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Case No: HQ12X03367

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2014

Before :
MR JUSTICE LEGGATT

BETWEEN:

SERDAR MOHAMMED

Claimant

and

MINISTRY OF DEFENCE

Defendant

AND BETWEEN:

(1) MOHAMMED QASIM
(2) MOHAMMED NAZIM
(3) ABDULLAH

PIL Claimants

and

SECRETARY OF STATE FOR DEFENCE

Defendant

- -

Richard Hermer QC, Ben Jaffey, and Nikolaus Grubeck
(instructed by **Leigh Day**) for the **Claimant**

James Eadie QC, Karen Steyn QC, Sam Wordsworth QC and Marina Wheeler
(instructed by **Treasury Solicitors**) for the **Defendant**

Michael Fordham QC, Shaheed Fatima, Hanif Mussa and Paul Luckhurst
(instructed by **Public Interest Lawyers**) for the **PIL Claimants**

Hearing dates: 13 – 17 January 2014

Approved Judgment

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

Mr Justice Leggatt :

Introduction and Summary

1. The important question raised by this case is whether the UK government has any right in law to imprison people in Afghanistan; and, if so, what is the scope of that right. The claimant, Serdar Mohammed ("SM"), was captured by UK armed forces during a military operation in northern Helmand in Afghanistan on 7 April 2010. He was imprisoned on British military bases in Afghanistan until 25 July 2010, when he was transferred into the custody of the Afghan authorities. SM claims that his detention by UK armed forces was unlawful (a) under the Human Rights Act 1998 and (b) under the law of Afghanistan.

2. As this is a long judgment which discusses many issues and arguments, I will summarise my conclusions at the start. This is, however, a bare summary only and the reasons for my conclusions are set out in the body of the judgment.

3. UK armed forces have since 2001 been participating in the International Security Assistance Force ("ISAF"), a multinational force present in Afghanistan with the consent of the Afghan government under a mandate from the United Nations Security Council. Resolutions of the Security Council have: (1) recognised Afghan sovereignty and independence and that the responsibility for providing security and law and order throughout the country resides with the government of Afghanistan; (2) given ISAF a mandate to assist the Afghan government to improve the security situation; and (3) authorised the UN member states participating in ISAF to "take all necessary measures to fulfil its mandate".

4. ISAF standard operating procedures permit its forces to detain people for a maximum of 96 hours after which time an individual must either be released or handed into the custody of the Afghan authorities. UK armed forces adhered to this policy until November 2009, when the UK government adopted its own national policy under which UK Ministers could authorise detention beyond 96 hours for the purpose of interrogating a detainee who could provide significant new intelligence. This UK national policy was not shared by the other UN member states participating in ISAF nor agreed with the Afghan government.

5. SM was captured by UK armed forces in April 2010 as part of a planned ISAF mission. He was suspected of being a Taliban commander and his continued detention after 96 hours for the purposes of interrogation was authorised by UK Ministers. He was interrogated over a further 25 days. At the end of this period the Afghan authorities said that they wished to accept SM into their custody but did not have the capacity to do so due to prison overcrowding. SM was kept in detention on British military bases for this 'logistical' reason for a further 81 days before he was transferred to the Afghan authorities. During the 110 days in total for which SM was detained by UK armed forces he was given no opportunity to make any representations or to have the lawfulness of his detention decided by a judge.

6. On the issues raised concerning the lawfulness of SM's detention I have concluded as follows:

i) UK armed forces operating in Afghanistan have no right under the local law to detain people other than a right to arrest suspected criminals and deliver them to the Afghan authorities immediately, or at the latest within 72 hours. On the facts assumed in this case SM's arrest was lawful under Afghan law but his continued detention after 72 hours was not.

ii) It is now clear law binding on this court: (a) that whenever a state which is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") exercises through its agents physical control over an individual abroad, and even in consequence of military action, it must do so in a way which complies with the Convention; and (b) that the territorial scope of the Human Rights Act coincides with that of the Convention. Accordingly, the Human Rights Act extends to the detention of SM by UK armed forces in Afghanistan.

iii) In capturing and detaining SM, the UK armed forces were acting as agents of the United Kingdom and not (or at any rate not solely) as agents of the United Nations. The UK government is therefore responsible in law for any violation by its armed forces of a right guaranteed by the Convention.

