Neutral Citation Number: [2021] EWHC 331 (QB)

Case No: QB/2019/004274

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2021

Before :

THE HONOURABLE MR JUSTICE LANE

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Between :

ZAYN AL-ABIDIN MUHAMMAD HUSAYN (ABU ZUBAYDAH)	**Claimant**
- and -	
(1) THE FOREIGN AND COMMONWEALTH OFFICE **(2) THE HOME OFFICE** **(3) THE ATTORNEY GENERAL**	**Defendants**

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Richard Hermer QC, Ben Jaffey QC and Edward Craven (instructed by **Bhatt Murphy**) for the **Claimant**
Jonathan Glasson QC, Melanie Cumberland and Andrew Byass (instructed by **the Government Legal Department**) for the **Defendants**

Hearing date: 20 January 2021

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JUDGMENT IN PRELIMINARY ISSUE

Mr Justice Lane:

BACKGROUND

1. The claimant is held by the United States as a detainee in Guantanamo Bay, Cuba. He was captured in March 2002 in Pakistan. The claimant says that between 2002 and 2006 he was unlawfully rendered by agents of the United States to the following countries: Thailand, Poland, the United States' base at Guantanamo Bay, Morocco, Lithuania and Afghanistan (hereafter "the Six Countries"). In 2006 he was rendered again to Guantanamo Bay.

2. The claimant's case is that in each of these Six Countries he was arbitrarily detained at a US "black site" prison, where he was subjected to extreme mistreatment and torture, including waterboarding on some 83 occasions, extreme sleep deprivation, confinement inside boxes (including those said to simulate a coffin), beatings, death threats, denial of food and denial of medical care.

3. These "black sites" have been described as secret detention facilities around the world, operating outside the US legal system. The claimant was the first person to be detained in such a site, according to the 2014 Report of the US Senate Select Committee on Intelligence. Although the United States is said to have denied the existence of these facilities at the time and, even after admitting the "black sites" programme in 2006, has never confirmed the location of the sites, the European Court of Human Rights in Al-Nashiri v Poland/Husayn v Poland (2015) 60 E.H.R.R. 16 found that such a site existed in Poland and that the claimant had been held in it, during which time he suffered breaches of the ECHR. Similar findings were made in respect of Lithuania in Abu Zubaydah v Lithuania (Application No. 46454/11) (31 May 2018).

4. The particulars of claim aver that the claimant was taken to Thailand, following his capture in Pakistan, where he remained at a "black site" facility until 4 December 2002. On that day he was placed on a CIA Gulfstream jet aircraft and rendered to Poland, where he arrived on 5 December 2002. He was held at a "black site" facility in Poland from 5 December 2002 to 22 September 2003. On that day, he was placed on another CIA Gulfstream jet and rendered to Guantanamo Bay. The claimant remained there from 22 September 2003 to 27 March 2004, again in "black site" detention. On 27 March 2004, the claimant was placed on a CIA rendition aircraft and taken from Guantanamo Bay to Morocco. This is said to have been in response to the CIA's expectation that United States Supreme Court would shortly deliver a judgment, recognising the right of Guantanamo detainees to challenge the legality of their detention before US courts.

5. The particulars further aver that from 27 March 2004 until some date in February 2005, the claimant was detained at a "black site" facility in Morocco. On 17 or 18 February 2005, he was removed by CIA aircraft from Morocco to Lithuania. The claimant was detained at a "black site" facility in Lithuania from 17 or 18 February 2005 until 25 March 2006, when he was removed by CIA aircraft to Afghanistan. The claimant was in Afghanistan, again at a "black site" facility, from 25 March 2006 until a date in September 2006. In that month, the claimant was removed by CIA aircraft from Afghanistan to Guantanamo Bay, where he remains. It is contended in the particulars

of claim that the claimant suffered arbitrary detention, torture and mistreatment in each of the countries at which he was held in a "black site" facility.

6. The claimant's case against the defendants arises as follows. The particulars of claim state that from at least May 2002 the defendants were aware that the claimant was being arbitrarily detained without trial at secret "black sites", where he was being subjected to extreme mistreatment and torture during interrogations conducted by the CIA. Notwithstanding that knowledge, from at least May 2002 until at least 2006, the Secret Intelligence Service ("SIS") and the Security Service ("SyS") sent numerous questions to the CIA, to be used in their interrogations of the claimant for the purpose of attempting to elicit information of interest to SIS and SyS. No assurances were sought that the claimant would not be tortured or mistreated and no steps were taken to discourage or prevent such torture or mistreatment being inflicted against the claimant during his interrogation sessions. It is, the claimant says, therefore to be inferred that SIS and SyS sent the questions to the CIA in the knowledge and with the expectation and/or intention that the CIA would subject the claimant to torture and extreme mistreatment at those interrogation sessions, conducted for the specific purpose of attempting to extract information in response to the questions from SIS and SyS.

