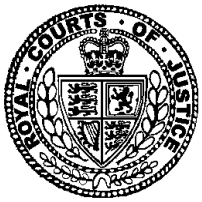

Neutral Citation Number: [2019] EWHC 290 (QB)

Case No: HQ13X00363

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2019

Before:

MR JUSTICE JAY

- -

Between:

ISMAIL KAMOKA and others	**Claimants**
- and –	
THE SECURITY SERVICE and others	**Defendants**

- -
- -

Tom de la Mare QC, Charlotte Kilroy and Helen Law (instructed by **Birnberg Peirce**) for the **Claimants**
Lisa Giovannetti QC, Rory Dunlop and Stephen Kosmin (instructed by **Government Legal Department**) for the **Defendants**
Angus McCullough QC, Tom Forster QC, Jennifer Carter-Manning and Rachel Toney (instructed by **SASO)** as **Special Advocates**

Hearing dates: 12th and 13th December 2018

- -

OPEN JUDGMENT

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE JAY:

Introduction

1. There are two sets of applications presently before me. The first in time are the defendants' applications under section 6 of the Justice and Security Act 2013 ("the JSA 2013"), issued on 27th April and 25th May 2018 in relation to claimants 1-10 ("C1-10"), for a declaration that these are proceedings to which a closed material application may be made. Secondly, I am seized of applications under CPR r.3.4(2)(a) and/or CPR Part 24, issued on 21st September 2018 on behalf of C1-5, seeking to strike out the Defence in relation to the claims for false imprisonment and trespass, alternatively ordering summary judgment on those claims.

2. Given that C1-5 can be in no better position under CPR r.3.4(2)(a), it is convenient and appropriate to limit my consideration to the summary judgment application under CPR Part 24: the greater includes the lesser.

3. The parties are agreed that I should address the summary judgment application before the defendants' section 6 application, although the sequencing cannot of course dictate the outcome. Mr Tom de la Mare QC realistically accepts that if he were to lose the application for summary judgment there would be no sound basis for resisting the defendants' section 6 application for a declaration. Instead, and in my view for good reason, he submits that in that eventuality I should impose a tight timetable for disclosure and for the section 8 hearing. I should add that even if the summary judgment application were to succeed, a section 6 declaration would still be required because issues of *Lumba* causation and quantum, including the claims for aggravated and exemplary damages, remain very much live. Besides, a section 6 declaration would be required for the remaining causes of action advanced by C1-5, and in respect of the other claimants.

4. On Friday 14th December 2018 I made various orders and directions in connection with the section 6 applications. I also made orders in CLOSED in relation to various categories of material.

Outline of the Claims

5. This litigation has a lengthy, complex and tortuous procedural history which I can adumbrate as follows. The claims of C1-5 were struck out as an abuse of process by Irwin J ([2016] EWHC 769 (QB)) but were restored on appeal ([2017] EWCA Civ 1665). There was a case management hearing before me in February 2018 and I gave an *ex tempore* judgment on 9th February ([2018] EWHC 517 (QB)) during the course of which I summarised the factual background and sought to identify the crux of the case as set out in the pleadings. This was in the context of the defendants' contention that the present claims should be stayed behind *Belhaj*. The factual background has been set out most comprehensively in Irwin J's OPEN judgment of 22nd January 2015 ([2015] EWHC 60 (QB)), and insofar as reference need be made to matters of detail, this is the best source.

6. For present purposes, and in the light of the expository work done by others, I may summarise the facts necessary for the determination of this application briefly as follows.

7. C1-5 are of Libyan origin and are alleged to have been members or associates of the Libyan Islamic Fighting Group ("LIFG") formed in the 1990s in opposition to the regime of Colonel Qadhafi. They have all sought asylum in the UK. From the late 1990s, and particularly after 9/11, there was a general thawing of relations between HMG and the Libyan regime, and an alleged increasing degree of interaction between their respective Security Services. On 18th October 2005, no doubt following a lengthy and delicate process, a Memorandum of Understanding on Deportation with Assurances ("MoU") was concluded with Libya. In contemplation of the imminent signing of the MoU, C1 and C2 were served with Notices of Intention to Deport on 3rd October 2005; the other claimants on dates in November and December. They were all immediately detained. The national security threat they constituted is not presently in issue.

8. Appeals to SIAC were made by some of the claimants on the ground that the MoU, and the attendant monitoring arrangements, were insufficient to protect them if they were deported to Libya; and these succeeded in April 2007. C1-5 were released on SIAC bail on various dates thereafter, and there were then Control Order proceedings, the exact detail of which does not need to be addressed for present purposes, save to note that only C1-4 have brought false imprisonment claims in connection with the periods they were subject to these orders,

9. Pursuant to my Order given on 9th February 2018, the claimants have filed Amended Consolidated Particulars of Claim which conveniently locate their various claims in one document. However, I have not yet decided whether these claims should be consolidated.

10. By way of summary, the following key facts are alleged:

    (1) The defendants were aware of the circumstances surrounding the unlawful rendition to Libya, and detention and interrogation under torture by the US and Libyan Security Services, of Messrs Belhaj and Al Saadi (para 30.1). (For these purposes it is unnecessary to differentiate between the various defendants.) Considerable detail of this is subsequently provided.

    (2) The defendants sent lists of questions to the Libyan, Saudi and US Security Services in order that they be put to detainees including Messrs Belhaj and Al Saadi, knowing that there was a real risk that the answers would be procured by torture (para 30.3).

    (3) C1-5 were unlawfully detained because:

> "the involvement of the defendants in the unlawful rendition and subsequent interrogation of Belhaj, Al Saadi and other detainees in Libya meant that the diplomatic assurances on which the claimants' deportation to Libya depended could never reasonably have been judged to provide adequate protection against the accepted risk of torture which these claimants faced on return. There was never at any point a reasonable prospect of their being deported to Libya." (para 33.2)

(4) *Either* critically relevant information was not provided to the relevant decision-maker, the Home Secretary, in 2005, rendering his deportation and detention decisions unlawful on that basis (para 435), *or* he did consider it, in which case he acted irrationally (para 436). This was because:

> "… no reasonable decision-maker could have concluded prior to 3rd October 2005 … either that the balance of advantage in the developing relationship lay with Libya and was far more crucial to it, or that Colonel Qadhafi would consider it necessary to comply with the assurances in order to maintain good relations with the UK. On the contrary the Security Services' covert role in the abduction, rendition, arrest and/or subsequent interrogation of Belhaj, Al Saadi, C6 and/or C9 and other Libyan detainees made it far more likely that Colonel Qadhafi and/or his Security Services would conclude that the request for an MoU was a public relations exercise designed to please the courts as opposed to a genuine request that Libya abide by the assurances." (para 436.4.4: this was part of the "critical plea" identified by Flaux LJ at para 13 of his judgment and more fully set out under para 12 – para 437 of the claimants' pleading in its original numbering)

11. The draft OPEN Defence filed on 11th May 2018 pleads the following facts and averments:

(1) On 2nd August 2005 the Home Secretary (Charles Clarke) was provided with a submission which outlined the national security case against C1. Similar submissions were subsequently provided in relation to C2-5. Later, he was provided with further information as to the progress of negotiations with the Libyan authorities concerning the terms of the MoU, that the latter had been agreed and initialled (on 21st September), and that although it had not been possible to deport C2, for example, in the past due to article 3 concerns, in the light of the pending MoU deportation to Libya was now "a more realistic prospect" (paras 132-145).