iv) Article 5 of the Convention, which guarantees the right to liberty, was not qualified or displaced in its application to the detention of suspected insurgents by UK armed forces in Afghanistan either (a) by the United Nations Security Council Resolutions which authorised the UK to participate in ISAF or (b) by international humanitarian law. Further, the authorisation given by the UN Security Council Resolutions to "take all necessary measures" to fulfil the ISAF mandate of assisting the Afghan government to improve security does not permit detention (a) outside the Afghan criminal justice system for any longer than necessary to deliver the detainee to the Afghan authorities nor (b) which violates international human rights law, including the Convention.

v) ISAF detention policy is compatible with Article 5 of the Convention and falls within the authorisation given by the UN Security Council. SM's arrest and detention for 96 hours therefore complied with Article 5.

vi) However, his subsequent detention did not. The UK government had no legal basis either under Afghan law or in international law for detaining SM after 96 hours. Nor was it compatible with Article 5 to detain him for a further 25 days solely for the purposes of interrogation and without bringing him before a judge or giving him any opportunity to challenge the lawfulness of his detention.

vii) SM's continued detention by the UK for another 81 days for 'logistical' reasons until space became available in an Afghan prison was also unlawful for similar reasons and was not authorised by the UN Security Council. In addition, this further period of detention was arbitrary because it was indefinite and not in accordance with the UK's own policy guidelines on detention.

viii) Accordingly, SM's extended detention for a total of 106 days beyond the 96 hours permitted by ISAF policy was not authorised by the UN mandate under which UK forces are present in Afghanistan and was contrary to Article 5 of the Convention.

ix) In circumstances where his detention took place in Afghanistan, the law applicable to the question whether SM has suffered a legal wrong is Afghan law, which gives him a right to claim compensation from the UK government. However, the English courts will not enforce that claim in circumstances where SM's detention was an 'act of state' done pursuant to a deliberate policy of the UK government involving the use of military force abroad. SM therefore cannot recover damages in the English courts based on the fact that his imprisonment by UK forces was illegal under Afghan law.

x) However, this 'act of state' defence does not apply to claims brought under the Human Rights Act for violation of a right guaranteed by the Convention. Article 5(5) of the Convention gives SM an "enforceable right to compensation" which the courts are required to enforce.

xi) This decision will not come as a surprise to the MOD which formed the view at an early stage that there was no legal basis on which UK armed forces could detain individuals in Afghanistan for longer than the maximum period of 96 hours authorised by ISAF. I have found that this view was correct. Nothing happened subsequently to provide a legal basis for such longer detention, either under the local Afghan law, international law or English law. UK Ministers nevertheless decided to adopt a detention policy and practices which went beyond the legal powers available to the UK. The consequence of those decisions is that the MOD has incurred liabilities to those who have been unlawfully detained.

7. The main body of this judgment is in 12 parts, as follows:

I) The claim and the issues;

II) The UK's involvement in Afghanistan;

III) Detention policy in Afghanistan;

IV) The claim under Afghan law;

V) The claim under Article 5;

VI) The territorial scope of the Convention;

VII) Responsibility for acts of UK armed forces in Afghanistan;

VIII) United Nations Security Council Resolutions;

IX) International Humanitarian Law;

X) Alleged breaches of Article 5;

XI) The 'act of state' defence;

XII) Conclusion.

I. THE CLAIM AND THE ISSUES

8. SM is an Afghan citizen. It is said that he does not know his date of birth but was probably born in or about 1988. In this action against the Ministry of Defence ("MOD") he claims damages for (amongst other things) his allegedly unlawful detention by UK armed forces from 7 April 2010 until 25 July 2010.

