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PRESS SUMMARY

Abd Ali Hameed Al-Waheed (Appellant) v Ministry of Defence (Respondent) [2017] UKSC 2

On appeal from [2014] EWHC 2714 (QB)

Serdar Mohammed (Respondent) v Ministry of Defence (Appellant) [2017] UKSC 2

On appeal from [2015] EWCA Civ 843

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Wilson, Lord Sumption, Lord Reed, Lord Hughes, Lord Toulson (1-4 February 2016), Lord Hodge (26 October 2016)

BACKGROUND TO THE APPEALS

This judgment is one of three being given simultaneously on the liabilities of the United Kingdom government for allegedly tortious acts done by HM Forces in the course of operations overseas or by foreign governments in which UK officials are alleged to have been complicit. This particular judgment deals with allegations that persons in Iraq and Afghanistan were unlawfully detained in breach of article 5 of the European Convention on Human Rights (“ECHR”) by HM forces engaged in peacekeeping operations in those countries under mandates from the United Nations Security Council.

Serdar Mohammed (“SM”) was captured by British forces in Afghanistan on 7 April 2010. It is the Government’s case that his capture took place in the course of a planned operation involving a ten-hour firefight, from which SM was seen fleeing, discarding a rocket-propelled grenade launcher and ammunition as he went. Intelligence is said to have identified him as a senior Taliban commander. SM was detained in British facilities until 25 July 2010, when he was transferred to the Afghan authorities. His detention can be divided into three periods: (i) the first 96 hours, (ii) 11 April to 4 May 2010, when he was being interrogated, and (iii) 4 May to 25 July, when he was held pending transfer to the Afghan authorities.

Abd Ali Hameed Al-Waheed was captured by British forces in Basrah, Iraq on 11 February 2007 at his wife’s home. The Government contends that weaponry material for explosives were found on the premises. He was held at a British army detention centre for six and a half weeks, and was then released after an internal review had concluded that a successful prosecution would be unlikely.

The relationship between article 5 and international law is one of three preliminary issues in *Serdar Mohammed*. The High Court held that British forces had no power to detain prisoners for any longer than was required to transfer them to the Afghan authorities, and then for no more than 96 hours. Accordingly, it held that the detention of SM breached article 5(1) and 5(4) of the ECHR. The Court of Appeal reached the same conclusion, albeit for different reasons. In *Al-Waheed*, it was common ground before the High Court that, so far as the claim was based on a breach of article 5(1) of the ECHR, the judge and the Court of Appeal would be bound to dismiss it by virtue of the decision of the House of Lords in *Al-Jedda*. The judge granted a certificate for a leapfrog appeal to the Supreme Court.

Lord Toulson sat on all aspects of the appeals other than those involving the scope and procedural requirements of articles 5(1)(c) and/or (f), 5(3) and 5(4) of the Convention in relation to the detention of Serdar Mohammed, in relation to which (following Lord Toulson’s retirement) Lord Hodge sat on 26 October 2016.

JUDGMENT

By a majority of 7 to 2, the Supreme Court dismisses Mr Al-Waheed’s appeal, and allows the Government’s appeal in *Serdar Mohammed* in part. The majority holds that British forces had power to take and detain prisoners for periods exceeding 96 hours if this was necessary for imperative reasons of security, but that its procedures for doing so did not comply with ECHR article 5(4) because they did not afford prisoners an effective right to challenge their detention. Lord Sumption (with whom Lady Hale agrees) gives the lead judgment. Lord Wilson gives a concurring judgment. Lord Mance adds a mainly concurring judgment, as does Lord Hughes (with whom Lord Neuberger agrees). On the issues with which he was involved, Lord Toulson agrees with Lord Mance, Lord Wilson and Lord Sumption. So far as he was involved, Lord Hodge agrees with Lord Sumption. Lord Reed (with whom Lord Kerr agrees) gives a dissenting judgment holding that there was authority to detain prisoners for periods exceeding 96 hours only in circumstances falling within the grounds specified in article 5(1) (which would cover the first and third periods of detention, but not the second).

REASONS FOR THE JUDGMENT

The first issue the Court addresses is whether British forces had legal power to detain SM in excess of 96 hours. The possible sources for such a power are customary international law and/or the authority of the UN Security Council [13]. The majority finds it unnecessary to express a concluded view on whether customary international law sanctions the detention of combatants in a non-international armed conflict (“NIAC”) [14, 113, 148, 224]. Lord Reed concludes that no such rule currently exists as a matter of customary international law [275]. However, the majority holds that authority to capture and detain enemy combatants for imperative reasons of security was implicitly conferred by the relevant Security Council resolutions [30, 119, 164, 224]. These were UNSCR 1546 (2004) in Iraq [20]; and UNSCR 1386 (2001) in respect of Afghanistan [28, 119]. The majority (other than Lord Mance) further concludes that individual states participating in the International Security Assistance Force (“ISAF”) in Afghanistan were not limited by ISAF’s policy of restricting detention to 96 hours, so that the United Kingdom was entitled to adopt its own detention policy [38-39]. Lord Mance considers that the resolutions conferred authority to detain on ISAF, not the contributing states [180], but arrives at the same conclusion as the majority regarding the legitimacy of the United Kingdom’s detention policy on the ground that ISAF tacitly accepted of the UK’s adoption of this policy [39, 188].

