Neutral Citation Number: [2019] EWHC 3172 (QB)

Claim Nos: HQ13X01841
& HQ15P01285

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2019

Before:

THE HON MR JUSTICE TURNER

- -

Between:

YUNUS RAHMATULLAH	**1st Claimant**
- and -	
AMANATULLAH ALI	**2nd Claimant**
- and -	
(1) THE MINISTRY OF DEFENCE **(2) THE FOREIGN AND COMMONWEALTH OFFICE**	**Defendants**

- -
- -

Richard Hermer QC, Nikolaus Grubeck and **Andrew McIntyre**
(instructed by **Deighton Peirce Glynn**) for the **1st Claimant**
Angus McCullough QC and **Martin Goudie QC**
(supported by **Special Advocates' Support Office**) for the **1st Claimant**
Dan Squires QC and **Julianne Morrison** (instructed by **ITN Solicitors**) for the **2nd Claimant**
Shaheen Rahman QC, Zubair Ahmad QC and **Rachel Toney**
(supported by **Special Advocates' Support Office**) for the **2nd Claimant**
Derek Sweeting QC and **James Purnell**
(instructed by **Government Legal Department**) for the **Defendants**

Hearing dates: 15th and 16th October 2019

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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.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

1. The claimants in this case are Pakistani nationals both of whom allege that they were captured by British forces in Iraq in February 2004. They contend that they were subsequently handed over to United States' control and, thereafter, taken to Afghanistan where they were subjected to prolonged detention, torture and mistreatment.

2. The case against the defendants is based upon three broad categories of allegation:

   (i) mistreatment by UK personnel upon arrest and before the claimants were transferred to United States' control;

   (ii) transfer to United States' control; and

   (iii) failures thereafter to intervene to bring the claimants' detention to an end and/or stop the United States' authorities from further mistreating them ("the return claim").

3. The claims are brought under the provisions of the Human Rights Act 1998 and in common law. They are strenuously denied.

4. As the claims proceed towards trial, two important issues have arisen between the parties relating to disclosure and applicable law respectively. For the sake of convenience and ease of reference, I have set about the task of giving separate written judgments on each issue. This judgment is concerned with the issue of applicable law.

5. In their presentation of the return claim, the claimants rely on the torts of negligence and misfeasance in public office respectively. These causes of action arise under the common law which will, of course, be engaged only in the event that English law[1] is found to apply.

THE STATUTORY FRAMEWORK

6. The old common law rules for the determination of the applicable law relating to tortious claims were replaced by the provisions of Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Section 9, in so far as is material, provides:

> "**Purpose of Part III.**
>
> (1) The rules in this Part apply for choosing the law (in this Part referred to as "the applicable law") to be used for determining issues relating to tort…
>
> (2) The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort … is a matter for the courts of the forum…
>
> (4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort …has occurred.

[1] For ease of reference I have referred to the law of England and Wales as English Law without intending any disrespect to the Principality.

> (5) The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned.
>
> (6) For the avoidance of doubt (and without prejudice to the operation of section 14 below) this Part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country.
>
> (7) In this Part as it extends to any country within the United Kingdom, "the forum" means England and Wales, Scotland or Northern Ireland, as the case may be."

7. The starting point for the exercise of determining the applicable law takes the form of a general rule to be found in section 11:

> "**Choice of applicable law: the general rule.**
>
> (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
>
> (3) In this section "personal injury" includes disease or any impairment of physical or mental condition."

8. In this case, the elements of those events constituting the relevant torts are alleged to have occurred in different countries. However, there is no dispute that the claimants' return claim is, in essence, one relating to personal injury. The alleged mistreatment occurred in Iraq and Afghanistan and so the general rule, unless displaced, would operate so as to preclude the application of the English common law.

9. The general rule is, however, subject to exceptions the first of which is to be found in section 12 of the 1995 Act:

> "**Choice of applicable law: displacement of general rule.**

> (1) If it appears, in all the circumstances, from a comparison of—
>
> (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
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> (b) the significance of any factors connecting the tort or delict with another country,
>
> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort…with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort…in question or to any of the circumstances or consequences of those events."

10. The claimants seek to persuade me that, on the facts of this case, this section operates to displace the general rule and to open the door to the application of the common law.