7. The first defendant is said to be vicariously liable for the acts and omissions of officials of the SIS. The second defendant is said to be vicariously liable for the acts and omissions of the SyS. The Attorney General is made a defendant pursuant to section 17(3) of the Crown Proceedings Act 1947. This provides for proceedings to be brought against the Attorney General when no authorised government department is the appropriate defendant in civil proceedings against the Crown; or where there is reasonable doubt as to whether any department is the appropriate defendant to proceedings.

8. The claimant contends that the defendants are liable to him for the tort of misfeasance in public office; conspiracy; trespass to the person and false imprisonment; and negligence. The particulars of claim contend that the defendants are liable for these torts under the law of England and Wales. If that is not the case, the claimant avers that the defendants are liable under the laws of the Six Countries. Paragraphs 58 to 107 of the particulars set out what is said to be the applicable laws of the Six Countries. So far as concerns Guantanamo Bay, the claimant pleads US law, including the Alien Tort Statute 1789, which recognises the subset of customary international law in respect of violations of "specific, universal, and obligatory" norms of international law.

9. Paragraph 47 of the defendants' open defence is considered by the claimant to involve the contention that the law of Cuba falls to be applied in respect of the CIA's conduct at Guantanamo Bay. Depending on the outcome of the present proceedings, the claimant indicates that he will consider whether to plead Cuban law in the alternative.

PRELIMINARY ISSUE

10. The preliminary issue concerns the applicable law for the purposes of the claim. It is common ground that the issue of the applicable law falls to be determined by reference to the provisions of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"). By a consent order dated 8 January 2021, it was ordered that the issue of the applicable law should be determined as a preliminary issue at a hearing to take place remotely on 20 January 2021. It was also ordered by consent that

the proceedings are proceedings in which a closed material application may be made in accordance with section 6 of the Justice and Security Act 2013 ("the 2013 Act").

11. Section 10 of the 1995 Act abolished the common law rules, which required actionability under both the law of the forum and the law of another country, for the purpose of determining whether a tort or delict was actionable. It also abolished the rule allowing, by way of exception to the rule just mentioned, for the law of a single country to be applied for the purpose of determining those issues. The general rule for choice of applicable law is set out in section 11:-

> **"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."

12. The claimant accepts that, unless displaced, section 11(2)(a) produces the result that the applicable law in the context of the present proceedings is the laws of each of the Six Countries (subject to the point mentioned earlier regarding Guantanamo Bay). The claimant contends, however, that, in the circumstances of his case, the operation under section 12 of the 1995 Act is such that the appropriate law for the purposes of his claim against the defendants is the law of England and Wales.

13. Section 12 provides:-

> **"12. 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
>
> (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 or delict 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 or delict in question or to any of the circumstances or consequences of those events."

14. Should his section 12 case not succeed, the claimant submits that the law of England and Wales is the applicable law, by reason of the operation of section 14 of the 1995 Act. The relevant provisions of section 14 are as follows:-

> **"14. Transitional provision and savings.**
>
> …
>
> (2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.
>
> (3) Without prejudice to the generality of subsection (2) above, 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—
>
> (i) would conflict with principles of public policy; or
>
> …"

SECTION 12 OF THE 1995 ACT

15. Before me, there was no dispute that the correct way to approach section 12 is as described in *Dicey, Morris & Collins, the Conflict of Laws (*15th Edition*)* at 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."

16. Having noted that section 12 has been applied to displace the law applicable under section 11 only "on very few occasions", paragraph 35-148 draws attention to the following points. First, the rule applies irrespective of whether the applicable law has been determined by section 11(1) or by one of the limbs of section 11(2). Secondly, the case for displacement is likely to be most difficult in cases falling within section 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. The present case is not one of that kind. Thirdly, section 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, section 12 may lead to the application of the law of any country other than that designated by section 11.

17. The fifth point is that 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 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 the choice of law provision in a contract between the parties. I note that this is not relevant to the present case.

18. The seventh and final point is that:-

> "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 would 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 … this will make it much more difficult to invoke the rule of displacement in s.12."

CASE LAW

19. In conducting the exercise of deciding whether section 12 displaces the general rule in section 11, the court must, of course, follow the path set out in section 12(1) and (2). Insofar as the case law contains findings on how those subsections operate and what the language used in them means in practice, the judgments of the higher courts constitute authoritative pronouncements, which I am bound to follow. Otherwise, the cases serve to illuminate how others have undertaken the broad evaluative assessment which, as the authors of *Dicey, Morris and Collins* say, "will depend on the facts of the case and on the particular issue or issues which arise for decision". Although findings of the latter kind can, as we shall see, be helpful in showing how others have gone about their task, and in shedding light on how the statutory language, as authoritatively interpreted, may operate in practice, they are in no sense binding factual precedents. It should also be observed that, within the same judgment, one may find elements of both categories.

