

Northumbria Research Link

Citation: Mallory, Conall (2015) Human Rights Obligations on Consular Agents in Capital Punishment cases. In: Canadian Law and Society Association Conference, 3-5 June 2015, Ottawa, Canada.

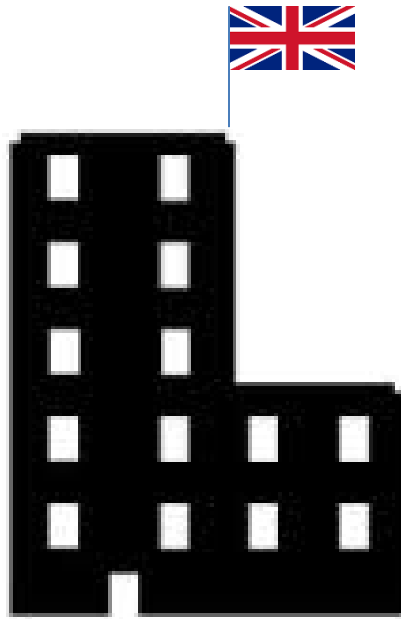
URL:

This version was downloaded from Northumbria Research Link:
<http://nrl.northumbria.ac.uk/id/eprint/25859/>

Northumbria University has developed Northumbria Research Link (NRL) to enable users to access the University's research output. Copyright © and moral rights for items on NRL are retained by the individual author(s) and/or other copyright owners. Single copies of full items can be reproduced, displayed or performed, and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided the authors, title and full bibliographic details are given, as well as a hyperlink and/or URL to the original metadata page. The content must not be changed in any way. Full items must not be sold commercially in any format or medium without formal permission of the copyright holder. The full policy is available online: <http://nrl.northumbria.ac.uk/policies.html>

This document may differ from the final, published version of the research and has been made available online in accordance with publisher policies. To read and/or cite from the published version of the research, please visit the publisher's website (a subscription may be required.)

Conall Mallory
CLSA, Ottawa
June 2015



Human Rights Obligations on Consular Agents in Capital Punishment cases

This paper will address:

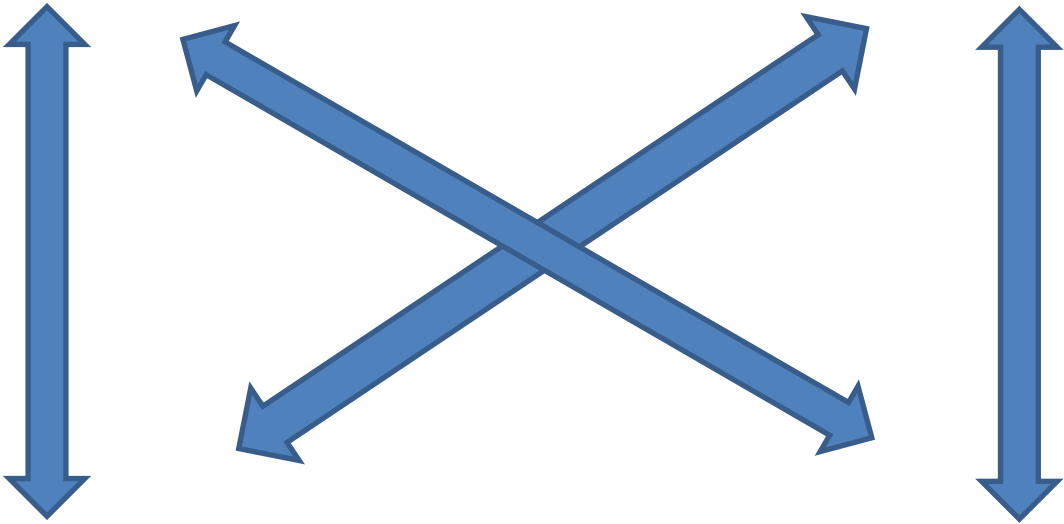
- **The role of consular assistance**
- **The relationship between consular assistance and human rights obligations**
- **The recent case of *Sandiford v Secretary of State for the Foreign and Commonwealth Office***