11. Alternatively, they contend that, even if they were to be unsuccessful in their argument under section 12, they are entitled to fall back upon section 14, which provides in so far as is material:

> "**Transitional provision and savings.**
>
> (3) … nothing in this Part
>
> (a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so—
>
> would conflict with principles of public policy…"

12. The defendants deny that on the facts of this case there would be any justification for departing from the general rule on either basis advanced by the claimants.

SECTION 12 – THE CASE LAW

13. In ***R (Al-Jedda) v Secretary of State for Defence*** [2007] Q.B. 621 the claimant, who had dual British and Iraqi nationality, travelled to Iraq where he was arrested and detained in a detention centre operated by British forces on the grounds that he was suspected of membership of a terrorist group and of terrorist activities. He argued, unsuccessfully, that section 12 operated to displace the general rule under which Iraqi law would apply.

14. In dismissing his appeal, the Court identified the mischief to which the statutory regime was directed with reference to The Law Commission Report: Private International Law, Choice of Law in Tort and Delict (1990) (Law Com No 193, Scot Law Com No 129), para 2.7:

> "The exceptional role given to the substantive domestic law of the forum in the law of tort, apart from being almost unknown in the private international law of any other country, is parochial in appearance and 'also begs the question as it presupposes that it is inherently just for the rules of the English domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances and the parties'."

15. Brooke LJ, with whom the other members of the court agreed, held, with reference to the section 12 exception:

> "104. The threshold exclusion test which they chose, and which Parliament adopted, was that it should be substantially more appropriate for the applicable law to be other than the law of the country in which the events constituting the tort in question occurred. We have read the evidence given by the representatives of the Law Commission to the Special Standing Committee of the House of Lords (Session 1994–1995, HL Paper 36). It is clear that the commission intended the use of the word "substantially" to be taken seriously. Thus Dr Peter North, the distinguished scholar of private international law who was the moving force behind these proposals when he was a law commissioner, said, at p 37:
>
> > "The structure of clauses 11 and 12 is to have as certain a rule as possible in 11 but in 12 to disapply that rule after a threshold has been overcome. The words that embody that threshold are the words in line 20 on p 5 of the Bill: 'substantially more appropriate.' I do not see any magic in those particular words but I do support the policy that you disapply the rules in clause 11 when some significant threshold has been reached embodied in clause 12… I think the word 'substantially' or a word like it ought not to be omitted because it is part of what Lord Wilberforce described as the striking of this balance. If you take the word 'substantially' or a similar word out of clause 12, you strike the balance more in favour of flexibility and further away from the certainty provided by clause 11."

I should explain that Lord Wilberforce was a member of the committee, and he said, at p 37, that for the rule of displacement to apply: "it is a very rare case. Prima facie there has to be a strong case."

16. This decision was upheld by the House of Lords[2] which approved, without further material elaboration, the reasoning of the Court of Appeal.

17. ***In Belhaj v Straw*** [2013] EWHC 4111 the claimants claimed damages arising from what they contended was the participation of the Defendants in their unlawful abduction, kidnapping and illicit removal across state borders to Libya in March 2004. The claims encompassed allegations that they had been unlawfully detained and/or mistreated in China, Malaysia, Thailand, Libya and on board a US-registered aircraft. Their detention and mistreatment was alleged to have been carried out by agents of the states concerned and by common design with the Libyan and US authorities. Simon J (as he then was), having referred to ***Al-Jedda***, held:

> "133. In the present case none of the locations where the Claimants allege they were detained, or from where they allege they were transferred, was under British control. The alleged detentions and transfers are said to have involved, or to have resulted from, the actions of agents of foreign states. Even in respect of the two causes of action which might be said to have a real link to the United Kingdom (misfeasance in public office and negligence) the basis of the claims is the allegation of unlawful detention in and transfer from various foreign states. This is not a case in which it would be 'substantially more appropriate' to apply English law. Nor are the locations where the Claimants say their injuries occurred under United Kingdom control. It is also pertinent to note that the Claimants are not, and never have been UK nationals, did not have the right to enter or remain in the United Kingdom and were not resident within the United Kingdom during the relevant period."