9. According to the amended particulars of SM's claim:

i) In the early morning of 7 April 2010 he was irrigating his family's fields near his home in northern Helmand when British soldiers arrived by helicopter and arrested him.

ii) In the course of his capture/arrest SM was attacked and bitten by a military dog. He was then blindfolded, handcuffed and subjected to assaults by British soldiers.

iii) He was held in detention by UK armed forces for around 110 days at their detention facilities at Camp Bastion and Kandahar Airfield, without charge or trial. Whilst in UK custody, he was deprived of sleep, exposed to very cold temperatures and interrogated at least 26 times.

iv) On 25 July 2010 SM was transferred to the Afghan authorities, who subjected him to prolonged and severe torture. He was subsequently convicted by an Afghan court at a trial conducted in a language he does not speak or understand and without legal representation or knowing what he was charged with. He was sentenced to 16 years' imprisonment, later reduced to 10 years' imprisonment on an appeal. At present, SM remains imprisoned at a prison on the outskirts of Kabul.

10. In its amended defence the MOD gives a very different account of SM's capture and detention. In particular, the MOD alleges that:

i) SM was detained at around 03.20am (Afghan time) on 7 April 2010 as part of a planned ISAF operation involving UK armed forces. The operation targeted a senior Taliban commander and the vehicle in which he was believed to be travelling. When the operation was launched, approximately four people were seen leaving the vehicle and entering two compounds.

ii) As their helicopter touched down near the compounds, the British soldiers came under heavy fire.

iii) SM ran from one of the two compounds, along with another insurgent. The other insurgent fired upon British soldiers and was killed. SM fled into a field about 450 metres away. He was asked a number of times via an interpreter to come out with his hands up. He did not do so. He was considered to present a significant and imminent threat. Accordingly a military dog was released into the field by its handler and apprehended SM, in the process biting his right arm.

iv) Half way between the compound from which SM had fled and the place of his arrest, British soldiers found a rocket propelled grenade ("RPG") launcher, and two RPG rounds.

v) During the operation, two other insurgents were found in one of the compounds. One of them engaged the British soldiers and was killed. The other was captured.

vi) UK armed forces safely extracted SM and the other captured insurgent. They did so whilst under heavy and sustained small arms and RPG fire. The extraction took about ten hours. Three British soldiers were wounded in action.

vii) On arrival at Camp Bastion, SM was informed, with the aid of an interpreter, that he had been detained because he was considered to pose a threat to the accomplishment of the ISAF mission and would either be released or transferred to the Afghan authorities as soon as possible.

viii) SM was held at Camp Bastion for approximately 7 days and was then taken to the UK detention facilities at Kandahar Airfield on 14 April; he was returned to Camp Bastion on or about 31 May 2010 and remained there until his transfer to an Afghan prison on 25 July 2010.

ix) The MOD denies that SM was deliberately deprived of sleep or otherwise mistreated by UK armed forces while in their custody.

x) In response to questioning, SM said that he was a farmer. However, the MOD subsequently received information that he was a senior Taliban commander, also known as Mullah Gulmad, who was involved with the large scale production of improvised explosive devices and believed to have commanded a local Taliban training camp in mid-2009.

xi) While in UK custody, SM's detention was reviewed every 72 hours by the Detention Review Committee in Camp Bastion. The first such review took place on 8 April 2010 and the last on 4 May 2010. However, he did not have access to a lawyer or receive family visits.

xii) Ministers approved SM's short term detention in UK custody on the grounds that it appeared likely that questioning him would provide significant new intelligence vital for force protection purposes and significant new information on the nature of the Taliban insurgency. Following SM's last detention review on 4 May 2010, the Afghan National Directorate of Security ("NDS") stated that they wished to accept SM into their custody but at that time did not have the capacity to do so due to overcrowding at NDS Lashkar Gar. Between 6 May 2010 and 25 July 2010 SM was held in 'logistical detention' pending transfer to the Afghan authorities. He was not interrogated during this period.

xiii) The MOD has no direct knowledge of what happened to SM after he was transferred to the Afghan authorities on 25 July 2010. SM was visited by UK personnel on three occasions while at NDS Lashkar Gar and made no allegations of mistreatment. He did, however, allege mistreatment after he was transferred to a prison in Kabul.

xiv) The MOD has no direct knowledge of the criminal proceedings against SM but is aware that he was legally represented before the Afghan appeal court.