20. In R (Al-Jedda) v Defence Secretary [2006] EWCA Civ 327, Brooke LJ explained the meaning to be given to "substantially" in section 11(1) of the 1995 Act:-

> "103. The Law Commission, in their report Private International Law, Choice of Law in Tort and Delict (1990) (Law Com 193, Scot Law Com No 129), para 2.7, identified the mischief which they sought to remedy in these terms:
>
> > "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'."
>
> The quotation is taken from an article by Mr Peter Carter "Torts in English Private International Law" in *The British Yearbook of International Law* (1981), p.24.

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."

21. No doubt was thrown on Brooke LJ's finding on this issue in the House of Lords: [2007] UKHL 58.

22. In VTB Capital Plc v Nutritek International Corp & Ors. [2012] EWCA Civ 808, Lloyd LJ, having examined the provisions of section 11, addressed section 12 as follows:-

> "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."

23. I turn to the cases (or parts thereof) falling within the second of the categories identified above: namely, cases showing how section 12 has been applied in practice, by reference to the particular factual matrices of those cases.

24. In Al-Jedda, the Court of Appeal held that section 11 of the 1995 Act was not displaced by reason of section 12, in a case involving a claimant with dual British and Iraqi nationality, who was arrested and detained in Iraq in a detention centre operated by British Forces operating as part of a multi-national force under the authority of, inter alia, United Nations Security Council Resolution 1546 of 8 June 2004. As a result, the claim fell to be assessed by reference to the law of Iraq. At paragraph 105, Brooke LJ rejected the claimant's submission that it would be strange for an English court to apply Iraqi law to a claim by a British citizen against the British government in respect of activities on a base operated according to British law by British troops governed by British law (who would be immune from Iraqi law). At paragraph 106, Brooke LJ did not consider "that these considerations are strong enough to displace the normal rule". For the present claimant, Mr Hermer QC draws attention to the fact that the laws of Iraq had been adapted to give the multi-national force the requisite powers. This led Brooke LJ to find that "it would be very odd if the legality of Mr Al-Jedda's detention was to be governed by the law of England and not the law of Iraq". Also of relevance, according to Mr Hermer, is the passage in paragraph 108, where Brooke LJ noted that Mr Al-Jedda "is not being arbitrarily detained in a legal black hole, unlike the detainees in Guantanamo Bay in the autumn of 2002".

25. Next there is the judgment of Simon J in Belhaj and Another v Straw and Others [2013] EWHC 4111 (QB). Before me, there were considerable oral and written submissions as to the status of Belhaj; in particular, Simon J's findings on section 12 of the 1995 Act, as it bore on the facts before him.

26. As can be discerned from page 1109 of the report of the Court of Appeal judgment in [2015] 2 WLR 1105, Simon J held that the applicable law in respect of the alleged torts was that of the countries in which the acts had allegedly occurred, so that it was for the claimants to plead the relevant provisions of foreign law. At page 1110, it is recorded that the claimants contended the "decision on applicable law was wrong because (a) the defendants had not sought to plead or identify any specific relevant law, nor to identify how such law might differ from English law", as well as on other bases, including that "it was inappropriate to determine the applicable law without first determining the relevant facts".

27. Simon J's conclusion, upheld by the Court of Appeal, that, in the circumstances of the case before him, the claimants needed to plead the relevant provisions of foreign law, has attracted a good deal of subsequent analysis. A detailed summation of the relevant case law is to be found at paragraphs 169 *et seq* of the judgment of Underhill LJ in FS Cairo (Nile Plaza) LLC v Christine Brownlie [2020] EWCA Civ 996. In essence, the issue concerns the effect, if any, of Belhaj on rule 25 at para 9R-001 of *Dicey, Morris and Collins*:-

> "(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

> (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

28. At paragraph 193 of FS (Cairo), Underhill LJ described the Court of Appeal in Belhaj as having:-

> "treated the case as falling into the exceptional category where the application of the default rule [as articulated in 9R-001 of Dicey and Morris] is inappropriate. On that basis, of course, its reference to CPR 16.4(1)(a) is unexceptionable, since where it is inappropriate to apply the default rule a claimant will indeed have to rely on the content of foreign law."

29. For present purposes, I am satisfied that the evaluative assessment which Simon J undertook in respect of section 12 of the 1995 Act was not *obiter*. It underlay the finding of the applicable law, which was specifically challenged on appeal to the Court of Appeal as being wrong. My attention has not been drawn to any passage in the judgments of the Court of Appeal that cast doubt on Simon J's evaluative assessment. On the contrary, at paragraph 144, the court held that Simon J "made no error in applying the relevant sections of the 1995 Act to the material before him". The court so found in the context that the claimants had conceded an argument before Simon J; namely, that it was unlikely the laws of England and Wales applied, for example, to their alleged detention in China and Malaysia. I shall revert to that point in due course. For the moment, however, it is in my view manifest that Simon J's evaluative assessment for the purposes of section 12 was not called into question by the Court of Appeal or, I should add for completeness, by the Supreme Court in [2017] UKSC 3.

30. That is unsurprising. Provided that the judge has applied section 12 as required by the provisions of the statute, as authoritatively interpreted, his or her decision is unlikely to be overturned, even though another judge might, on the same facts, have reached a different conclusion.