18. The claimants appealed unsuccessfully on this point. The Court of Appeal[3] dealt with the issue in succinct terms:

> "148. The decision that the general rule should not be displaced was not a marginal one in our view, nor was it premature to take it."

19. The claimants did not seek to challenge this finding when the matter progressed to the Supreme Court[4].

20. In ***Serdar Mohammed v Ministry of Defence*** [2014] EWCH 1369, the claimant was captured by UK armed forces during a military operation in Afghanistan. He was imprisoned on British military bases in Afghanistan and thereafter transferred into the custody of the Afghan authorities. It was admitted on his behalf that, by the operation of the 1995 Act, the applicable law was that of Afghanistan.

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[2] ***R (on the application of Al-Jedda) (FC) v Secretary of State for Defence*** [2008] 1 A.C. 332
[3] ***Belhaj v Straw*** [2015] 2 W.L.R. 1105
[4] ***Belhaj v Straw*** [2017] A.C. 964

21. The issue of applicable law was first addressed in the instant case[5] in the context of the determination of two preliminary issues relating to the doctrines of act of state and state immunity. Leggatt J observed:

> "26. In the present cases, all the events relied on as constituting the torts alleged by the Iraqi civilian claimants occurred in Iraq. The claimants have not sought to argue that English law is applicable and have accepted that the applicable law is the law of Iraq. It is likewise not disputed that the claims in tort relating to Mr Rahmatullah's detention, alleged ill treatment and transfer to US forces in Iraq are governed by Iraqi law. In so far as Mr Rahmatullah's claims are founded on his subsequent detention and alleged ill treatment in Afghanistan, the general rule dictates that Afghan law is applicable and neither party has suggested that there is any factor which could displace it."

22. Thereafter, ***Serdar Mohammed*** and ***Rahmatullah*** progressed as joint appeals to the Court of Appeal[6]. The Court referred, in passing, to the applicable law issue:

> "366. The claims by Yunus Rahmatullah and the Iraqi civilian claimants all include claims in tort. Although all of these claims were pleaded in English law in the statements of case, it now seems to be common ground that the claims are governed by the lex loci delicti. Yunus Rahmatullah accepts that the claims relating to his detention, alleged ill-treatment and transfer in Iraq to US forces are all governed by Iraqi law. To the extent that his claims are founded on his subsequent detention and alleged ill-treatment in Afghanistan, neither party has suggested that Afghan law is displaced. The Iraqi civilian claimants have accepted that the law governing their claims in tort is the law of Iraq."

23. The position remained unchanged when the case progressed thereafter to the Supreme Court.[7] Baroness Hale commented:

> "17 …it is now accepted that the tort claims have to be determined according to the law of Afghanistan or Iraq respectively, subject to the doctrine of Crown act of state if applicable, while the human rights claims have to be determined according to the Human Rights Act 1998."

24. The proper approach to be taken by the Court in the application of section 12 is set out in ***VTB Capital plc v Nutritek International Corp*** [2012] EWCA Civ 808 in which the Court of Appeal gave the following guidance:

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[5] ***Rahmatullah v Ministry of Defence*** [2014] EWHC 3846
[6] ***Rahmatullah v Ministry of Defence*** [2016] 2 W.L.R. 247
[7] ***Rahmatullah v Ministry of Defence*** [2017] A.C. 649

> "149. If section 12 has to be considered, we derive the following additional propositions from our consideration of the statute and the cases. (7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule. (8) At this stage there has to be a comparison between the significance of those factors with the significance of any factors connecting the tort or delict with any other country. The question is whether, on that comparison, it is 'substantially more appropriate' for the applicable law to be the law of the other country so as to displace the applicable law as determined under the 'general rule'. (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the 'elements of the events constituting the tort' in section 11 . They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict. (10) In particular the factors can include (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict."