(2) The allegations relating to Messrs Belhaj and Al Saadi are entirely irrelevant to the issue of safety of return to Libya pursuant to a MoU (para 189).

(3) As for para 435 of the Amended Consolidated Particulars of Claim:

> "… it is denied that any non-disclosure to the Secretary of State of facts material to the deportation of C1-5 would render unlawful their detention pursuant to paragraph 2(2) of Schedule 3 to the 1971 Act. The Secretary of State formed an intention to deport C1-5, and the intention was formed in good faith. Notice of the Secretary of State's intention to deport C1-5 was served on them in the prescribed manner. In the premises, the necessary preconditions for lawful detention pursuant to paragraph 2(2) of Schedule 3 to the 1971 Act were met, in each case (para 261(iii))."

(4) The Home Secretary was reasonably entitled to conclude on the available evidence that the Libyan authorities would comply with the MoU (para 262(ii)).

The Application under CPR Part 24

12. On 27th July 2018, with the assent of the defendants, the Special Advocates communicated to the claimants the terms of certain admissions made in the draft CLOSED defence. This "form of words" was revised slightly on 27th September 2018, as follows:

> "In their draft CLOSED defence, the defendants have admitted that the information provided to the Secretary of State in support of the recommendations to deport each of C1-5, and to place them in detention pending deportation, did not contain an account of the nature and extent of any relationship between the UK government and the Libyan Security Services, including the involvement of UK personnel in the international transfer of Belhaj."

13. The first of these communications generated the claimants' application for summary judgment. Although the application relies on evidence (strictly speaking, inadmissible on a strike-out application), in particular the Report of the Intelligence and Security Committee of Parliament on Detainee Mistreatment and Rendition dated 28th June 2018 ("the ISC Report"), it is based primarily on legal arguments which derive from the defendants' admission. In particular:

> "The decision to deport C1-5 was accordingly unlawful because it failed to take account of relevant considerations. In particular, given the centrality and nature of the 'safety on return' considerations arising, no lawful decision to deport could be made without the decision-maker considering whether the UK Security Services' covert involvement in the Renditions, as necessarily known to the Libyan authorities, would undermine or risk undermining the reliability of any assurances the Libyan government might give as to the treatment of C1-5 on their return to Libya."

It is also pointed out that paragraph 189 of the OPEN Defence concedes that the Security Services' alleged involvement in the renditions of Messrs Belhaj and Al Saadi was irrelevant to the decision to deport.

14. The scope of the claimants' application needs careful delineation. It is confined, in terms, to the defendants' admission of irrelevance, and the public law consequences which are said to flow from that. The claimants are entitled to place limited reliance on admissible public domain material which supports their case, but cannot invite me to engage in a "mini-trial" (the law on this topic is well-established), still less speculate as to what material there may or may not be in CLOSED. On the other hand, I cannot assume that there is material in CLOSED which supports the defendants' case, nor are they entitled in the context of this application to refer me to any such material.

15. The evidential constraints imposed by the nature of the claimants' application and the absence of a closed material procedure within it have led both parties to advance submissions which I have found problematic. Paragraph 45 of Mr de la Mare's skeleton argument comes close to conceding that I should, if necessary, consider CLOSED material with the assistance of the Special Advocates. Given that no section 6 JSA 2013 application has been made for the purposes of the claimants' application as well as its clear contours, I have no power or inclination to do that. Furthermore, there would be no useful or sensible purpose in permitting the Special Advocates to deploy CLOSED material at this stage pursuant to my case management powers since that would necessarily cause significant delay (the material is not immediately available) and no doubt prompt the defendants to seek to deploy in CLOSED a limited range of further material on a selective basis, as they would be entitled to do on a CPR Part 24 application. Ms Lisa Giovannetti QC, on the other hand, submits that there is a necessary circularity in the claimants' case because they have brought this application only in order to circumvent the need for a closed material procedure in circumstances where evidence adduced only in CLOSED would, at the very least, demonstrate that the defendants' case has a real prospect of success. The obvious difficulty with this submission is that it mischaracterises the claimants' application. The CPR Part 24 application is, properly understood, limited to a consideration of OPEN material; and it stands and falls by that.

16. In my judgment, neither party has formulated what should be the correct approach to my consideration of this application for summary judgment. I should be addressing it within the four corners of the application that has been made, relying on such admissible evidence in OPEN as exists, and drawing inferences only where it is clear that there is no real prospect of some different inference being deduced. This means, for CPR Part 24 purposes, that I must be wary of drawing inferences unfavourable to the defendants and should only do so where satisfied that there is no real prospect of some better interpretation being placed on evidence that I can properly treat as reliable. I will demonstrate how this approach works in practice when addressing the admissible evidence before me.

17. I should make clear that I have read the draft CLOSED Defence of the claims of C1-5, as well as the CLOSED judgment of Flaux LJ in the Court of Appeal strike-out proceedings. I am able to exclude anything and everything I recall about these documents from my consideration of this application, and unhesitatingly do so.

The Claimants' Evidence

18. The correct point of departure for a consideration of the claimants' case is paras 13 and 103-114 of Flaux LJ's judgment holding that the current proceedings are not an abuse of process. The *ratio* of the Court of Appeal's decision on that issue, insofar as is relevant for present purposes, appears at para 103:

> "Mr de la Mare QC made it clear that the appellants' case was that the collusion of the UK agencies in unlawful rendition and mistreatment of detainees was on any view relevant to both the national security case and the issue of safety on return and the MoU. What is being contended is that, if the evidence now available of such collusion was not taken into account by the decision maker or put before the court, that calls into question

> the legality of the decisions to deport and to detain pending such deportation and to seek Control Orders. That case does not involve any challenge to the national security case either in SIAC or in the Control Order proceedings. In the circumstances, I accept Mr de la Mare QC's submission that the respondent's case is a collateral attack on the earlier decisions of SIAC and the Administrative Court is misconceived. It necessarily follows that the judge's conclusion at [39] of the judgment under appeal that the proceedings represent a collateral challenge to the judgments of SIAC and the Control Order proceedings is equally misconceived and fails to take proper account of the clarification given by the appellants' solicitors in correspondence prior to the hearing before Irwin J in December 2015. That fundamental misconception must vitiate the rest of his reasoning in [39] and [40]."