31. The facts of Belhaj were essentially as follows. A Libyan citizen and his Moroccan wife alleged that the then Home Secretary and others had participated in their unlawful abduction and removal to Libya, where they suffered serious ill-treatment. The causes of action included false imprisonment, trespass to the person, conspiracy to injure, misfeasance in public office and negligence. Mr Belhaj and his wife fled Libya, eventually moving to China. They were detained at Beijing Airport, seeking to board a commercial flight to the United Kingdom. They were then removed to Malaysia, before being put on a flight to Thailand, where they were placed on a United States aircraft bound for Libya. On arrival in Libya they were imprisoned and Mr Belhaj was sentenced to death. The allegations included mistreatment and/or torture at places of detention by agents of the particular states, with the collusion of the defendants.

32. At paragraph 124, Simon J recorded the claimant's concession that it was unlikely the laws of England and Wales applied to the alleged detention in China or Malaysia. For the present claimant, Mr Hermer submits that this was because Mr Belhaj and his wife were held "under color of the law" of China and Malaysia; in contrast with the present case, where the "black sites" were operated by the CIA without reference to the laws of the countries in which those sites were located.

33. At paragraph 133, Simon J 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."

34. In Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB), Leggatt J was concerned with a claimant who had been captured by United Kingdom Armed Forces during a military operation in Afghanistan in 2010. The claimant was imprisoned on British military bases in that country until July 2010 when he was transferred to the custody of the Afghan authorities. The claimant asserted that his detention by the United Kingdom Armed Forces was unlawful under the Human Rights Act 1998 and under the law of Afghanistan.

35. At paragraph 55, Leggatt J said:-

> "55. When a claim is brought in the English courts for compensation for a wrongful act (tort) allegedly committed abroad by a defendant over whom the English courts have jurisdiction, questions may arise as to which system of law should be used for determining issues relating to the tort, including the question whether an actionable tort has occurred. Section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 establishes the general rule that the law applicable for these purposes is the law of the country in which the events constituting the tort occurred. In the present case all the relevant events occurred in Afghanistan. It is not suggested that there are any factors which displace the general rule. It is thus common ground between the parties that the applicable law is the law of Afghanistan."

36. Mr Hermer submits that the common ground mentioned in paragraph 55 was not surprising, given what had been said in Al-Jedda about the international nature of the operations undertaken in Afghanistan. In that regard, the judgment in Serdar Mohammed records that the International Security Assistance Force ("ISAF") was a multi-national force, established in Afghanistan on the authorisation of the United Nations Security Council. Since 2003, ISAF had been under the command of NATO. The United Kingdom's detention policy in Afghanistan differed in some respects from the ISAF standard operating procedures. In April 2006, the United Kingdom concluded a Memorandum of Understanding with the government of Afghanistan concerning the transfer by UK Armed Forces to Afghan authorities of persons detained in Afghanistan.

37. I note that Mr Glasson QC draws attention to the fact that the policy in question was announced in the United Kingdom by a Ministerial statement, in circumstances where the decision to extend the time of detention in respect of those in the position of the claimant in that case was made by United Kingdom government ministers.

38. In Rahmatullah and Another v Ministry of Defence and Foreign and Commonwealth Office [2019] EWHC 3172 (QB), the claimants were Pakistani nationals, who alleged that they were captured by British Forces in Iraq in 2004 and subsequently handed over to United States control, and, thereafter, taken to Afghanistan, where the claimants were subjected to prolonged detention, torture and other mistreatment. The claim against the defendants concerned alleged mistreatment by UK personnel upon arrest and before the claimants were transferred to the control of the United States; the transfer itself to United States control; and failures after that transfer to intervene so as to bring to an end the detention of the claimants and/or stop the United States authorities from further mistreating them.

39. At paragraph 8, Turner J held as follows:-

> "8. In this case, the elements of those events constituting the relevant torts are alleged to have occurred in different countries. However, these 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."

40. Turner J set out his section 12 analysis as follows:-

> "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.
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> 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.
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> 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."

41. Beginning at paragraph 30, Turner J dealt with the Memorandum of Understanding of March 2003, which the claimants argued was a strong factor to be taken into account in "the section 12 balancing act". Having set out passages from the opinion of Lord Kerr in Rahmatullah (No. 1) [2013] 1 AC 614, Turner J continued as follows:-

> 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:
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> (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.
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> (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.
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> (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.
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> 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."

42. Mr Hermer seeks to distinguish the present case from Rahmatullah on the basis that the present case lacks the United Nations element, which we have seen in Al-Jedda; and also because the present case involves "forum shopping", as discussed in paragraph 34 of Turner J's judgment. Mr Hermer submits that the movement by the CIA of the present claimant from "black site" to "black site" is, quintessentially, forum shopping of the most heinous kind. Mr Glasson, by contrast, submits that what was being discussed in paragraph 34 was the claimants' rendition by British Forces to United States control. I shall return to this matter in due course.