25. The position is further, and helpfully, summarised in Dicey, Morris & Collins on the Conflict of Laws 15th Edition:

> "**35-148**
>
> The application of the displacement rule in s.12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the tort with the country the law of which would be applicable under the general rule and the significance of any factors connecting the tort with another country. Secondly, it then has to be asked, in the light of that comparison, whether it is "substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues," to be the law of the other country.
>
> The provisions of s.12 have been applied to displace the law applicable under s.11 on very few occasions. The following

> points, in particular, are to be noted. First, the rule applies irrespective of whether the applicable law has been determined by s.11(1) (clause (5) of this Rule) or by one of the limbs of s.11(2) (clause (6) of the Rule). Secondly, it would seem that the case for displacement is likely to be the most difficult to establish in cases falling within s.11(2)(c), because the application of that provision of itself requires the court to identify the country in which the most significant element or elements of the tort are located. Thirdly, s.12 envisages displacement of the general rule not only in relation to the case as a whole, but also in relation to a particular issue or issues. Fourthly, s.12 may lead to the application of the law of any country other than that designated by s.11. Fifthly, the factors to be taken into account include, but are not limited to, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events. Sixthly, the relevant connection may be to the territory of a particular country, or to its legal system, with the consequence that the court may take into account a choice of law provision in a contract between the parties. Finally, it has been emphasised that "substantially" is the key word in determining whether displacement of the general rule should be permitted and that the general rule should not be dislodged easily, lest it be emasculated. The general rule in s.11 is not displaced simply because on balance, when all factors relating to a tort are considered, those that connect the tort with a different country prevail. Accordingly, the party seeking to displace the law which applies under s.11 must show a clear preponderance of factors declared relevant by s.12(2) which point towards the law of the other country. Whether that is the case will depend on the facts of the case and on the particular issue or issues which arise for decision. If, however, in addition to the factors to which the general rule in s.11 refers, there are other significant factors connecting the tort to the country whose law applies under that rule (such as the fact that it is the national law or country of residence of at least one party), this will make it much more difficult to invoke the rule of displacement in s.12."

26. The loss and damage alleged to have been sustained by the claimants were sustained in Iraq and then in Afghanistan. It is on this basis that the general rule is agreed to apply. The underlying policy of the 1995 Act is thus engaged. The claimants contend, however, that there are few, if any, other factors which connect the alleged torts with these countries.

27. They point out that the locations at which they were detained in both Iraq and Afghanistan were as a matter of fact, albeit not of law, effectively operated and occupied outwith the auspices of the authorities of these respective nations. In Afghanistan, the claimants were held, at least for most of the time, at Bagram Airfield Military Base which was leased by the Afghan government to the United States under

arrangements described in detail in ***Al Maqaleh v Gates*** 605 F.3d 84 (D.C. Cir. 2010). It is alleged that it would be unrealistic to consider that the United States government would have considered that the law of either Iraq or Afghanistan would play any part in its response to any hypothetical efforts on the part of the government of the United Kingdom to intervene on the claimants' behalf. The additional point is made that the claimants were in Afghanistan not voluntarily but as a result of extraordinary rendition. These contentions have been elaborated upon in the claimants' Schedule of Arguments to which I have paid full regard but which it would be disproportionate for me to rehearse in full.

28. It is not enough, however, for the claimants to demonstrate, as I am satisfied they have done, that the significance of the geographical factors which connect the alleged torts to Iraq and Afghanistan is of a lesser order than might often be the case in other factual contexts. They still face the hurdle of establishing that it would be substantially more appropriate to apply English law.

29. They make the point that those in senior positions who are to be held accountable for the alleged failures under the return claim were based in England and were acting (or failing to act) in the exercise of state authority. This factor is not insignificant but it will be recalled that common law claims in respect of negligence and malfeasance in public office also arose in ***Belhaj*** but were not afforded determinative weight. Indeed, as I have noted earlier, the Court of Appeal regarded the first instance decision not to displace the general rule in that case not even to have been rendered marginal by such considerations. The test as to whether a criminal court may have territorial jurisdiction to entertain a criminal prosecution for misfeasance in public office differs significantly from the test laid down in civil proceedings in the 1995 Act. The fact that such a prosecution could theoretically be brought in England does not, of itself, provide a strong steer towards the proper determination of the applicable law in tortious claims in respect of the same conduct.[8]

30. The claimants, however, seek to rely upon a Memorandum of Understanding (MoU) dated 23 March 2003 as amounting to a strong factor to be taken into account when the section 12 balancing act falls to be carried out.