I must make two specific comments. First, we now know that evidence of collusion was *not* taken into account by the Home Secretary. Secondly, I do not read Flaux LJ as holding that the claimants' case on collusion was necessarily well-founded. He had of course read the claimants' detailed pleading, based on documents obtained from Libya on the fall of Colonel Qadhafi in 2011 ("the Libyan cache"), which tended to show, if they were genuine, evidence of the Security Services' involvement in the rendition of Messrs Belhaj and Al Saadi, as well as engagement with the Libyan Security Services; and, as I have said, he had seen CLOSED material. An outline of the defendants' case was available, not the more detailed document filed pursuant to my Order in May 2018. The defendants' position at all material times has been neither to confirm nor deny the Libyan cache. The correct analysis, in my view, is that Flaux LJ was holding that the claimants' case on the evidence was arguable, maybe highly arguable, but that it was not necessarily correct.

19. The evidence on which the claimants rely for the purposes of this application includes the terms of the Belhaj apology and the ISC Report.

20. As for the former, on 10th May 2018 HM Attorney General gave a statement to the House of Commons which included the following:

> "The Attorney General and senior UK government officials have heard directly from you both about your detention, rendition and the harrowing experiences you have suffered. Your accounts were moving and what happened to you is deeply troubling. It is clear that you were both subjected to appalling treatment and that you suffered greatly, not least the affront to the dignity of Mrs Boudchar, who was pregnant at the time [this was in 2004]. The UK Government believes your accounts. Neither of you should have been treated in this way.
>
> The UK Government's actions contributed to your detention, rendition and suffering. The UK Government shared information about you with its international partners. We should have done more to reduce the risk that you would be mistreated. We accept that this was a failing on our part.

> Later, during your detention in Libya, we sought information about and from you. We wrongly missed opportunities to alleviate your plight: this should not have happened."

21. There was some debate at the Bar as to how far this apology went. Mr de la Mare submitted that the defendants have accepted the whole of Mr Belhaj's account, including his evidence that when in Libya he gesticulated to an MI5 agent signs of his torture and the latter made it clear that he understood. Ms Giovannetti submitted that precisely what was said during the mediation process cannot be discerned from the terms of the Attorney General's apology, from which it follows that the defendants' acceptance that Mr Belhaj has told the truth does not really advance the claimants' case. With some regret, I am driven to conclude that Ms Giovannetti's submission is right.

22. The ISC Report does lend general support for the claimants' case that the UK agencies connived in the unlawful policy and practice of rendition spearheaded by the US Government over the relevant period. At the very least, submits Mr de la Mare, this is similar fact or systemic evidence which chimes with the claimants' pleaded case in this litigation. The difficulty with that submission, and again I express this with some regret, is that the ISC Report attracts Parliamentary privilege and cannot strictly speaking be relied on for the purposes of this CPR Part 24 application. In any case, the claimants' case would be stronger if an analysis of the underlying CLOSED material were to show that Libya was within the scope of the ISC's consideration. The highest that the claimants' case may be put, even were the ISC report admissible, relates to the alleged relevance of the individual anonymised as CUCKOO.

The Evidence of Mr Nick Toogood

23. It is convenient at this stage to interpose the evidence of Nick Toogood filed on 29th November 2018. Mr Toogood is described as "Head of Unit in the Office of Security and Counter Terrorism" at the Home Office. Mr de la Mare was highly critical of this evidence, and it is right that I examine it with a careful, precise and, if necessary, sceptical eye.

24. Mr Toogood states that he has worked for the Home Office in his current role since September 2014. He does not explain when he started working for the Home Office, and whether he was in any relevant post between October to December 2005. In my opinion, he should have done this. On the other hand, Mr de la Mare does not oppose the adducing of this evidence as hearsay, if that is what it is, nor could he properly do so because such evidence is admissible under the rules.

25. Much of Mr Toogood's evidence is a commentary on documentary evidence and/or a vehicle for legal submission. In my opinion, he should not have done this.

26. Mr Toogood makes it clear that "decisions to deport Libyan nationals had been in contemplation since 2001". This is another way of saying that HMG had been hoping since 9/11 that some means could be found for deporting LIFG members, and others, to Libya, notwithstanding that the Qadhafi regime was celebrated for its human rights abuses. To be fair, HMG appreciated for some years that deportation of such individuals to Libya could not take place without creating an unacceptable article 3 risk.

27. Mr Toogood then says this:

> "By late 2005, the position had changed. Anthony Layden, who had been UK Ambassador to Libya from October 2002 to April 2006 and at that time had been appointed to the FCO as Special Representative for Deportation with Assurances (DWA), gave evidence to SIAC in which he agreed that a 'sea-change … appears to have taken place at some time after May 2004'. (CLOSED evidence, 8 November 2006)" (para 12d)

Mr de la Mare is generally critical of Mr Toogood's selective and unexplained revelation of previously CLOSED evidence in the context of this CPR Part 24 application. I share his concerns. However, there is nothing I can properly do to preclude reliance on this fragment of evidence save to parse it extremely narrowly. In any case, it falls to be read in conjunction with Mr Layden's OPEN evidence (paras 12f and i) that the change of the political climate in Libya, generated by the developing relationship between the two countries, was such that the MoU could be regarded as reliable – in the sense that the Libyan authorities would abide by it.

28. Mr Toogood notes the terms of the communication to the Special Advocates, and points out that its language has been chosen carefully: the "information provided to the Secretary of State in support of the recommendations to deport each of C1-5 did not contain an account etc." (para 16). Mr Toogood observes that the defendants are not able to say precisely when the Home Secretary was first made aware "of the specific matters set out in the quotation" from the communication to the Special Advocates, but states that the latest date was February 2006. In my judgment, if the defendants wish to rely on some earlier date they should have adduced proper evidence about that: they have had sufficient time to do so, and cannot now be heard to advance an evidential case by suggestion or allusion. In my view, February 2006 is too late for the defendants' purposes, for two reasons. First, I am focusing on the legal integrity of the initial decisions to detain and deport. Secondly, there is no evidence of what happened when the Home Secretary saw the "specific matters" to which Mr Toogood refers.