The preliminary issues

11. It is SM's case in these proceedings that, even if the MOD's statement of the relevant facts is true and his account is not, he was still unlawfully detained and is entitled to compensation from the UK government because UK armed forces have no legal right to capture and detain anyone in Afghanistan. Alternatively, if this is wrong and there is a lawful power to detain, it is strictly limited in scope and does not extend to detention (a) for more than 96 hours, (b) for the purpose of obtaining intelligence or (c) because the Afghan authorities do not have sufficient prison capacity. SM further contends that his detention was in any event unlawful in circumstances where it was authorised solely by British officials and Ministers and was not approved or reviewed by a judge.

12. If as a matter of law any of these contentions is correct, it follows that, even on the MOD's own factual case, SM has been unlawfully detained for part or all of the period that he was in UK custody. Because of the importance of the issues raised by SM's claim and the fact that there is no prospect of holding a fair trial of the factual

disputes in the foreseeable future while SM remains in prison in Kabul, I made an order dated 6 March 2013 for a trial of preliminary issues. This order was subsequently varied by an order of Silber J dated 30 July 2013 which added a further preliminary issue.

13. The preliminary issues are as follows:

> "On the assumption that the facts set out in paragraphs 26-65 of the amended defence are true and without prejudice to the claimant's right to challenge the factual basis of his arrest and detention at any further trial in these proceedings:
>
> 1. Can the defendant rely on the doctrine of 'Act of State' to preclude a claim for damages, false imprisonment and/or breach of Article 5 of Schedule 1 of the Human Rights Act 1998?
>
> 2. Was the claimant's detention in accordance with Article 5 of the European Convention on Human Rights, and in particular:
>
> i. Was the act of detaining the claimant attributable to the defendant or to the United Nations?
>
> ii. Was the effect of Article 5 displaced or qualified by resolutions of the United Nations Security Council?
>
> iii. Did the jurisdiction of the [UK under the Convention] extend to the military premises on which the claimant was detained?
>
> iv. Was the effect of Article 5 qualified or displaced by International Humanitarian Law?
>
> 3. Was the claimant's detention lawful?"

14. In relation to Question 3, the parties agree that the law applicable to any claim in tort arising out of SM's detention is the law of Afghanistan.

The trial

15. At the trial of these preliminary issues, a substantial amount of documentation was put in evidence, mostly relating to the arrangements under which UK armed forces have participated in ISAF and operated in Afghanistan and to the detention policies of ISAF and the UK during that time. In addition, the MOD relied on witness evidence from Mr Paul Devine, the Director of Operational Policy in the MOD, and Mr Alasdair Pennycook, who from November 2010 to December 2012 was Assistant Head of Policy at the UK's Permanent Joint Headquarters. The claimant relied on a witness statement of Mr Angus Henderson, a retired Lieutenant Colonel in the UK armed forces, regarding UK detention facilities in Afghanistan.

16. Evidence on Afghan law was given by two expert witnesses for each party. I will refer to that evidence in part IV of this judgment.

17. In accordance with orders dated 30 July 2013 and 22 November 2013, three claimants in separate proceedings (Mohammed Qasim, Mohammed Wazim and Abdullah) whose claims raise similar issues to that of SM were also represented at the trial. These claimants are represented by the law firm Public Interest Lawyers, and I will refer to them as the "PIL claimants".

18. The preliminary issues in this case involve questions of English law, the law of Afghanistan, the European Convention on Human Rights and international law, including international humanitarian law and resolutions of the United Nations Security Council, and the relationship between these systems of law. Some 200 cases and academic articles filling 10 lever arch files were cited in argument, many of them relevant.

19. I have received extensive written submissions from counsel for the MOD, SM and the PIL claimants, and heard oral submissions from Mr James Eadie QC on behalf of the MOD, Mr Richard Hermer QC on behalf of SM and Mr Michael Fordham QC and Ms Shaheed Fatima on behalf of the PIL claimants. Both the written and oral submissions were of outstanding excellence.

II. UK INVOLVEMENT IN AFGHANISTAN

20. UK armed forces are engaged, as part of the International Security Assistance Force ("ISAF"), in a non-international armed conflict between the government of Afghanistan and various insurgent forces. ISAF is a multinational force, which was established and operates in Afghanistan on the authorisation of the United Nations Security Council.

The establishment of ISAF

21. UK military involvement in Afghanistan began in October 2001 when UK armed forces joined Coalition forces, led by the United States, in Operation Enduring Freedom. This operation was directed against Al-Qaeda and the Taliban in response to the terrorist attacks of 9/11.