31. In identifying the contents and status of the MoU, I gratefully adopt the analysis of Lord Kerr in ***Rahmatullah (No.1)*** [2013] 1 A.C. 614:

> "6. The 2003 MoU was signed three days after military operations in Iraq had begun. In a statement made for the purpose of these proceedings, Mr Damian Parmenter, Head of Operating Policy in the Operations Directorate of the Ministry of Defence, explained that it was considered important to obtain the 2003 MoU because of "the known US position on the application of the Geneva Conventions". That position, succinctly stated, was that the Conventions did not apply to Al-Qaeda combatants. Mr Rahmatullah is believed by the US to be a member of

[8] Although the point was not argued, I note in passing that it is in the highest degree unlikely that the civil jurisdictional challenge could be successfully circumvented by seeking compensation in the Crown Court in the event of conviction (see ***R. v Bewick*** [2007] EWCA Crim 3297).

Lashkar-e-Taiba, a group affiliated to Al-Qaeda. To say that it was important to obtain the 2003 MoU certainly does not overstate the position, therefore. Section 1(1) of the Geneva Conventions Act 1957 makes it an offence for any person to commit, or aid, abet or procure the commission by any other person of a grave breach of any of the Geneva Conventions. Article 147 of GC4 provides that unlawful deportation or transfer or the unlawful confinement of a protected person constitute grave breaches of that Convention. It might be considered in those circumstances to have been not only important but essential that the UK should obtain a commitment from the US that prisoners transferred by British forces to the US army would be treated in accordance with GC3 and GC4.

7. The importance of the need to obtain that commitment is reflected in the terms of the very first clause of the 2003 MoU which provides:

> "This arrangement will be implemented in accordance with the Geneva Convention relative to the Treatment of Prisoners of War and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, as well as customary international law."

8. As Ms Lieven QC, who appeared for Mr Rahmatullah, pointed out, clause 4 of the 2003 MoU, which provides for the return of transferred prisoners, is in unqualified terms. This was no doubt necessary because of the unambiguous requirements of article 45 of GC4. It will be necessary to look more closely at that article presently but, among its material provisions, is the stipulation that if the power to whom the detainee is transferred (in this instance the US) fails to fulfil GC4, the detaining power (here the UK) must take effective measures to correct the situation or request the return of the transferred person. Clause 4 of the 2003 MoU therefore provides:

> "Any prisoners of war, civilian internees, and civilian detainees transferred by a detaining power [the UK] will be returned by the accepting power [the US] to the detaining power without delay upon request by the detaining power."

9. Ms Lieven argued—and I am inclined to accept—that the unvarnished and blunt terms of clauses 1 and 4 were designed to avoid disagreements as to the applicability of GC3 and GC4; to eliminate disputes as to whether particular actions of the accepting power might have breached the Conventions; and to remove from the

potentially controversial and delicate area of inter-state diplomacy debates about how prisoners should be treated.

10. Clause 5 of the memorandum deals with the situation where it is proposed that prisoners who had been transferred would be released or removed to territories outside Iraq. It seems likely that at least one of the reasons for including this provision was to cater for the requirement in article 45 of GC4 that protected persons may only be transferred to a power which is a party to the Convention and after the detaining power has satisfied itself of the willingness and ability of the transferee power to apply GC4. Clause 5 of the 2003 MoU provides:

> "The release or repatriation or removal to territories outside Iraq of transferred prisoners of war, civilian internees, and civilian detainees will only be made upon the mutual arrangement of the detaining power and the accepting power."

11. It is common case that the 2003 MoU is not legally binding. It was, said Mr Eadie QC, who appeared for the Secretaries of State, merely a "political" arrangement. But its significance in legal terms should not be underestimated. That significance does not depend on whether the agreement that it embodies was legally binding as between the parties to it. As Lord Neuberger of Abbotsbury MR said [2012] 1 WLR 1462, para 37, the 2003 MoU was needed by the UK in order to meet its legal obligations under article 12 of GC3 and article 45 of GC4. (Such parts of these as are relevant to the present appeal are in broadly similar terms.) Put plainly, the UK needed to have in place an agreement which it could point to as showing that it had effectively ensured that the Geneva Conventions would be complied with in relation to those prisoners that it had handed over to the US. The 2003 MoU was the means of meeting those obligations. It provided the essential basis of control for the UK authorities over prisoners who had been handed over to the US.