29. Another difficulty I have with this aspect of Mr Toogood's evidence is that, save to the limited extent identified below he does not give particulars of the "specific matters" set out in the communication to the Special Advocates beyond the blanket reference to "the nature and extent of any relationship between the UK government and the Libyan Security Services". The emphasis for present purposes should be on the adjective "any". In OPEN, the defendants are admitting that no consideration was given to evidence or information about "specific matters" but beyond that no admissions or averments are made. The question arises of what inferences, if any, I can properly draw about the nature and extent of these matters.

30. Mr Toogood also says that it is a "fundamental misconception to proceed on the basis that in making the deportation decisions the Home Secretary's knowledge was limited to the documentation accompanying the recommendations to deport each of C1-5" (para 14), and that "institutional competence" lay with the FCO (paras 17ff). However, it is unclear what advice the Home Secretary, as distinct from his department, was given by the FCO, and when. Indeed, para 19 of Mr Toogood's witness statement suggests that the Home Office properly regarded the FCO as the relevant decision-maker, which might be taken to indicate that communications between the two departments of state were limited. Para 23 of Mr Toogood's statement refers blandly to FCO advice and to the fact that the Home Secretary received briefings on the situation in Libya. In my

opinion, to the extent that this advice was provided to the SSHD, it should have been disclosed and exhibited, as should the briefings referred to. All references to the national security case could of course have been redacted. In my judgment, the defendants should be remedying this defect as soon as possible.

31. Furthermore, Mr Toogood contends that if it was reasonable for the Home Secretary to make the deportation decisions on the basis of the FCO advice that the MoU would be reliable, that should dispose of the claimants' CPR Part 24 application (para 24). This contention would be stronger if it were clear from the FCO advice that account had been taken of any contrary or countervailing material, including the "specific matters" Mr Toogood has mentioned.

32. One possible interpretation of all this evidence, and one supported I have to say by para 27 of Mr Toogood's statement, is that both the SSHD and the FCO regarded the MoU as some form of trump card, sufficient to defeat all antecedent concerns about the Libyan authorities and regardless of the nature and extent of any burgeoning relationship between the countries' respective Security Services. As before, the adjective "any" needs to be emphasised. Some insight into the attitude of the Home Secretary may be gained by a consideration of the email from Ms Gross at No 10 Downing Street to the Home Secretary's private office dated 2nd August 2005. This speaks for itself and it is unnecessary for me to comment further.

33. According to para 26 of Mr Toogood's witness statement, the "window-dressing" issue, and evidence bearing on it, "were not legally relevant". Ms Giovannetti sought to persuade me that this means something along the lines of: "taken into account as part of the overall decision-making process but not ultimately legally relevant to the decision to deport". I cannot accept that submission. The natural meaning of "not legally relevant" is "not legally capable of being relevant to the decision in question". After all, the defendants have accepted that as a matter of fact information was not taken into account by the Home Secretary, without of course accepting what that information was.

34. According to para 28 of Mr Toogood's witness statement, HMG had sought assurances from the Libyan Government on the treatment of Mr Belhaj before he arrived there. It is contended that the Court is not presently in a position to assess their effectiveness. Further, at para 29 it is said that before the deportation notices were served in the present cases, "information indicated that Mr Belhaj was being well-treated by the Libyans".

35. Finally, at para 37c the following appears:

> "Without prejudice to those observations, the CLOSED evidence before SIAC did include evidence that Mr Belhaj had been rendited to Libya in March 2004 along with the fact that HMG had contributed to his arrest and transfer to Libya once sufficient assurances on treatment had been obtained from the Libyan Government. The CLOSED evidence further concerned the nature and scope of UK-Libya governmental co-operation on counter-terrorism."

Again, the point may fairly be made that the defendants have chosen to refer to CLOSED evidence on a selective basis, without explaining (a) why the interests of

national security no longer mandate the protection of this evidence, and (b) why it is not possible to disclose more.

The Claimants' Case on this Application

36. The essential submission advanced by Mr de la Mare was that it is clear from the defendants' admitted stance in the CLOSED Defence, now put in OPEN, that the decision-maker(s) did not consider critically important evidence relevant to the issue of safety of return in Libya. Strictly speaking, there was only one decision-maker, the Home Secretary, but the application of the *Carltona* doctrine still requires exploration. This failure constitutes an elementary public law error which entitles the claimants to summary judgment on its false imprisonment and trespass claims pursuant to CPR Part 24; issues of causation and quantum fall to be addressed subsequently.

37. Mr de la Mare relied on a trio of Supreme Court decisions – *R (WL (Congo)) v Home Secretary* [2012] 1 AC 245 ("*Lumba*"), *R (SK (Zimbabwe)) v Home Secretary* [2011] 1 WLR 1299 *("Kambadzi")* and *R (B (Algeria)) v SSHD* [2018] AC 418 – in support of his essential submission. He maintained that another trio of cases decided at Court of Appeal level – *Ullah v Home Office* [1995] Imm AR 166, *R (Draga) v SSHD* [2012] EWCA Civ 842 and *SSHD v Gaviria-Manrique* [2016] EWCA Civ 159 – did not trump or obstruct his argument. I should add that Mr de la Mare also drew my attention to at least two cogent first instance decisions which supported his thesis. Given the plethora of weightier authority to consider, it is sufficient to say that I have taken these into account but that I do not intend to examine them specifically.

The Defendants' Case on this Application

38. Ms Giovannetti advanced the following four submissions in defence of her clients' position:

    (1) the trio of Court of Appeal decisions precludes these claims.

    (2) the issue of safety on return does not arise when decisions to deport are made; they arise only when the deportation orders are made.

    (3) it is insufficient for the claimants' purposes to demonstrate that the decision-maker(s) failed to take relevant considerations into account; this is an error in process or procedure which does not, without more, amount to a violation of article 3 of the Convention (see the trio of House of Lords decisions: *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100 and *R (Nasseri) v SSHD* [2010] 1 AC 1).

    (4) in any event, even if all legal defences fail, the Court cannot on a CPR Part 24 application on wholly OPEN material summarily determine the complex inferential and factual issues in the claimants' favour.

The Issues

39. In the light of the parties' submissions, which I am not proposing to set out in any further detail, it seems to me that I should be addressing these questions in the following order:

(1) the correct approach to the statutory scheme.

(2) the scope of the *Lumba* principle as enunciated at the highest judicial level.

(3) whether binding Court of Appeal authority precludes these claims.

(4) whether cases such as *Nasseri* defeat these claims at this stage.

(5) whether, if the claimants are right on the law, I may properly determine the claimants' essential submission on this CPR Part 24 application.