22. In the latter part of 2001 the UN held talks on Afghanistan in which all the main Afghan political factions apart from the Taliban took part. These talks resulted in an "Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government Institutions" dated 5 December 2001 (known as the "Bonn Agreement"). The Bonn Agreement provided for the establishment of an Interim Administration in Afghanistan on 22 December 2001.

23. Annex 1 to the Bonn Agreement contained a request to the United Nations to provide an international security force in the following terms:

> "1. The participants in the UN Talks on Afghanistan recognise that the responsibility for providing security for law and order throughout the country resides with the Afghans themselves. To this end, they pledge their commitment to do all within their means and influence to ensure such security, including for all United Nations and other personnel of international governmental and non-governmental organisations deployed in Afghanistan.
>
> 2. With this objective in mind, the participants request the assistance of the international community in helping the new Afghan authorities in the establishment and training of new Afghan security and armed forces.
>
> 3. Conscious that some time may be required for the new Afghan security and armed forces to be fully constituted and functioning, the participants in the UN Talks on Afghanistan request the United Nations Security Council to consider authorising the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, if appropriate, be progressively expanded to other urban centres and other areas.
>
> 4. The participants in the UN Talks on Afghanistan pledge to withdraw all military units from Kabul and other urban centres and other areas in which the UN mandated force is deployed. It would also be desirable if such a force were to assist in the rehabilitation of Afghanistan's infrastructure."

24. In a resolution adopted on 6 December 2001 (UNSCR 1383), the UN Security Council endorsed the Bonn Agreement and declared its willingness to support the implementation of the Agreement and its annexes.

25. In a letter dated 19 December 2001 to the President of the Security Council, the Acting Minister for Foreign Affairs of the Interim Administration of Afghanistan informed the Security Council that, "taking into account all relevant considerations, an international security force could be deployed under Chapters VI or VII of the [UN] Charter."

26. On 20 December 2001 the UN Security Council adopted Resolution 1386, which established ISAF. Acting under Chapter VII of the UN Charter, the Security Council:

    i) Authorised "the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim

> Authority as well as the personnel of the United Nations can operate in a secure environment";
>
> ii) Called upon Member States to contribute personnel, equipment and other resources to ISAF; and
>
> iii) Authorised "the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate".

27. The phrase "take all necessary measures to fulfil its mandate", which has been repeated in subsequent resolutions, is the authority relied on by the MOD to justify the detention of individuals in Afghanistan by UK armed forces participating in ISAF.

28. A Military Technical Agreement ("MTA") dated 14 January 2002 was concluded between ISAF and the Interim Administration of Afghanistan to define their respective obligations and responsibilities. Article I(2) of the MTA stated that the Interim Administration "understands and agrees the Mission of the ISAF is to assist it in the maintenance of security" in the geographical area of responsibility covered by the MTA. Article III(1) stated:

> "The Interim Administration recognises that the provision of security and law and order is their responsibility. This will include maintenance and support of a recognised Police Force operating in accordance with internationally recognised standards and Afghanistan law and with respect for internationally recognised human rights and fundamental freedoms, and by taking other measures as appropriate."

29. Article IV(1) of the MTA referred to the authorisation of ISAF by UNSCR 1386 to assist the Interim Administration in the maintenance of security. Article IV(2) stated:

> "The Interim Administration understands and agrees that the ISAF Commander will have the authority, without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission."

UN extensions of ISAF's mandate

30. The authorisation of ISAF was subsequently extended by the UN Security Council both in time and in geographical scope. UNSCR 1510 (2003) authorised the territorial expansion of ISAF's mandate to "areas of Afghanistan outside of Kabul and its environment". Since then, there have been annual extensions of the authorisation of ISAF on materially identical terms for periods of 12 months at a time. At the time of SM's detention in 2010, the applicable resolution was UNSCR 1890 (2009).