Position in International Law

Art 5, Vienna Convention on Consular Relations 1963

- (a) **protecting in the receiving State the interests of the sending State and of its nationals**, both individuals and bodies corporate, within the limits permitted by international law;
- (d) **issuing passports and travel documents to nationals** of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- (e) **helping and assisting nationals**, both individuals and bodies corporate, of the sending State;
- (f) **acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature**, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- (h) **safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State**, particularly where any guardianship or trusteeship is required with respect to such persons;

State A State B



National of
State A

National of
State B

UK Consular Assistance

Support for British Nationals Abroad: A Guide (2014)

- Offer help appropriate to the individual circumstances.
- Make an assessment based on the vulnerability of each application.
- Aim to offer assistance which helps meet these needs.

FCO Human Rights and Democracy Report (2013)

- Consular Strategy 2013-2016 aims to provide greater focus on the needs of the most vulnerable and where international norms are protected.
- Greatest human rights risks to those:
 - charged with criminal offences
 - facing the death penalty
 - victims of forced marriage
 - child abduction cases

Consular Assistance

What is provided ✓

- Providing appropriate help if you have suffered rape, physical or sexual assault, are a victim of crime or in hospital.
- Providing details of local lawyers, interpreters and support specialists.
- Contacting friends and relatives.
- Making special arrangements in cases of terrorism or natural disasters.
- Providing documentary services such as consular birth or death registration, marriage/civil partnership documents, or notarial services.

Consular Assistance

What is not provided ✕

- Financial assistance for legal fees.
- Assistance in selling your house.
- Assistance with transporting your pet.
- Advice on what to pack.
- A telephone number for Phil Collins.
- Prince Charles's shoe size.

Consular Assistance

What else is not provided ✕

- Jet-ski repairs.
- Hotel room repairs.
- Assistance tracking down a 'fiancé' met online when she doesn't get in contact after money has been transferred for her visit.
- Payment for services rendered with a sex worker.



Article 1 European Convention on Human Rights:
[t]he High Contracting Parties shall secure to
everyone **within their jurisdiction** the rights and
freedoms defined in Section I of [the] Convention

ECtHR Jurisprudence

- *X v Federal Republic of Germany* (1965)
Yearbook of ECHR, vol. 8.
- *X v United Kingdom* (1977) 12 DR 73
- *W.M v Denmark* (2003) 15 EHRR CD 28
- *Al-Skeini and Others v United Kingdom*
(2011) 53 EHRR 18

X v Federal Republic of Germany (1965) Yearbook
of ECHR, vol. 8, p.158



"... in certain respects,
**the nationals of a
Contracting State are
within its
"jurisdiction" even
when domiciled or
resident abroad;;"**

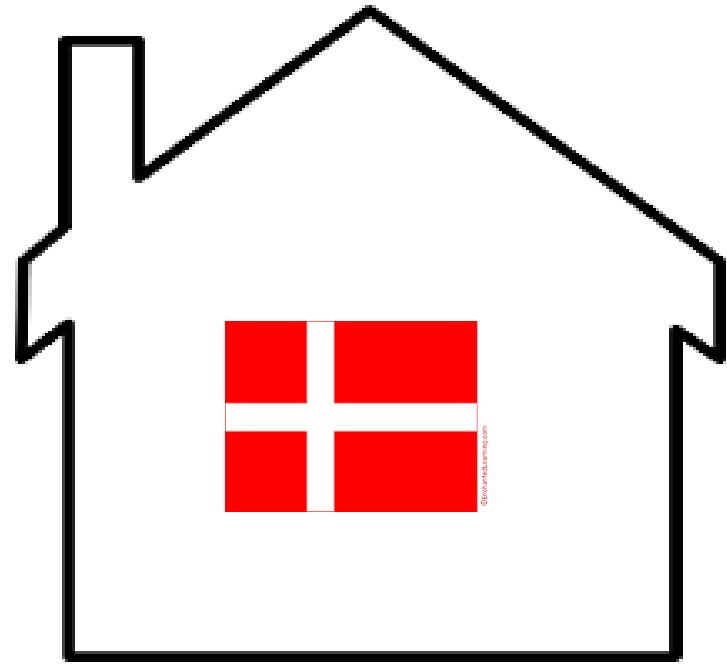
*X v the United Kingdom, No.
7547/76, (1977) 12 DR 73*

"authorized agents of a State including diplomatic or consular agents bring other persons or property within the jurisdiction of that State **to the extent that they exercise authority over such persons** or property."