40. I need to explain the slightly different formulations under items (3) and (4) above. If the defendants' case is correct as to preclusive binding Court of Appeal authority, I think that the claimants would have to accept that their claims fail not merely under CPR Part 24 but for all purposes. They would add, and I would agree, that it is unfortunate to say the least that the argument was not raised before Irwin J as part and parcel of the original strike-out application. If, on the other hand, the defendants are right about item (4), they would succeed in defeating this application but triable issues would still arise under a different sub-set of *Wednesbury*: it would open to the claimants to contend, as they have pleaded, that the deportation decisions were irrational on their merits.

The Statutory Scheme

41. The claimants were liable to deportation under section 3(5)(a) of the Immigration Act 1971 because the Home Secretary, considering them to be a threat to the national security of the UK, was entitled to deem their deportation as conducive to the public good. In such circumstances, the Home Secretary was empowered to make a deportation order against the claimants: see section 5(1). The scheme of the Act requires a two-stage approach: the making of an appealable decision to deport; and then the making of a deportation order.

42. Para 2(2) of Schedule 3 to the Act provides:

> "Where notice has been given to a person … of a decision to make a deportation order against him …, he may be detained under the authority of the Secretary of State pending the making of a deportation order."

43. At the time the claimants' cases were being considered, the governing immigration rules were HC395. Para 364 provided:

> "Subject to paragraph 380, in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. …
>
> … Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including:
>
> (i) age;

> (ii) length of residence in the UK;
>
> (iii) strength of connections with the UK;
>
> (iv) personal history, including character, conduct and employment record;
>
> (v) domestic circumstances;
>
> (vi) previous criminal record …
>
> (vii) compassionate circumstances;
>
> (viii) any representations received on the person's behalf."

44. Para 380 provided:

> "A deportation order will not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the … Human Rights Convention."

45. Para 364 considers the merits of deportation at what I am calling the first stage of the decision-making process. Article 3 of the Convention is not part of the para 364 list. However, para 364 is subject to para 380, and in deciding whether to deport an individual at the first stage it seems to me that the Home Secretary must address Convention issues. If, for example, deportation would clearly breach a person's article 3 rights, the Home Secretary could not lawfully decide to deport him; and were she or he determined to do so, an appeal would inevitably succeed. Although the article 3 breach could not arise until removal is taking place, it follows from what I have said that the detention power could not on these hypothetical facts be lawfully deployed. This, I think, despatches Ms Giovannetti's submission that article 3 issues do not arise at the decision to deport stage. In any event, I had thought that the primary plank of her clients' defence to these false imprisonment claims was that the issue of safety on return was properly considered by the Home Secretary.

46. The statutory scheme is not such that administrative detention will always ensue when the Home Secretary decides to deport. However, it is a salient feature of the instant cases that detention was inevitable once these deportation decisions were made. This was because the executive would not wish to keep at large individuals deemed to be a threat to the national security of this country, absent wholly unusual or exceptional circumstances.

47. I need to footnote the separate regime which applied to Control Orders at the material time. The combined effect of ss.2 and 3 of the Protection of Terrorism Act 2005 was that the Home Secretary was empowered, subject to court application, to make a Control Order against an individual if he:

> "(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

> (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual."

Thus, no issue arose in relation to the feasibility - in line with Convention obligations - of removing that individual from the UK. The Protection of Terrorism Act 2005 was enacted, after all, to remove the discrimination against foreign nationals created by the earlier regime.

48. Contrary to the view I expressed in a draft of this Judgment, I have concluded that the Control Order issue cannot readily be assimilated or collapsed into the immigration detention issue: it raises a fresh and separate point, arising in the context of a discrete statutory regime. In view of the manner in which the argument proceeded before me, I have decided to defer making a final ruling on this issue under the rubric of the present CPR Part 24 application.

The Lumba Principle

49. In *Lumba* the Home Secretary applied an unpublished, blanket and therefore (in the public law terms) unlawful policy to the claimants. The majority in the Supreme Court held that a breach of public law principles could found an action at common law for damages for false imprisonment, and that if it did so it was unnecessary for a claimant to prove causation. All that had to be established to constitute the completed tort was that the relevant public law breach bore on and was relevant to the decision to detain. If, on the other hand, it was inevitable that the claimant would have been detained pursuant to the exercise of lawful, published policies, damages would be nominal.

50. Lord Dyson JSC gave the lead judgment for the majority. For present purposes, paras 66 and 67 are critical. They are too well-known to warrant full citation in this Judgment, but what I would wish to emphasise is the analysis which is founded upon and flows from *Anisminic*, namely that there can be no distinction between administrative decisions which are unlawful, *ultra vires* and a nullity. Lord Dyson pointed out that decisions which were unreasonable in the *Wednesbury* sense were comprehended by this unitary principle. On the other hand, minor public law errors – e.g. decisions taken by the wrong grade of official – would not necessarily lead to tort claims because, by analogy with the court's approach in refusing relief in judicial review proceedings, they could be disregarded.

51. *Kambadzi* was very similar to *Lumba* and for present purposes may be treated in the same way. Neither case was precisely analogous to the instant cases because the focus was solely on the detention decisions: our cases are concerned with the deportation decisions.

52. In *B (Algeria)* SIAC maintained bail conditions in circumstances where it had ruled that the claimant could no longer be lawfully detained pursuant to para 2(2) of Schedule 3 to the Act, applying *Hardial Singh* principles. The issue arose of whether there was power to impose such conditions: this in turn hinged on whether, applying the approach in *Anisminic*, "detained" in paras 22 and 29 of Schedule 2 meant "lawfully detained". The Supreme Court, applying the fundamental principle of the common law that in enacting legislation Parliament was presumed not to intend to interfere with the liberty

of the subject without making such an intention clear, construed the statutory wording as being subject to this implied interpolation.

53. Para 31 of the judgment of Lord Lloyd-Jones JSC is illuminating:

> "Paragraph 22 of Schedule 2 confers a power to release on bail in the case of three categories of person, namely a person detained under paragraph 16(1) pending examination, a person detained under paragraph 16(1A) pending completion of his examination or a decision on whether to cancel his leave to enter, and a person detained under paragraph 16(2) pending the giving of directions. Each category is defined by reference to the person being detained under paragraph 16 of Schedule 2. Similarly, paragraph 29 applies to a person who "is for the time being detained under Part I of this Schedule". Applying the strict approach to interpretation which I consider is required here, these provisions must be taken to refer to detention which is lawful. This conclusion is reinforced by the fact that in respect of each category to which it applies paragraph 16 refers to detention "under the authority of an immigration officer". This makes clear that the provision is not addressing the mere fact of detention; this must refer to a lawful authorisation for detention. As the Court of Appeal concluded in the present case, it would be extraordinary if Parliament had intended to confer the power to grant bail where a person had been unlawfully detained or could not lawfully be detained. The words employed are certainly not appropriate to refer to a state of purported detention or to embrace both lawful and unlawful detention. I consider that "detained" in paragraphs 22 and 29 refers to lawfully authorised detention."