31. I note that UNSCR 1890 (2009), like other resolutions before and after it, included recitals adopted by the Security Council:

    i) "Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan";

    ii) "Recognising that the responsibility for providing security and law and order throughout the country resides with the Afghan Authorities, stressing the role of [ISAF] in assisting the Afghan Government to improve the security situation";

    iii) "Stressing the central and impartial role that the United Nations continues to play in promoting peace and stability in Afghanistan by leading the efforts of the international community, noting, in this context, the synergies in the objectives of the United Nations Assistance Mission in Afghanistan (UNAMA) and of ISAF";

    iv) "Expressing its strong concern about the security situation in Afghanistan, in particular the increased violent and terrorist activities by the Taliban, Al-Qaida, illegally armed groups, criminals and those involved in the narcotics trade";

    v) "Expressing also its concern over the harmful consequences of violent and terrorist activities by the Taliban, Al-Qaida and other extremist groups on the capacity of the Afghan Government to guarantee the rule of law, to provide security and basic services to the Afghan people, and to ensure the full enjoyment of their human rights and fundamental freedoms";

    vi) "Condemning in the strongest terms all attacks including Improvised Explosive Device (IED) attacks, suicide attacks and abductions, targeting civilians and Afghan and international forces …";

    vii) "Expressing its serious concern with the high number of civilian casualties and calling for compliance with international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection of civilians";

    viii) "Determining that the situation in Afghanistan still constitutes a threat to international peace and security"; and

    ix) "Determining to ensure the full implementation of the mandate of ISAF, in coordination with the Afghan Government".

32. This resolution, again like others before and after it, authorised "the Member States participating in ISAF to take all necessary measures to fulfil its mandate".

33. Since 2003, ISAF has been under the command of NATO. Within Afghanistan there is a regional command structure. The majority of UK armed forces in Afghanistan are currently deployed in Helmand Province in southern Afghanistan, as part of Task Force Helmand. Although force levels are now being reduced in the run-up to 'transition', as of April 2013 ISAF comprised about 100,000 troops, contributed by 50 nations, of whom about 8,000 were UK service personnel.

III. DETENTION POLICY IN AFGHANISTAN

34. UK armed forces acting as part of ISAF have been detaining people in Afghanistan for many years. According to the evidence of Mr Devine, the majority of those detained by UK forces are suspected insurgents, including individuals suspected of making bombs or improvised explosive devices. Those captured and detained are held at temporary holding facilities until they are released or handed over to the Afghan authorities.

ISAF's policy

35. The policy and procedures governing detention operations by ISAF are set out in ISAF Standard Operating Procedures for detention (SOP 362). Relevant provisions of SOP 362 are as follows:

> "4. Authority to Detain. The only grounds upon which a person may be detained under current ISAF Rules of Engagement (ROE) are: if the detention is necessary for ISAF force protection; for the self-defence of ISAF or its personnel; for accomplishment of the ISAF Mission.
>
> 5. Detention. … The current policy for ISAF is that detention is permitted for a maximum of 96 hours after which time an individual is either to be released or handed into the custody of the ANSF [i.e. Afghan National Security Forces]/GOA [i.e. Government of Afghanistan].
>
> …
>
> 7. The Powers of the Detention Authority. A Detention Authority [defined as an individual authorised to make detention decisions] may authorise detention for up to 96 hours following initial detention. Should the Detention Authority believe that continued detention beyond 96 hours is necessary then, prior to the expiration of the 96-hour period, the Detention Authority shall refer the matter by the chain of command to HQ ISAF.
>
> 8. Authority for Continued Detention. The authority to continue to detain an individual beyond the 96 hour point is vested in COMISAF (or his delegated subordinate). A detainee may be held for more than 96 hours where it has been necessary in order to effect his release or transfer in safe

> circumstances. This exception is not authority for longer term detention but is intended to meet exigencies such as that caused by local logistical conditions e.g. difficulties involving poor communication, transport or weather conditions or where the detainee is held in ISAF medical facilities and it would be medically imprudent to move him. …"

36. A footnote to paragraph 5 states that:

> "It is accepted that detention will take place under National guidelines. However, the standards outlined within this SOP are to be considered the minimum necessary to meet international norms and are to be applied."

I interpret this to mean that (amongst other things) detention for more than 96 hours other than in the circumstances outlined in paragraph 8 was not considered to meet international norms.