43. Mr Glasson drew attention to Allen and Others v Depuy International Ltd [2014] EWHC 753 (QB). From the headnote in [2015] 2 WLR 442, one sees that the claimants, none of whom has ever resided in England, brought claims in England against the defendant, an English registered company, for damages for personal injury following adverse reactions to metal debris from defective prosthetic hip implants, which the defendant had manufactured in England and which had been implanted in the claimants, variously, in New Zealand, Australia and South Africa. Stewart J held that none of the claimants succeeded in establishing under section 12 of the 1995 Act that it was substantially more appropriate for the applicable law to be English law.

44. At paragraph 26, Stewart J identified the factors connecting the tort with England/New Zealand/South Africa. The prostheses were designed and manufactured in England. Accordingly, all the defendant's wrongful acts or omissions occurred in England "though it may be said that part of the wrong was marketing in New Zealand/South Africa". Causation of the damage took place in South Africa and New Zealand and the damage itself was sustained in those countries. None of the claimants had ever lived in or been domiciled in England at any relevant time. The prostheses were marketed in New Zealand and South Africa, where all the medical operations took place. So far as concerned the parties' expectations, addressed by reference to the phrase "consequences of those events" in section 12(2), Stewart J found that it was more likely that the claimants would expect the applicable law to be the country where they underwent their operations. At paragraph 27, having given full weight to the fact that the defendant manufactured the prostheses in England and was resident there, Stewart J found that the applicable law in respect of liability was that of New Zealand/South Africa, according to the general rule.

45. Mr Glasson submits that Allen is of some assistance, in demonstrating the approach to be taken where, as in the present case, an element (the manufacture of the prostheses) that played a part in the sustaining of injury, arose in a different country. Mr Hermer demurs, drawing attention to the fact that marketing of the prostheses had taken place in New Zealand and South Africa.

SECTION 12: DISCUSSION

46. The findings of courts that fall into the second category described above demonstrate the difficulty in displacing the general rule, generated by section 11, in situations which have some factual similarities with the present proceedings. The fact that, in several instances, concessions were made in those cases does not make it inappropriate to have

regard to the factual matrix in question, since there is no indication that the concessions were wrongly made.

47. Having said this, as I have already sought to emphasise, it is for me to make my own assessment, by reference to the facts of the present case. There is no dispute that, for the purposes of section 12, there is a sufficient factual basis for me to perform this task. It is also common ground that I could and should determine the preliminary issue solely by reference to the "open" materials.

48. I accordingly embark on this task. I remind myself of the language of section 12, including the non-exhaustive factors highlighted in subsection (2). I follow paragraph 149 of the judgment of Lloyd LJ in VTB Capital, which was cited with apparent approval by Lord Clarke at paragraph 203 of [2013] UKSC 5. Although Lord Clarke dissented from the majority in the Supreme Court, there is nothing in the other judgments that casts doubt on the Court of Appeal's findings on the operation of section 12 of the 1995 Act.

(a) The significance of the factors that connect the tort with the Six Countries

49. The injuries sustained by the claimant occurred in the Six Countries. That is, of course, significant in the sense that it is the reason why the general rule in section 11(2)(a) applies. Those causing the injury to the claimant – namely, his CIA jailors and interrogators – were physically present with the claimant at all relevant times.

50. For the claimant, Mr Hermer seeks to downplay the significance of those factors in a number of ways. First, he submits that the "black sites" within each of the Six Countries were deliberately used by the US in order to be free to act with impunity, irrespective of the laws of the country in question. Whilst that may have been the result in practice at the time the torts were committed, it does not in any sense mean that the laws of the country concerned in some way ceased to exist. On the contrary, as the claimant's pleaded case makes plain, each of the Six Countries has laws which, on their face, would appear to proscribe the treatment the claimant says he received. Furthermore, in the cases of Poland and Lithuania, the governments of those countries have been found by the ECtHR to have been in breach of the ECHR as regards the CIA's actions towards the claimant.

51. This also goes to Mr Hermer's point that the CIA were assumed by the defendants to be "acting within their own law" and "operating their own framework of value and law" over the operations. Even if this was so in practice, it did not as a matter of law serve to displace the relevant legal system of the country concerned.

52. It is convenient at this point to address a related aspect of Mr Hermer's submissions on behalf of the claimant, concerning forum shopping. This arises from paragraph 34 of the judgment in Rahmatullah, where Turner J had this to say:-

> "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."

53. Before me, there was disagreement between Mr Hermer and Mr Glasson as to the interpretation of this paragraph. According to Mr Glasson, Turner J was considering rendition by the UK, in that it was British Forces who had handed over Mr Rahmatullah to US control. Mr Hermer, by contrast, submitted that what Turner J had in mind was rendition by the US to Afghanistan; since it was the US who took Mr Rahmatullah to that country.