"Insofar as **they affect such persons or property by their acts or omissions, the responsibility** of the State is engaged."

WM v Denmark (App. No. 17392/90), (2003) 15 EHRR CD 28, decision of 12 October 1992.

‘the authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they **exercise authority over such persons or property.**’



Al-Skeini and Others v United Kingdom (2011) 53 EHRR 18

‘It is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents **exert authority and control** over others.’(para 134)

- ‘the state is under an obligation under art.1 to secure to that individual the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “**divided and tailored**”.’ (para 137)

Triggering Jurisdiction

Approach A
X v FRG



in certain respects, **nationals of a Contracting State are within its "jurisdiction"** even when domiciled or resident abroad

Approach B
X v UK



to the extent that they **exercise authority over such persons**
How?
they affect such persons or property by their acts or omissions

Approach C
Al-Skeini



may amount to an exercise of jurisdiction when these agents **exert authority and control** over others

Drug mule gran Lindsay Sandiford loses appeal to UK's highest court over legal funding

16 July 2014 10:32 AM

Richard Hartley-Parkinson

Sandiford, 57, was sentenced to death by firing squad in Bali after trafficking drugs into Bali



Lindsay Sandiford



Mirror

News | World news | Lindsay Sandiford

Death row drugs mule gran has hopes of pardon dashed in Bali

29 November 2014 04:51 PM

Steve White

Lindsay Sandiford was sentenced to death in January last year for trafficking cocaine worth £1.6 million and all her appeals have so far been denied



R (Sandiford) v SS for Foreign and Commonwealth Office

- Vulnerable individual, suffering from physical and mental health problems
- A mother of two children one of whom suffers from learning difficulties.
- Not had adequate legal assistance at any stage of proceedings, having had three different Indonesian lawyers, none of whom (it was alleged) provided her with effective legal representation.
- No prospect that competent counsel with the relevant experience could be retained to act without the provision of some funding.
- She wanted SSFCO to fund and provide an adequate lawyer to represent her on appeal.

Jurisdiction link through:



- visiting the claimant in custody
- discussing her case with her
- providing her with consular assistance and support
- raising concerns about her welfare with the police and prison authorities
- attending Court
- liaising with Reprieve and her family in relation to the obtaining of legal representation
- contacting legal representatives to enquire whether they would act
- informing the claimant of the requirement to and the time limits for, filing notice and grounds of appeal
- assisting in the obtaining of necessary Court documents

R (Sandiford) v SS FCO

- Divisional Court:

‘...it is manifestly clear on the facts of this case, that, at all relevant times, from the moment she was arrested, throughout the time she was in custody, throughout the trial process, and after her conviction when held in prison, the claimant was and remains under **the authority and control of the Indonesian state and relevant criminal authorities.**’

- UK Supreme Court:

‘A deliberate refusal to instruct or fund lawyers on behalf of Mrs Sandiford cannot constitute an exercise of authority or control over her. It is the opposite – a **decision not to undertake or exercise any relevant authority or control.**’

Policy Influences

- 'International legal aid'
- Certification of lawyers
- Open ended as to when legal funding is an obligation
- Means tested
- Floodgates argument
- Pursue other areas

My position

- Return to a clearer understanding of jurisdiction from *X v United Kingdom*.
- Consular agents bring someone within their jurisdiction:
 - ‘to the extent that they **exercise authority over such persons**’
 - Authority is exercised in such manner that the state **‘affect such persons or property by their acts or omissions**’
- Remember:

Only a finding of jurisdiction > not of a human rights obligation or a violation of an obligation

Any questions?