37. Annex C to ISAF SOP 362 deals with detention procedure. Paragraph 6 of Annex C states that, on arrival at an ISAF holding facility, the detained person will be informed, in a manner they understand, of his/her rights under international law and of their right to file a grievance with the detention authority in order to bring attention to any matters concerning the reasons for detention, length of detention, conditions of detention or treatment during detention. Paragraph 7 states that a detained person "must be permitted access to legal counsel or representative, subject to operational security concerns". Paragraph 17 deals with review procedure as follows:

> "The obligation upon the Detention Authority to review the conditions of detention is continuous. Once the circumstances supporting any of the justifying grounds outlined within the Authority to Detain are no longer present, then ISAF must release that individual. The fact that a person may have information of intelligence value is not by itself a basis for ISAF detention."

UK detention policy

38. The UK has developed its own detention policy in Afghanistan which differs in some material respects from the ISAF Standard Operating Procedures.

39. At all relevant times the MOD doctrine for detention operations on overseas operations was articulated in Joint Doctrine Publication ("JDP") 1-10, first edition dated May 2006. JDP is generic doctrine, which requires interpretation and expansion to fit the requirements of a particular theatre of operations. For Afghanistan, the requirements of the JDP 1-10 were expanded into theatre level doctrine, Standard Operating Instruction ("SOI") J3-9 – Amendment 1 dated 6 November 2009.

40. The basis for UK detention policy in Afghanistan was outlined in a MOD memorandum dated 1 March 2006, as follows:

> "5. To date our policy in Afghanistan has been to avoid detaining individuals wherever possible. We have retained the capacity to detain for immediate force protection but this facility (at Camp Souter, in Kabul) has only been used a handful of times. … Although this policy has been tenable in Kabul and north Afghanistan the more challenging security environment in Helmand has required a review of the UK's policy on detention.
>
> 6. The legal basis by which the UK might detain individuals differs between Afghanistan and Iraq. In Iraq the letters annexed to the UNSCR and referred to in it confirm an explicit right to intern for imperative reasons of security which is further clarified in Iraqi domestic law. In Afghanistan the UNSCR does not make reference to detention or internment. However, its authorisation for ISAF to use 'all necessary measures' infers that there is authority for temporary detention for the purposes of self defence. The UNSCRs can also be interpreted as authorising arrest and temporary detention for broader law enforcement purposes. Current ISAF policies permit detention for a maximum of 96 hours …
>
> 7. Although the legal basis differs, the operational circumstances which UK forces might face on the ground in Helmand are likely to share some of the characteristics of operations in southern Iraq. UK forces are likely to detain individuals and suspected criminals in line with ISAF policies. We will look to transfer such individuals to Afghan Authorities within the period of 96 hours. However it is also likely that there will be a need to detain others who, as in Iraq, are judged to pose a substantial and imminent threat to UK forces but may not have committed a criminal act. In such cases assessments may be taken on the basis of sensitive intelligence which we are unable to share with the Afghans. We may also have a strong interest in interrogating them to further develop our intelligence picture. Legal advice has confirmed that there is currently no basis upon which we can legitimately intern such individuals." [emphasis added]

41. The memorandum noted (in paragraph 10) that legal advice had been sought on the applicability of the Convention to UK detention operations in Afghanistan and stated that:

> "The considered advice is that [the Convention] will apply unless individuals are handed over to an Afghan official immediately upon pick up."

42. The memorandum discussed various possible mechanisms by which a basis for longer periods of detention including detention for force protection and intelligence exploitation might be achieved. These included Afghan legislation or revision of the applicable UNSCR. The memorandum concluded (in paragraph 16):

> "Detention is a complex and sensitive subject. The reality of the legal basis for our presence in Afghanistan is such that available powers may fall short of that which military commanders on the ground might wish, particularly in the early stages of the operation. Our initial starting point will be temporarily [to] detain individuals before transferring to the Afghan criminal system. … Longer term we need to continue to work to ensure access to detainees to further our intelligence picture, and potentially to consider options that might permit us to intern individuals who pose a security threat but may not have committed a crime." [emphasis added]

43. In April 2006, the UK concluded a Memorandum of Understanding (MOU) with the government of Afghanistan concerning the transfer by UK armed forces to Afghan authorities of persons detained in Afghanistan. "Detention" was defined in the MOU as "the right of UK forces operating under ISAF to arrest and detain persons where necessary for force protection, self-defence, and accomplishment of mission so far as is authorised by the relevant UNSCRs". Para 3.1 of the MOU stated:

> "The UK AF [armed forces] will only arrest and detain personnel where permitted under ISAF Rules of Engagement. All detainees will be treated by UK AF in accordance with applicable provisions of international human rights law. Detainees will be transferred to the authorities of Afghanistan at the earliest opportunity where suitable facilities exist. Where such facilities are not in existence, the detainee will either be released or transferred to an ISAF approved holding facility."