12. In other contexts the UK Government has deployed the fact that it has made arrangements with foreign powers in order to persuade courts that a certain course should be followed. Thus, in MT (Algeria) v Secretary of State for the Home Department [2010] 2 AC 110 , para 192, Lord Hoffmann, referring to assurances which the Algerian and Jordanian Governments had given that the persons whom the Home Secretary proposed to deport to Algeria and Jordan would not face torture or other ill-treatment contrary to article 3 of the European Convention for the

Protection of Human Rights and Fundamental Freedoms ("ECHR"), said that the existence of those assurances was a sufficient basis on which it could properly be found that the deportee would not be subject to such treatment.

13. The assurances to which Lord Hoffmann had referred were considered by the European Court of Human Rights ("ECtHR") in Othman v United Kingdom (2012) EHRR 1. At para 164, the court recorded the following submission made on behalf of the UK Government:

> "The Government reiterated that the assurances contained in the MoU had been given in good faith and approved at the highest levels of the Jordanian Government. They were intended to reflect international standards. There was no lack of clarity in them, especially when the MoU was interpreted in its diplomatic and political context … To criticise the MoU because it was not legally binding (as the applicant had) was to betray a lack of an appreciation as to how MoUs worked in practice between states; they were a well-established and much used tool of international relations."

14. In Ahmad v Government of the United States of America [2007] HRLR 157 , in resisting an application for extradition to America to stand trial on various federal charges, the appellants claimed that if they were extradited there was a real prospect that they would be made subject to a determination by the President that would have the effect that they be detained indefinitely and/or that they would be put on trial before a military commission in violation of their rights under articles 3, 5 and 6 of ECHR. By diplomatic notes, the Government of the US had given assurances that upon extradition they would be prosecuted before a federal court with the full panoply of rights and protection that would be provided to any defendant facing similar charges. It was held there was a fundamental assumption that the requesting state was acting in good faith when giving assurances in diplomatic notes. The assurances in the notes were given by a mature democracy. The United States was a state with which the United Kingdom had entered into five substantial treaties on extradition over a period of more than 150 years. Over this period there was no instance of any assurance having been dishonoured.

15. Memoranda of understanding or their equivalent, diplomatic notes, are therefore a means by which courts have been invited to accept that the assurances which they contain will be honoured. And indeed courts have responded to that invitation by giving the assurances the

> weight that one would expect to be accorded to solemn undertakings formally committed to by responsible governments. It is therefore somewhat surprising that in the present case Mr Parmenter asserted that it would have been futile to request the US Government to return Mr Rahmatullah. As Lord Neuberger of Abbotsbury MR pointed out [2012] 1 WLR 1462, 1486, para 39, this bald assertion was unsupported by any factual analysis. No evidence was proffered to sustain it."

32. With respect to the nature and potential application of Article 45 of GC4, Lord Kerr went on to observe:

> "37. It is at this point that article 45 of GC4 comes directly into play. In so far as is material to the present case, it provides:
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> "Protected persons may be transferred by the detaining power only to a power which is a party to the present Convention and after the detaining power has satisfied itself of the willingness and ability of such transferee power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the power accepting them, while they are in its custody. Nevertheless, if that power fails to carry out the provisions of the present Convention in any important respect, the power by which the protected persons were transferred shall, upon being so notified by the protecting power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with."
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> 38. In these circumstances the UK Government was under a clear obligation, on becoming aware of any failure on the part of the US to comply with any provisions of GC4, to correct the situation or to request the return of Mr Rahmatullah. On 9 September 2004, the then Minister for the Armed Forces, Mr Adam Ingram MP, gave a written answer to a parliamentary question in which he stated that "all persons apprehended by the United *635 Kingdom Forces in Iraq and transferred to United States forces, and who are still in custody, remain in Iraq". That was plainly incorrect. In February 2009 Mr John Hutton MP, then Secretary of State for Defence, made a statement to Parliament in which he said:
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> "in February 2004 … two individuals were captured by UK forces in and around Baghdad. They were transferred to US detention, in accordance with normal practice, and subsequently moved to a US detention facility in