54. I consider that Mr Hermer's reading of paragraph 34 is correct. The reference in it to Article 49 of the GC (Geneva Convention) No. 4 takes us to paragraphs 38 and 39 of the judgment of Lord Kerr in Rahmatullah No. 1 [2013] 1 AC 614, cited by Turner J at paragraph 31 of his judgment. Paragraphs 38 and 39 of Lord Kerr's judgment make it plain that the transfer in question was that effected by the US to Afghanistan, for which the UK bore some responsibility, as it had handed over Mr Rahmatullah to the US Forces.

55. Mr Hermer submits that for this court to apply the law of the Six Countries would amount to forum shopping of the most heinous kind imaginable. I respectfully disagree. Turner J identified that a legitimate concern would arise in respect of forum shopping where a "rogue state" had been "selected for its lack of adequate legal protection for those within its geographical and jurisdictional boundaries".

56. The claimant has not sought to categorise any of the Six Countries as a "rogue state" of the kind described by Turner J. Nor, in any event, do I consider there is any evidence before me to justify such a description (including, for this purpose, the US as the perpetual lessee of Guantanamo Bay). There is no indication that the US chose the locations of the "black sites" on the basis that the laws of the countries concerned were so generally lacking as to fail to offer sufficient protection to anyone present within their borders. Leaving aside Guantanamo Bay, it seems the sites were selected because the CIA had reason to believe that, in particular because of its relationship with the Security Services of the country concerned, the interrogations of the claimant could take place clandestinely, without the laws of that country being invoked in practice in respect of the claimant. But, as is evident from, amongst other things, the Report of the Intelligence and Security Committee of the UK Parliament and the Report of the US Senate Select Committee, the CIA's practices have been subjected subsequently to intense scrutiny. That includes the scrutiny of the ECtHR.

57. The fact that, at the time the claimant suffered injury, the laws of the Six Countries, as pleaded by the claimant, did not stop him in practice from sustaining those injuries, whilst of some significance, is not to be compared with laws that are so generally lacking, or so generally dysfunctional, as to create a legal "black hole" of the kind envisaged by Turner J.

58. Mr Hermer also says that the significance of the injuries occurring in the Six Countries is reduced because the claimant had no control over his presence in those countries. He had been taken to each of them, against his will, by the CIA. Mr Hermer contrasts this with his example of a road accident in Australia, involving two vehicles each driven by

a British holidaymaker, who had freely chosen to be in Australia and who would have assumed that any liability arising from the accident would be governed by the laws of Australia. Whilst there is some force in this comparison, it does not serve to reduce to any material extent the significance of the claimant's injuries being sustained in the Six Countries, against the background of the pleaded laws of those countries.

59. Finally under this heading, Mr Hermer contends, in similar vein, that it is unclear whether SIS and SyS were aware at all relevant times of the places where the claimant was being interrogated, between 2002 and 2006. The fact that SIS and SyS continued to supply questions for the CIA to be used in the interrogations lessens, in Mr Hermer's submission, the significance of the actual countries in which the questions were put.

60. Again, I do not consider this point has any material impact. The fact of the matter is that each of the injuries occurred on the territory of a particular country. Even if the defendants were indifferent to the countries chosen by the CIA for the "black sites", the injuries still took place there; and it is hard to see why any such indifference should lead to the law of England and Wales being substituted for the law of the country concerned. The locations to which the CIA took the claimant were not "incidental", as far as that agency was concerned; and it was the CIA that caused the injuries to the claimant.

(b) <u>The significance of the factors connecting the tort with England and Wales</u>

61. Insofar as expectation is concerned, there is no suggestion that the claimant had, at any relevant time, any expectation that any claim against the defendants would be governed by the law of England and Wales. The claimant's case is that the actions of SIS and SyS, said to give rise to liability on the part of the defendants, are more likely than not to have taken place in England. Those actions were undertaken for the perceived benefit of the UK. The defendants are all emanations of the UK state.

62. For present purposes, I am prepared to accept that all of this is so. Its significance for the determination of the applicable law is, however, in my view limited. Any provision of information to be used in interrogation by the CIA was a component in the overall exercise undertaken by the CIA. It was the methods adopted by the CIA in putting the questions to the claimant that are said to have occasioned the physical and psychological harm to him.

63. The claimant is not a British citizen. He has never had leave to enter or remain in the UK. There is no indication that he has ever been to the UK or been under the physical control of any UK force or of their entity.

(c) <u>Comparison between the significance of the factors in (a) and (b) above</u>

64. As we have seen, the case law – in line with *Dicey, Morris and Collins*, stresses the use of the word "substantially" in section 12(1) and confirms that the party seeking to displace the general rule produced by section 11 needs to show a "clear preponderance" of relevant factors that point to the law of another country.

65. I agree with the claimant that this exacting threshold is not so high as to render displacement of the general rule illusory. I have borne that in mind in making my assessment. I also bear in mind that the present case is not one in which the general

rule is provided by section 11(2)(c) and that, as a result, the operation of section 12 in the present case is not affected by a prior comparison of what constitutes the most significant elements for the purposes of section 11(2)(c).

66. Mr Hermer submits that the only factor in favour of the general rule is the fact that the relevant personal injuries were sustained by the claimant whilst he was present in the Six Countries. By contrast, he says, there are significant factors that cumulatively compel the conclusion that the appropriate law should be that of England and Wales.