54. This analysis is helpful for present purposes because it shows that the proper exercise of the power to grant bail is dependent on the existence of a *lawful* detention. By parity of reasoning, the proper exercise of the power to detain in the instant cases predicates the existence of lawful decisions to deport.

55. The analogy is not complete, but in my judgment the principle can be applied to the instant cases, subject to one qualification which needs to be made. As I have already said, the decisions to detain these claimants were entirely consequent on the decisions to deport. Although as a matter of *form* a separate decision had to be made, as a matter of *substance* there was next to nothing for the Home Secretary to consider; and there is no suggestion that a different Minister or official made the detention decisions. Indeed, the stronger the national security case was/is, the greater the justification for detaining these claimants pending their deportation. Thus, other things being equal, a public law breach in connection with the decisions to deport would, it seems to me, inevitably bear on and be relevant to the decisions to detain.

56. The one qualification concerns the taxonomy or nature of the *Wednesbury* error in this case. There would be no difficulty whatsoever if the Home Secretary's deportation decisions were irrational in the pure Diplockian sense, and Lord Dyson made that very point at para 66 of his judgment in *Lumba*. Mr de la Mare has advanced such a case in

the claimants' Consolidated Particulars of Claim, but this is not the case that he either can or does advance under CPR Part 24. His contention is that the Home Secretary failed to take relevant matters into account. This, as I have said, falls within a different sub-set of *Wednesbury*, and Ms Giovannetti submits that separate considerations arise. I will therefore be returning to this point under the rubric of the fourth issue (see para 70ff below).

Binding Court of Appeal Authority?

57. In *Ullah v Home Office* [1995] Imm AR 166, the plaintiff was detained for 17 days under para 2(2) of Schedule 3 to the Act following the defendant's decision to deport him. The defendant then withdrew his decision because relevant facts had not been taken into account: an official stated that the "decision to deport was not in accordance with the law". In striking out the claim, the Court of Appeal held as follows:

> "… all that is required by para 2(2) of Schedule 3 in order to make detention legitimate is the giving of a notice of intention to make a deportation order. That condition precedent would not be fulfilled if no such intention had been formed, or if the intention had been formed in bad faith, but otherwise once notice is given in accordance with the regulations to a person liable to be deported, that person may be detained, and his detention will be lawful even if the notice is later withdrawn or set aside." (per Kennedy LJ at 170-1)
>
> "What the paragraph does not require, however, is that the decision should be the right decision, or without flaw, or otherwise impervious to successful challenge by way of judicial review. A decision made by the Secretary of State in good faith against a person liable to be deported is a decision within the contemplation of the paragraph even if it later appears that it is a decision which he should not have made or which he should not have made without further consideration." (per Millett LJ at 171)

58. At page 170 of the Immigration Appeal Report, Kennedy LJ recorded a submission of mine in these terms:

> "Mr Jay accepts, in my view, rightly, that in this case we should not be tempted to consider whether the decision of the Secretary of State to issue the deportation notice was void or voidable. The action was plainly not *ultra vires*, but, although Mr Jay does not concede as much, it may have been irrational and therefore liable to be declared void."

At this distance, I cannot precisely recall what I submitted, conceded or inadvertently left ambiguous. I do not believe that I would or could have told the Court of Appeal that "the action was plainly not *ultra vires*" because it was my consistent understanding of *Anisminic* since I first read it carefully in May 1978 that all errors of law went to jurisdiction. However, the inference must be that I did not point this out to Kennedy LJ after I saw his judgment in draft.

59. Be that as it may, the ratio of *Ullah*, if still binding, is dispositive of both this application and these claims.

60. Mr de la Mare drew my attention to the decision of the Court of Appeal in *D v Home Office (Bail for Immigration Detainees and another intervening)* [2006] 1 WLR 1003. The focus of that case was Schedule 2 to the Act and not Schedule 3, but this is a distinction without a difference. In a magisterial judgment Brooke LJ examined the post-*Anisminic* line of cases and at paras 120 and 121 came to the following conclusion about *Ullah*:

> "120. In my judgment we are entitled to regard ourselves as not bound by the decision in *Ullah* because (1) we heard far more argument on material questions of law than was available to the court in *Ullah*; (2) in *Ullah* there was no clear distinction between the liability of the first actor and the liability of the second actor (Dr Forsyth's analysis of the importance of this distinction post-dated *Ullah*), the challenge in that case was made to the decision of the second actor, and in the context of a Schedule 3 detention which raises different considerations; (3) the reach of the law of false imprisonment over unlawful acts of the executive that lead to an infringement of liberty has now been illuminated by the decision of the House of Lords in *ex Evans (No 2)*; (4) in *Ullah* Kennedy LJ appears to have taken for granted that a pre-*Anisminic* approach to the decision of an officer of the executive was appropriate in the post-*Anisminic* world without explaining why; and (5) the policy considerations that inspired the *dictum* of Lord Moulton in *Everett v Griffiths* are no longer sustainable in cases concerned with the right to liberty in the light of the way in which the House of Lords weighed the balance in favour of the victim of a wrongful imprisonment in *ex p Evans*. Mr Gordon QC, who appeared for the interveners, advanced the valid argument that the policy arguments for denying a right to damages for unlawful detention pale by comparison with the policy arguments for admitting such a right, because of the enormous damage that is caused, on occasion, by unlawful detention in terms of suffering and damage to physical and mental health. Indeed, the claimants submit that this is such a case.
>
> 121. In short, it appears to me that we are at liberty, unconstrained by binding authority, to interpret Schedule 2 to the 1971 Act without any preconceived notions. If we do so, there is nothing there to suggest that Parliament intended to confer immunity from suit on immigration officers who asked themselves the wrong questions, so that their decision to deprive an immigrant of his/her liberty was a nullity and consequently unlawful. This is a conclusion at which one can arrive with a measure of satisfaction because it seems entirely wrong that someone who has been wrongly detained by the executive because of a filing error or some other incompetence in their

> offices should not be entitled to compensation as of right. I see no reason, incidentally, in relation to a claim against a first actor, to obtain first either a declaration that the detention was unlawful or a quashing order: it is sufficient that the claimant was unlawfully detained on his authority and suffered damage as a result."