> Afghanistan … Following consultations, with US authorities, we confirmed that they transferred the two individuals from Iraq to Afghanistan in 2004 and they remain in custody there today. I regret that it is now clear that inaccurate information on this particular issue has been given to the House by my Department … The individuals transferred to Afghanistan are members of Lashkar-e-Taiba, a proscribed organisation with links to al-Qaeda. The US Government have explained to us that those individuals were moved to Afghanistan because of a lack of relevant linguists to interrogate them effectively in Iraq. The US has categorised them as unlawful enemy combatants, and continues to review their status on a regular basis. We have been assured that the detainees are held in a humane, safe and secure environment that meets international standards that are consistent with cultural and religious norms. The International Committee of the Red Cross has had regular access to the detainees … [The] review has established that officials were aware of the transfer in early 2004 … In retrospect, it is clear to me that the transfer to Afghanistan of these two individuals should have been questioned at the time." (See Hansard (HC Debates) 26 February 2009, cols 395–396.)
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> 39. Not only should the transfer of the two persons have been questioned at the time that they were removed, it should have been the subject of representation by the UK at the time that the authorities here became aware of it and subsequently. If the UK Government appreciated that the transfer was in apparent breach of article 49 of GC4 (and it has not been suggested otherwise) and if, as it should have done, it became aware that Mr Rahmatullah continued to be held in breach of articles 132 and 133, it was obliged by virtue of article 45 to take effective measures to correct the breaches or to ask for Mr Rahmatullah's return.
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> 40. There can be no plausible argument, therefore, against the proposition that there is clear prima facie evidence that Mr Rahmatullah is unlawfully detained and that the UK Government was under an obligation to seek his return unless it could bring about effective measures to correct the breaches of GC4 that his continued detention constituted. It is for that reason that I am of the view that the real issue in this case is that of control. But before examining that issue, it is necessary to say something about the nature of habeas corpus."

33. Doubtless, the MoU would be relied upon by the claimants in support of their claims in negligence and misfeasance in public office in the event that the common law were

held to apply but the existence of this document does not, in my view, support the very considerable weight which the claimants seek to put on it. I make the following points:

(i) As the remarks of Lord Kerr make clear, the MoU provided an essential reassurance to the UK that it could meet its own free standing obligations under GC4 without impediment. It was thus not the primary source of the UK's obligations to the claimants. Its central purpose was to provide a streamlined diplomatic path towards fulfilling them.

(ii) The MoU, notwithstanding its undoubted practical significance, was not a contract and was not intended to function as such in the context of any given private law context. It was signed, as it happens, in Qatar on behalf of the United States, the United Kingdom and Australia.

(iii) It is a document providing for commitments the fulfilment of which were potentially beneficial to the claimants but, at the risk of stating the obvious, not ones to which they were parties or under which they were subject to an applicable law clause.[9]

34. The claimants make the further point that transferring a detainee from one country to another in breach of Article 49 would legitimise forum shopping by illegal rendition. The defendants accepted during the course of oral submissions that circumstances could arise in which this was a legitimate concern where, for example, a detainee had been relocated in a rogue state selected for its lack of adequate legal protection for those within its geographical and jurisdictional boundaries. However, in this case there is no evidence to suggest that any consideration of the putative advantages of the application of Afghan jurisprudence lay behind the rendition decision or indeed to the effect that Afghan law would provide, as a matter of fact, a particularly suitable environment within which to achieve any such darker purpose.

35. I have given careful consideration to all of the factors relied upon by the claimants in support of the displacement of the general rule by the application of section 12. Many of them overlap to a greater or lesser extent and it would be disproportionate to list them all in full. Suffice it to say that I am satisfied that, taken together, they fall short of persuading me that it would be substantially more appropriate for English law to be applied to the return claim.

PUBLIC POLICY

36. Section 14 of the 1995 Act, as I have already noted, provides that nothing in Part III thereof authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so would conflict with principles of public policy.

37. The circumstances in which this provision has previously been argued to have been engaged have tended to involve an examination of the law of the relevant foreign jurisdiction to determine whether, in substance, its application would be contrary to public policy.

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[9] As to the potential significance of which see, in very different contexts***: Morin v Bonhams & Brooks Ltd*** [2003] EWCA Civ 1802 and ***Trafigura v Kookmin*** [2006] 2 Lloyd's Rep. 455

38. However, no such qualms have been mooted in this case in respect of the laws of Iraq or Afghanistan. Instead, the claimants contend that the application of foreign law would lead to procedural unfairness because any experts in such foreign law would be unlikely to be security cleared to have access to the closed material. Thus the court might fall into error by making factual mistakes as to the content of the relevant foreign law as a result of the constraints placed upon the experts.