67. I respectfully disagree. For the reasons I have given, the significance of the claimant sustaining injury in the Six Countries does not fall to be materially diminished. The identity of the countries and the period during which the claimant was present in each of them, have been pleaded by the claimant with a high degree of precision. The present case is far removed from the example, given by Mr Hermer, by way of asserted analogy, of an individual being subjected to torture whilst on a ship that is travelling between the territorial waters of different states, in such a way that a particular torture session may occur whilst the vessel was in the waters of two or more states, without the possibility of discerning which.

68. As I have already found, the laws of the Six Countries have been pleaded by the claimant, albeit in the alternative. Should it be necessary to plead the law of Cuba in respect of Guantanamo Bay, there is no reason to suppose this could not be done.

69. Whilst I accept the information allegedly provided to the CIA is more likely than not to have come from officials of SIS/SyS who were, at the time, in England, the significance of this imparting of information in the context of the present claim is limited because it is only an element of the overall treatment of the claimant by the CIA in the Six Countries. I emphasise that, in so saying, I am not in any way pre-judging the substantive issue or diminishing the seriousness of what happened to the claimant. I am here concerned with an examination of the relationship between the alleged actions of the SIS/SyS and the actions of the CIA solely in connection with the section 12 exercise.

70. Taking everything into account, and having full regard to the written and oral submissions of the parties, I find that it is not substantially more appropriate for the applicable law for the purposes of this claim to be the law of England and Wales. The claimant's case on section 12 of the 1995 Act accordingly fails.

SECTION 14 OF THE 1995 ACT

71. In the alternative to section 12, the claimant relies on section 14 of the 1995 Act. As we have seen, section 14(3)(a)(i) provides that nothing in Part III of the 1995 Act authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in the claim, insofar as to do so would conflict with the principles of public policy. Beginning at paragraph 43 of the particulars of claim, the claimant seeks to rely upon the arguments advanced in respect of section 12, as being applicable also to section 14. It is said to be contrary to public policy and incompatible with the rule of law for Crown servants who knowingly or recklessly encourage or facilitate torture and other serious human rights violations to be relieved from any civil liability under English law, including any liability arising under the tort of misfeasance in public office, merely because the victim happened to be detained

against his will in a foreign country at the time when the torture and other serious human rights violations were inflicted. This is particularly so, where (as alleged) the defendants were aware that the claimant had been unlawfully rendered against his will to a foreign country. In such circumstances it would be contrary to public policy for the claimant's ability to obtain redress to depend upon "the happenstance of the content of those countries' laws". It would also be contrary to the public policy of ensuring that the case is dealt with justly and at proportionate cost.

72. At the hearing on 20 January, the claimant's position was that, in fact, the question of whether foreign law should be disapplied under section 14(3)(a)(i) could only be answered following the determination of the content of that foreign law, in order to assess its consistency with English public policy. In reply, the defendants submit that it is not explained by the claimant how such a determination would take place. It is assumed that there would have to be a preliminary issue trial at some later point, with foreign law experts providing evidence as to the content of the foreign law.

73. As the claimant points out, in Cox v Ergo Versicherung AG [2014] AC 1379, Lord Sumption explained that section 14(3)(a)(i) "is not a choice of law principle at all, but turns on the overriding rules of policy of the forum" (paragraph 28). Although not a case concerned with the 1995 Act, a useful summation of the role of public policy in conflict of laws is to be found in the opinion of Lord Nicholls of Birkenhead in Kuwait Airways Corpn v Iraqi Airways Co (Nos. 4 and 5) [2002] 2 AC 883:-

> "15. Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform there would be no 'conflict' of laws.
>
> 16. This, overwhelmingly, is the normal position. But, as noted by Scarman J in *In the Estate of Fuld, decd (No 3)* [1968] P 675, 698, blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances.
>
> 17. This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will exclude the foreign decree only when it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal': see *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202.

> 18. Despite its lack of precision, this exception to the normal rule is well established in English law. This imprecision, even vagueness, does not invalidate the principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws. The leading example in this country, always cited in this context, is the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality and, consequentially, leading to the confiscation of their property. Surely Lord Cross of Chelsea was indubitably right when he said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all: *Oppenheimer v Cattermole* [1976] AC 249, 277-278. When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

74. At paragraph 32 of Cox, Lord Sumption described section 14(3)(a)(i) as:-

> "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."

SECTION 14: DISCUSSION

75. Leaving aside for the moment the issue of "closed" procedure (to which I shall turn later), I do not accept the claimant's prematurity argument, as advanced at the hearing. Both parties have set out their detailed pleadings as to the content of the applicable foreign law, in such a way as to be at least sufficient for me to reach a determination as to whether a public policy objection arises. There is no suggestion that there is a "specific foreign law" of the Six Countries (including the law of US, insofar as relevant to Guantanamo Bay) which can properly be said to be "repugnant" in its application to the claimant. As Lord Nicolls held, a refusal to recognise a foreign law on public policy grounds is in the nature of "a residual power, to be exercised exceptionally and with the greatest circumspection".