61. In my judgment, it is clear that in declining to follow *Ullah* this constitution of the Court of Appeal was effectively overruling it. *D* and *Ullah* cannot both be right, and in circumstances such as these it is the duty of a first instance judge to apply the subsequent case. I do so without any measure of dissatisfaction, putting to one side my personal involvement in bringing about, at least in part, the solecism of *Ullah*, because Brooke LJ's analysis is clearly right and cannot be improved. It is also supported by paragraph 66 of Lord Dyson's judgment in *Lumba*, which suggests that had the Supreme Court been shown *Ullah* that case would have been overruled. Finally, I put a marker against the second sentence of Brooke LJ's para 121 because it is relevant to the fourth issue.

62. Undaunted, Ms Giovannetti nonetheless submitted that there are two later Court of Appeal authorities which apply *Ullah* to the extent that I remain bound by it.

63. In *Draga* the claimant was served with a notice of intention to deport, was detained, then appealed to the AIT, and lost. Subsequently, he claimed that the decision to make a deportation order was invalid because it was based on secondary legislation which was unlawful: that contention eventually succeeded, the claimant's appeal against the Home Secretary's refusal to revoke the deportation order was successful, and a claim for false imprisonment was brought. That claim failed in the Court of Appeal in relation to the majority of the period under consideration.

64. The parties before me were not in accord as to the true *ratio* of *Draga*. I have read Sullivan LJ's judgment closely and have concluded that it is to be located in paras 65 and 66. What was critical in that case was that the claimant had brought an unsuccessful appeal against the Home Secretary's notice of intention to deport, and that the latter was therefore entitled to rely on it as a lawful decision. Thus, the appellate process amounted to a statutory bar to the claim, not the statutory scheme as envisaged by the Court of Appeal in *Ullah*. On this approach, the claimants in the instant case are not precluded by *Draga* because the relevant notices of intention to deport were not upheld by SIAC on appeal.

65. Two additional features of *Draga* should be mentioned. First, this was a post-*Lumba* decision, which explains Sullivan LJ's concerns about *Anisminic*: see paras 60 and 72. Secondly, his reference to *Ullah* at para 60 needs to be read in its proper context. Had it been Sullivan LJ's view that *Ullah* represented binding authority he would surely have said so and given a brief judgment to that effect – and on that hypothesis I would also have expected counsel in that case to have drawn *D* to the Court of Appeal's attention. Instead, he decided the case on a narrower, different and more complex basis. That is made even clearer by the final sentence of para 82 of Pill LJ's supporting judgment.

66. This interpretation of *Draga* is also supported by the Court of Appeal's approach to it in *R (DN (Rwanda) v Home Secretary* [2018] 3 WLR 490: see Arden LJ at para 34). Overall, I cannot accept that *Draga* avails Ms Giovannetti.

67. *Gaviria-Manrique* was produced by Ms Giovannetti somewhat late in the day, and both parties have provided further written submissions upon it. The facts are somewhat convoluted, and the issues for determination not wholly clear, but I am prepared to accept most of Ms Giovannetti's explanations about that. Para 42 of the judgment of McCombe LJ is material:

> "Given the existence of the deportation order, there was clearly a power to detain under paragraph 2(3) of Schedule 3 to the Act, and given the situation as the Appellant thought it to be, it is difficult to see how that decision to detain was rendered unlawful, simply because of an omission formally to serve the notice of the decision not to revoke the deportation order. It seems to me that so much is clear from the judgment of Millett LJ in *Ullah v Home Office* [1995] Imm AR 166 (quoted in *Draga* at [45]) as follows:
>
> > "Accordingly, [Counsel for the Secretary of State] rightly concedes that if the person served with the notice was not a person liable to deportation, or if the Secretary of State had not made a decision to make a deportation order against him, or had made such a decision in bad faith, then the notice would be bad and the detention would be unlawful. In none of those cases would there have been a decision of the kind contemplated by paragraph 2(2).
> >
> > What the paragraph does not require, however, is that the decision should be the right decision, or without flaw, or otherwise impervious to successful challenge by way of judicial review. A decision made by the Secretary of State in good faith against a person liable to be deported is a decision within the contemplation of the paragraph even if it later appears that it is a decision which he should not have made or which he should not have made without further consideration."

68. It is not easy to understand why Counsel for the Home Secretary in *Gaviria-Manrique* did not draw the attention of this constitution of the Court of Appeal to Brooke LJ's judgment in *D*. However, the legal error on the facts of that case was not regarded as particularly significant, and in any case the *ratio* of *Gaviria-Manrique* was, as McCombe LJ explained at para 43, based on an analogous application of *Draga*. In my judgment, this authority establishes no principle which avails the Home Secretary in the instant cases.

69. It follows that there is no binding Court of Appeal authority which impedes the correct application of *Lumba*.

70. Following the hearing I have considered the recent decisions of the Court of Appeal in *SSHD v SM (Rwanda)* [2018] EWCA Civ 2770 and *Parker v Chief Constable* [2018] EWCA Civ 2788, the overall tenor of which are in line with my thinking.

The Nasseri Line of Authority

71. The trio of cases I referred to under para 39(3) above are authority for the proposition that in claims for judicial review involving Convention rights, it is insufficient for a claimant's purposes to demonstrate some flaw in the decision-making process. What must be shown is that the defendant's decision violated the right that is sought to be invoked. As Lord Hoffmann clearly explains:

> "13. This approach seems to me not only contrary to the reasoning in the recent decision of this House in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 but quite impractical. What was the Council supposed to have said? "We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil." Or: "Taking into account article 10 and article 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil." Would it have been sufficient to say that they had taken Convention rights into account, or would they have had to specify the right ones? A construction of the Human Rights Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol." (*Belfast City Council v Miss Behavin' Ltd*)
>
> and
>
> "12. In my respectful opinion the judge was wrong in saying that article 3 creates a procedural obligation to investigate whether there is a risk of a breach by the receiving state, independently of whether or not such a risk actually exists. In making this mistake the judge was in good company, because it seems to me that he fell into the same trap as the English Court of Appeal in *R (SB) v Governors of Denbigh High School* [2005] 1 WLR 3372; [2007] 1 AC 100 and the Northern Irish Court of Appeal in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct

> approach when the challenge is based upon an alleged infringement of a Convention right. In the *Denbigh High School* case, which was concerned with whether the decision of a school to require pupils to wear a uniform infringed their right to manifest their religious beliefs, Lord Bingham of Cornhill said, in para 29:
>
> > "the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated."
>
> 13. Likewise, I said, in para 68:
>
> > "In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)?"" (*R (Nasseri) v Home Secretary*)

72. These dicta prompted Ms Giovannetti to submit that it is insufficient for the claimants' purposes to aver that the decision-maker failed to take material considerations into account, because this is to allege the sort of procedural error which cannot amount to a substantive breach of article 3 of the Convention.