39. The parties have been unable to identify any decided case in which this or any similar argument has previously been ventilated or adjudicated upon.

40. Of course, novel points are not necessarily bad points but, on the facts of this case, I do not accept that section 14 is apt to apply in the way contended for by the claimants. In my view, the proper interpretation of the section involves a consideration of the application of the substantive foreign law and not the procedural consequences under English law of the application of the general rule under section 11. As Lord Sumption observed in ***Cox v Ergo Versicherung AG*** [2014] A.C. 1379:

> "32 …The Private International Law (Miscellaneous Provisions) Act 1995 abolished the double-actionability rule and introduced rules requiring English courts to apply to claims in tort the law which had the most significant connection with the wrong, subject to an altogether more limited saving for the public policy of the forum applicable only in those cases where a specific foreign law was found to be repugnant to the policy of the forum."

41. I note in passing that Mr Hermer QC on behalf of the claimants conceded that public policy considerations under section 14 were not material to the application of section 12.

42. I acknowledge that this interpretation of the scope of the operation of section 14 was not the subject of full argument before me but, even if I were wrong on this point, I remain satisfied on the facts of this case that Part III would not operate so as to admit the application of English law through the back door of section 14 after it had been refused entry through the front door of sections 11 and 12.

43. As I have observed, the potential unfairness of which the claimants complain arises out of the risk that any experts in foreign law are likely to be precluded from having access to the closed pleadings and evidence. Thus it may happen that the court may not be fully equipped to adjudicate upon matters of foreign law which may arise from matters unscrutinised by the experts and thereby result in error.

44. However, it is inevitable that parties who do not have access to closed material in cases to which the 2013 Act applies are liable to suffer disadvantages. These can take many forms.

45. As Richards LJ observed in ***R (Sarkandi) v Foreign Secretary*** [2015] EWCA Civ 687:

> "58. The 2013 Act is one of those in which Parliament has stipulated that a closed material procedure may be permitted by the court. It represents Parliament's assessment of how, in relevant civil proceedings, the balance is to be struck between the competing interests of open justice and natural justice on the one hand and the protection of national security on the other, coupled with express provision in section 14(2)(c) to secure compliance with article 6."

46. Section 14(2)(c) of the 2013 Act provides:

> "(2) Nothing in sections 6 to 13 and this section (or in any provision made by virtue of them)…is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention."

47. Thus it is that the public policy of this jurisdiction is to balance "the competing interests of open justice and natural justice on the one hand and the protection of national security on the other" by the application of the CMP in cases falling within the scope of the statutory regime but subject to the overarching application of Article 6.

48. Furthermore, CPR r.82.2(3) provides that where there is a CMP, "the court must satisfy itself that the material available to it enables it properly to determine proceedings."

49. Accordingly, the court is equipped to strike the balance of the competing public policy issues within the framework of the CMP itself. In these circumstances, it would be inconsistent to hold that the application of the CMP would be contrary to public policy in the event that foreign law were held to apply. The impact of the claimants' concerns fall to be addressed by way of such accommodation as may be appropriate within the procedures laid down by Parliament and not by pre-emptively circumventing the fulfilment of the policy objectives of sections 11 and 12 of the 1995 Act.

50. In any event, the fears raised by the complainants are, understandably, generic in nature. This is not a case in which there is any specific area in which the restrictions placed upon the foreign law experts have been said to give rise to a particular concern. It cannot be the case that the operation of a CMP, as a result of which experts in foreign law lack the necessary security clearance to see all of the relevant material, should automatically, or even usually, mandate the applicable law even if, contrary to my view of the matter, embarking on such a balancing act were jurisprudentially valid in the first case.

CONCLUSION

51. It follows from my analysis that the applicable law in respect of the return claims must be that which is provided for under the general rule under section 11 of the 1995 Act and undisplaced by the operation of sections 12 or 14. Thus the law of Iraq applies to these claims prior to the claimants' rendition from Iraq to Afghanistan and that of Afghanistan thereafter.