The next question is whether it is possible to reconcile these conclusions under public international law with article 5 ECHR. The European Court of Human Rights in *Hassan v UK* was able to “accommodate” the six permitted grounds of detention under article 5 with the power recognised under public international law to detain in the course of an international armed conflict (“IAC”). The majority holds that the same approach applies to a NIAC, where the source of the power to detain is a resolution of the Security Council [60, 134-6, 164, 224]. The six permitted grounds for detention in article 5(1) ECHR were formulated in relation to peacetime conditions and could not be regarded as exhaustive in conditions of armed conflict. Their object was to “protect the individual from arbitrariness”. This object was achieved if there was a legal basis for detention and the power to detain was not exercisable on grounds which were unduly broad, opaque or discretionary [63, 93, 164-167, 224]. The procedure governing military arrest in Afghanistan was suitably clear and precise to meet the standards of article 5(1) [93, 113, 165-167, 224]. Article 5(1) did not therefore prevent a Convention state from acting under the authority conferred by a Security Council resolution.

A majority (Lord Sumption, Lady Hale, Lord Wilson, Lord Hodge, Lord Reed and Lord Kerr) considers that the detention of SM did not fall within any of the six specified grounds in article 5(1), during the second period of his detention. He was not at any time held pending “extradition” to the Afghan authorities, because transfer to the civil authorities within Afghanistan did not constitute an extradition within article 5(1)(f) [78, 84, 113, 235, 236, 351]. Any period when he was being detained solely for intelligence exploitation purposes could not be justified under article 5(1)(c) [81, 84, 113, 235, 236, 351], or under the relevant Security Council resolution. Lord Mance, Lord Hughes and Lord Neuberger consider that whether SM’s detention during any period fell within article 5(1)(f), as modified if necessary under

Hassan, should be remitted for trial [202-203, 230]. Lord Mance would also have remitted for trial the question whether article 5(1)(c) justified detention during the second period [202-203].

However, a majority (Lord Sumption, Lady Hale, Lord Wilson, Lord Mance, Lord Hughes, Lord Neuberger and Lord Toulson) holds that there should be remitted for trial issues as to:

- whether intelligence exploitation was in fact the sole ground for detention during the second period or whether imperative reasons of security were not also a concurrent reason, justifying detention under article 5 read with and modified as necessary under *Hassan* having regard to the relevant Security Council resolution [89, 113, 191-200 and 223, 224], and
- whether SM's detention during the third period fell within article 5(1)(c) or was justified by imperative reasons of security under article 5 read with and modified as necessary having regard to the relevant Security Council resolution [83, 94-98, 111, 113, 204, 224, 235].

The question of article 5(3) compatibility must also be left for trial [83, 94-98, 111, 113, 204, 224, 235].

A majority holds that it is unnecessary for the United Kingdom to establish a right of detention under Afghan law in order to rely on article 5 read with and modified as necessary having regard to the relevant Security Council resolution [139, 202, 233 and 343-346].

Under article 5(4), the minimum standard of protection from arbitrariness equates to that imposed by articles 43 and 78 of the Fourth Geneva Convention: an impartial body carrying out initial and regular reviews in accordance with a fair procedure [68, 134, 205-206, 224, 235]. Fairness required that SM be given an effective means of challenging his detention. A majority (Lord Sumption, Lady Hale, Lord Wilson, Lord Hodge, Lord Reed and Lord Kerr) holds that there was a breach of the requirement to provide "sufficient guarantees of impartiality and fairness to protect against arbitrariness" in two respects: the procedure lacked independence and it failed to provide for the participation of the detainee [104-106, 144]. Lord Mance, Lord Hughes and Lord Neuberger consider that in both respects the matter should, as the Court of Appeal concluded, be remitted for trial in the light of the views they express [212-218, 227].

The majority all agree that a finding of breach of the procedural standards required by article 5(4) will not necessarily entitle SM to damages. A different review process might well have led to no more than SM remaining in UK custody or being transferred slightly to Afghan custody. [110, 113, 219-220, 223, 224, 232, 235].

In his dissenting judgment, Lord Reed concludes that the Security Council resolutions cannot be interpreted as authorising detention falling outside article 5(1)(a) to (f) of the ECHR [296]. Moreover, *Hassan v UK* only operates to modify article 5 where it is necessary to reconcile it with the Third and Fourth Geneva Conventions (i.e. not in the case of a NIAC, to which the Geneva Conventions have only limited application). [315-316]. SM's detention during the second period was incompatible with article 5 as it was not for one of the six specified purposes [351]. In any event, it was for a purpose outside the scope of the authority granted by UNSCR 1890; it does not remain an open question whether it was for imperative reasons of security [352-353].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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