73. I confess that I was too dismissive of this submission before I heard Ms Giovannetti elaborate her case, but having now considered it properly I remain of the view that it is unsound. The claimants' case is that the exercise of the discretion to deport them on conducive grounds necessarily engaged questions of safety on return, and as part and parcel of the overall article 3 assessment critically important information was excluded from account. There are, therefore, superficial similarities between our case and the trio of House of Lords decisions that I have referenced. I do not agree with Mr de la Mare that these earlier authorities are distinguishable because the decision-makers *did* address relevant Convention rights one way or another: the same is true of the instant cases. I consider that the real point of distinction is that it is a fundamental aspect of the present cases that damages for false imprisonment are being claimed in circumstances where it is being said that the Home Secretary, who must justify the deprivation of liberty, did not ask himself the right questions (per Brooke LJ in *D*) and/or excluded from account evidence which necessarily and logically bore on the integrity of the decision-making process. I cannot see how Lord Dyson's seminal analysis in *Lumba* should be truncated in situations where the public law error bites on a Convention right as distinct, for example, from straightforward *Wednesbury* unreasonableness in a non-Convention context.

74. It follows that I must reject this limb of Ms Giovannetti's argument.

Application of these Principles to the Evidence

75. There was some discussion during the course of the hearing as to the true scope of the *Wednesbury* principle, and I mentioned to Counsel the decision of the Divisional Court in the *Worboys* case – *R (DSD and NBV) v Parole Board and others* [2018] 3 WLR 829. In my view, an examination of paras 134-164 of the judgment in that case reveals that there are three separate sub-categories of *Wednesbury*, viz.:

(1) A failure to take into account material considerations which form part of the statutory lexicon, either expressly or by necessary implication.

(2) A failure to take into account considerations which are so obviously material in any given circumstance that it is or would be irrational not to consider them.

(3) Regardless of (1) or (2), a decision which is so obviously and clearly wrong on its merits that it is irrational.

76. Mr de la Mare disavowed (1) and, as I have already pointed out, cannot rely on (3) at this stage. He did not shrink from placing his submissions within the envelope of (2).

77. In this specific regard I must reconsider the evidence. The Home Secretary has said that information as to what happened to Mr Belhaj and the nature and extent of any Security Services' involvement with their Libyan counterparts is "legally irrelevant" to the issue of safety on return. I have said that this is a surprising averment. On the other hand, it is necessary to be precise as to what constitutes this "information" for present purposes. The material in the ISC report must be excluded from the equation because it is inadmissible. The claimants' copious pleas and averments based on the Libyan cache cannot be considered at this stage because it is not evidence, and the defendants have neither confirmed nor denied it. Mr Belhaj's experiences in Libya before the Home Secretary's decisions were made in late 2005 cannot be taken into account against the defendants, save in a general and imprecise manner, because what he said at the mediation of his civil claims is neither admissible nor capable of being weighed in the balance: the detail is unknown.

78. So, all that exists for present purposes is the defendants' exiguous averments, somewhat unsatisfactorily expressed through the medium of Mr Toogood, to the effect that HMG received some assurances relating to Mr Belhaj, that they received information that he was being well-treated, and that the FCO assessed that the MoU was reliable. Implicit in these averments is that there was some sort of interaction between the Libyan and UK Governments, but beyond that one cannot go. It is unnecessary at this stage to suggest what further inferences, if any, may be drawn from the OPEN material.

79. Mr de la Mare submitted that Mr Toogood's OPEN evidence serves to prove that the Libyan cache, including the Musa Kusa/Allen letter, is genuine. I think that goes too far. The more limited, and accurate, submission would be that this OPEN evidence is consistent with the Libyan cache being genuine, but that without more cannot avail the claimants sufficiently for the purposes of this application. The position remains that the Libyan cache is neither confirmed nor denied by the defendants, and that is the end of the matter for the purposes of CPR Part 24.

80. There is, however, an internal inconsistency in the defendants' case which needs exploration. On the one hand, the defendants contend that the Libyan's decision to enter into an MoU amounted to the "sea-change". On the other hand, Mr Toogood informs the Court that some reliance could be placed on presumably informal assurances which were made in or before March 2004 when HMG "contributed to [Mr Belhaj's] arrest and transfer to Libya". It is not easy to understand how and why these informal assurances could have been regarded as having any utility and value, which might explain HMG's eventual decision to settle the *Belhaj* litigation.

81. It is this last consideration which has caused me to ponder. Ultimately, I have drawn back from deciding this case on a summary basis against the defendants. I have reached this conclusion for two reasons. First, the evidential picture in OPEN is limited, and all that is visible is a few peaks emerging from the clouds. Without seeing more of that picture, it is difficult to draw inferences adverse to the defendants, and I do not consider that I can altogether ignore Mr Toogood's observation that "the Court is not presently in a position to assess the nature and extent of the safeguards put in place by the Government in respect of the alleged treatment of Messrs Belhaj and Al Saadi". Secondly, the ability of the Divisional Court in the *Worboys* case to conclude that it was irrational not to consider certain material was based on it having sight of *all* relevant evidence and information. Only in that way was it apparent to the Divisional Court that critically important material had been excluded from account. In the present case, the absence of the full picture makes it much harder to say that it was irrational not to consider certain information, particularly when that information cannot be specified.

82. With considerable reluctance, therefore, I am driven to conclude that the defendants have raised sufficient of an evidential case in OPEN to have a real prospect of success.

Disposal

83. Although I am compelled to dismiss the claimants' application under CPR Part 24, I agree with Mr de la Mare that the defendants' case on the issue of liability is tenuous. This assessment will inform my future case management directions. Lest I should be misunderstood, I remain agnostic on the issue of *Lumba* causation.

84. I have decided to issue a brief CLOSED judgment in line with my powers under section 6(2)(b) of the JSA 2013 and the overriding objective. The upshot is that I am treating the Special Advocates as having made a Part 24 application in CLOSED. The Defendants have until 4pm on Monday 25th March 2019 to file CLOSED evidence and written submissions in opposition. I will decide how to proceed thereafter.

Post-scriptum

85. On 29th January 2019, being the day before I was minded to hand-down this Judgment, I received a letter from the Government Legal Department indicating that, in the absence of discovery of any evidence of detention reviews, the defendants were now constrained to concede that the detentions of C1-5 were unlawful upon the expiry of 24 hours from the dates of the initial confinements to the dates their detentions under immigration powers ceased. *Lumba* causation, as well as quantum, were denied.

86. The defendants question any continued need for a Part 24 application in CLOSED, but I agree with the claimants and the Special Advocates that the utility of this remains viable, appropriate and in line with the overriding objective. In the circumstances of this case, there is an overlap between liability and *Lumba* causation issues.

87. I invite the parties to draw up an Order which reflects the foregoing.