76. I reject the claimant's attempt to argue section 12 matters by reference to section 14. As Turner J held at paragraph 42 of Rahmatullah, this would be to admit an unworthy case "through the back door of section 14 after it had been refused entry through the front door of sections 11 and 12". I also reject the suggestion that "the public policy of ensuring that cases are dealt with justly and at proportionate cost" can play any part in displacing the application of the general rule in section 11. Such a public policy consideration has no bearing upon the content of the particular foreign law.

77. As I have mentioned, the present proceedings are the subject of a declaration made under section 6 of the Justice and Security Act 2013, that the proceedings are ones in which a closed material application may be made to the court. The claimant submits that, should the court subsequently order the claim to be subject to a closed material procedure, it would be both substantially more appropriate for the law applicable to the

claim to be the law of England and Wales and it would be contrary to public policy for the law applicable to the claim to be the law of any foreign state.

78. Before me, Mr Hermer did not advance the first aspect of that submission, in connection with section 12. I consider that he was quite right not to do so. Instead, he concentrated on section 14, submitting that I should either hold now that it would be contrary to public policy to apply the law of the Six Countries, in the light of the section 6 declaration or, if I was not so persuaded, that determination of this issue should be adjourned.

79. The relationship between closed material proceedings and section 14 of the 1995 Act arose before Turner J in Rahmatullah:-

> "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] AC 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."
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> 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.
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> 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:
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> > "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."

80. Mr Hermer submits that Turner J was wrong in paragraph 40 to hold that section 14 involves the 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. It is, however, in my view beyond doubt that the issue of what constitutes the applicable law under the 1995 Act is one of substance, not procedure. Whatever may be said about the precise status of other aspects of the judgments of the Court of Appeal in Belhaj, the last sentence of paragraph 155 is, with respect, undoubtedly correct: "The issue of the applicable law is one of substantive law, not procedure".

81. I find it is impossible to reconcile the claimant's primary position on this issue with the pronouncements in Kuwait Airways and Cox. A foreign law cannot become repugnant to public policy because of some procedural regime in the law of England and Wales, specifically authorised by Parliament. This leads to the second point elucidated by

Turner J; namely, that 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. The point here is not that the public interest has suffered some damage or diminution as a result of the enactment of the 2013 Act. Rather, in enacting the legislation, Parliament can be taken to have determined that the public interest demands the existence of the closed material procedure contained in the 2013 Act. Such a conclusion stems from the *in bonam partem* principle. The 2013 Act and its associated rules comprise a self-contained scheme. It is, in my view, inappropriate to seek to manipulate the 1995 Act in order to alter the effects of that scheme.

82. In his oral submissions, Mr Glasson specifically confirmed that there was no possibility of any expert called by the defendants to give evidence on foreign law seeing closed material. This means that there would be no inequality of arms as regards the evidence on foreign law.

83. In reply, Mr Hermer submitted that the parties were, nevertheless, left with the possibility that the judge trying the substantive action may be "compelled into legal error" as a result of being unable to "fill in the gaps" that there may be in the final evidence relating to foreign law.

84. I consider that there is a good deal of speculation inherent in this submission. Nevertheless, should some such issue arise during the course of the proceedings, the scheme of the 2013 Act means that it can be addressed by the court. Section 7(2) provides that the court:-

> "…must keep the declaration [under section 6] under review, and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings."

85. Should the court find itself in the potential position described by Mr Hermer, section 7(2) in effect means that the court has a duty to take such action as may be appropriate.

86. In reply, Mr Hermer returned to the issue of prematurity, contending that, at the very least, a decision on whether a foreign law is repugnant on the grounds of public policy should be deferred. In this regard, he drew attention to paragraph 48 of the open defence. Here, the defendants contend that they are either immune from the jurisdiction of United States; or that the claim contravenes the sovereign immunity of the United States for claims by enemy combatants. Mr Hermer submitted that the claimant must be able to argue, in due course, that the application of immunity in the case of torturers is contrary to public policy. He said, however, that the claimant was unable to do that, at this stage.

87. I regret I am unable to see any force in this submission. The open defence is dated 2 October 2020. The issues of the defendants' immunity and the sovereign immunity of the United States have been clearly pleaded by the defendants. In January 2021, the parties agreed that the issue of the applicable law for the purposes of the claim should be determined as a preliminary issue on 20 January 2021. In these circumstances, I do not consider that a case for deferring consideration of section 14 has been made good. Although Mr Hermer said that paragraph 48 was an example of the argument he was advancing, I consider I am entitled to regard it as his best point. I can, in any event,

detect no other aspect of the case that suggests it would be appropriate for me to defer consideration of section 14.

88. For these reasons, the claimant's case on section 14 fails.

DECISION

89. The preliminary issue is hereby determined as follows: the applicable law for the purposes of the claimant's claim is the law of the Six Countries.