the United States as a haven and was not relied upon by the District Court. Notably, the Defendant did return from the United States to allow the Haitian courts to adjudicate the Plaintiffs' claims (RA 640, RA 803-804).

As much as the Plaintiffs may seek to avoid them, the facts of this case are stark. To uphold the District Court's assertion of subject matter jurisdiction as argued by the Plaintiffs would require this Court to ignore the constitutional limits as embodied in the Law of Nations at the time the Constitution was enacted.

II. THE DISTRICT COURT ERRED IN ADMITTING THE TESTIMONY OF ROBERT MAGUIRE

The Defendant filed his motion for summary judgment in this action on March 28, 2022. [ECF No. 139]. The Plaintiffs filed counter motions. The crux of those motions was whether or not Plaintiffs' TVPA claims were barred for failure to

exhaust adequate and available remedies in Haiti. See Memorandum and Order, at p. 13, RA 243. The District Court issued a decision on that issue on February 7, 2023, 11 months after the motions were filed and immediately before the February 10th deadline for filing motions in limine. Until that issue was decided on summary judgment, the testimony of Robert Maguire remained hypothetically relevant as it related to the Haitian political and judicial system. After the summary judgment decision, it ceased to have any relevance and the Defendant moved to exclude the testimony and objected to its introduction at trial.

In U.S. v. Roark, 924 F.2d 1426 (8th Cir. 1991), the Eighth Circuit in finding that the trial court had improperly permitted evidence of the defendant's affiliation with a motorcycle gang, the court observed that:

> Evidence of uncharged misconduct to show criminal propensity is inadmissible not because it is logically irrelevant, but because it is inherently and unfairly prejudicial. It deflects the jury's attention from the immediate charges and causes it to prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged.

Id. at 1433, citing Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 218–19, 93 L.Ed. 168 (1948). In the instant case, although the Plaintiffs state in their brief that "[W]itnesses testified that defendant commanded a KOREGA crew," Pl. Br. at 54, there was no such evidence presented at trial. The testimony relied upon by the Plaintiffs is based on the Defendant being seen in the proximity of people wearing t-shirts with the name of KOREGA on them. (RA 413-414). Unlike the facts in

United States v. Teganya, 997 F.3d 424 (1st Cir. 2021), the Defendant's affiliation with KOREGA was not established, Mr. Maguire last visited the region 22 years prior to the trial of this action (RA 358), had never been to the locale where the acts took place (RA 359) and his testimony was based on no personal knowledge whatsoever (RA 359). The District Court's decision to allow Maguire's testimony was no different than a decision to allow the jury to go read newspaper articles about violent gangs in Haiti and then encouraging them to draw conclusions about the Defendant's actions based on his residency in a country in which violent activity often takes place. It was "inherently unfair and prejudicial" and had no place before the jury and no place in any venue in which the Plaintiffs were obligated to establish that such testimony was sufficiently tied to the facts of the case. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

III. THE TVPA DOES NOT PERMIT SECONDARY LIABILITY

There is nothing in the language of the TVPA that permits the establishment of secondary liability. Mastafa v. Chevron Corp., 759 F.Supp.2d 297, 300 (S.D.N.Y. 2010). The Plaintiffs rely upon the July, 2023 decision of the Ninth Circuit in Doe I v. Cisco Sys., 73 F.4th 700 (9th Cir. 2023) which in a case of first impression in that circuit the court held that the TVPA provided for secondary liability. The decision in Cisco revolves around the explication of the Supreme Court's decision in Central

Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) in which the court stated plainly that "[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." Id. at 182. The Ninth Circuit rejecting the guidance of Central Bank noted that "[t]he opinion declined to create a presumption favoring the inclusion of aiding and abetting liability in a civil statute, but it did not adopt the opposite presumption." Cisco at 744. Put more plainly, the Ninth Circuit decided that even though there is no presumption that aiding and abetting liability attaches to a statute that fails to provide for such liability, there is also no presumption that it does not provide for such liability. The Court is thus faced with the plain words of the statute and the Supreme Court guidance that secondary liability cannot be presumed and the decision of the Ninth Circuit that while secondary liability cannot be presumed it remains acceptable to presume it, even absent express statutory authorization. Faced with the tension between the Ninth Circuit decision and the Supreme Court, this Court should be guided by the latter.

The Eleventh Circuit in Doe v. Drummond Co., Inc., 782 F.3d 576 (11th Cir. 2015) avoided addressing the absence of language within the statute addressing secondary liability by reversion to the legislative history. Id. at 607. In doing so it ignores the observation of the Court in Central Bank that "Congress knew how to

impose aiding and abetting liability when it chose to do so." 511 U.S. at 176. The Second Circuit in Chowdhury v. Worrldtel Bangladesh Holding, Ltd., 746 F.3d 42 (2d Cir. 2014); presaging the Ninth Circuit decision in Cisco, also reversed the polarity of the Central Bank admonition not to presume secondary liability when it is not expressly provided for by reasoning that "Congress has not, in other words, 'specified' any 'intent' that traditional agency principles should not apply under the TVPA." Chowdhury at 53.

This Court guided by the language of the statute itself should restrict its application to claims that do not rely upon a theory of secondary liability and reverse the contrary determination of the District Court.

CONCLUSION

For the reasons set forth above, the Appellant prays that the Court reverse the Orders of the District Court, dismiss this action for lack of subject matter jurisdiction and, alternatively, allow the Appellant's Motion for Judgment as a Matter of Law, New Trial and Remittitur.

Respectfully submitted,

Jean Morose Viliena,

By his attorney,

/s/ Peter J. Haley

Peter J. Haley (BBO# 543858)
peter.haley@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
One Financial Center
Boston, MA 02111
p. (617) 217-4714
f. (617) 217-4710

Dated: October 30, 2024

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/s/ Peter J. Haley

Peter J. Haley (CA1 #21304)
peter.haley@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
One Financial Center
Boston, MA 02111
p. (617) 217-4714
f. (617) 217-4710

Dated: October 30, 2024

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I hereby certify that on this October 30, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Carmen K. Cheung
Elzbieta T. Matthews
Daniel McLaughlin
Direct: 415-544-0444
Fax: 415-544-0456
Center for Justice and Accountability
268 Bush Street, Suite 3432
San Francisco, CA 94104

Diana Li Kim
Direct: 202-887-8738
Fax: 650-494-0792
Morrison & Foerster
755 Page Mill Road
Palo Alto, CA 94304-0000

Bonnie Lau
Direct: 415-268-6511
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482

Tony K. Lu
Philip Aloysius O'Connell, Jr.
Direct: 617-235-6817
Fax: 617-235-6899
Dentons US LLP
1 Beacon Street, Suite 25300
Boston, MA 02108-3107

Brian R. Matsui
Direct: 202-887-8784
Fax: 202-887-0673
Morrison & Foerster LLP
2100 L St NW, Suite 900
Washington, DC 20037

Sarah Jane Vandervalk
Direct: 858-314-7665
Morrison & Foerster, LLP
12531 High Bluff Drive, Suite 100
San Diego, CA 92130-2040

Vanshika Vij
Direct: 202-887-1558
Fax: 202-887-0763
Morrison & Foerster LLP
2100 L St NW, Suite 900
Washington, DC 20037

/s/ Peter J. Haley

Peter J. Haley (CA1 #21304)
peter.haley@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
One Financial Center
Boston, MA 02111
p. (617) 217-4714
f. (617) 217-4710