The MOU made no provision for UK forces to keep hold of persons for the purpose of interrogation instead of transferring them at the earliest opportunity, but it provided for UK personnel to have "full access to question" any persons transferred to the Afghan authorities whilst such persons were in custody.

44. The MOD gave further consideration to developing an "intelligence exploitation capability" in Afghanistan in a memorandum dated June 2008. This stated (at paragraph 5):

> "The benefits of intelligence exploitation are evident from Iraq where a significant proportion of operations are triggered by intelligence from detainees … In Afghanistan, however, we cannot replicate Iraq arrangements because UK forces have no power to intern under the extant UNSCR (only a power to temporarily detain is inferred). Moreover NATO policy limits detention to 96 hours before hand-over to the Afghan authorities. This constraint not only results in the loss of

> opportunities to gather valuable intelligence as a result of UK Task Force operations, but often results in detainees being quickly released by the Afghan authorities due to lack of evidence."

45. In May 2009 a report from Kabul noted that ISAF HQ were reviewing their detention guidelines and seeking legal advice on increasing the 'transfer' period from 96 hours to two weeks. A few weeks later, however, a further report dated 4 June 2009 stated that there was "little or no chance of extending ISAF's 96hr guideline for holding detainees before transferring to Afghan custody so we need to make the best possible use of that period for gathering intelligence."

46. A confidential MOD note describes how the UK came to apply what the note refers to as a "national policy caveat" to the ISAF 96 hour rule:

> "4. The UK, US and Canada recognised as early as 2007 that 96 hours was detrimental to the overarching campaign: i.e. it severely limits opportunities for intelligence exploitation and does not allow ISAF to build a comprehensive evidence pack for the Afghans therefore High Value Individuals (HVIs) otherwise known as National Security Threats (NSTs) were being released after 96 hours. This was deemed to be unacceptable by the main detaining nations in 2009 who considered two options: a) renegotiating the ISAF Guidelines in Brussels NATO and b) applying national policy caveats.
>
> 5. Discussions ensued. Option a) has never really been an option as there are only four key detaining nations (US, UK, Canada and the Netherlands) who detain significant numbers and conducted intelligence exploitation (and the latter were not concerned due to their withdrawal in Summer 2010). The UK, following discussions between London, Kabul and Brussels, decided that any approach to NATO would be unsuccessful as the non-detaining nations, or detaining nations who didn't conduct exploitation, would not agree to an extension to the 96 hour guideline due to political sensitivities. In fact, there was a risk that reopening this debate may lead to a decrease in exploitation time in the ISAF Guidelines!
>
> 6. Option b) was therefore considered to be the only option. ISAF Legal Advisors were asked and helpfully confirmed that the ISAF SOPs were guidelines rather than a legal requirement. This therefore allows countries to apply National Policy Caveats to the 96 hour rule.
>
> 7. On 6 November 2009, following four months of discussion, Ministerial submissions and new processes being established, the UK publicly announced our intent to detain individuals for longer than 96 hours through a Written Ministerial Statement …"

47. The written Ministerial statement to Parliament is in fact dated 9 November 2009. It said:

> "In the light of the evolving threat to our forces, we have continued to keep our approach to these [detention] operations under review. Under NATO guidelines individuals detained by ISAF are either transferred to the Afghan authorities within 96 hours for further action through the Afghan judicial process or released. And in the majority of cases, the UK armed forces will operate in this manner. However, in exceptional circumstances, detaining individuals beyond 96 hours can yield vital intelligence that would help protect our forces and the local population – potentially saving lives, particularly when detainees are suspected of holding information on the placement of improvised explosive devices.
>
> Given the ongoing threat faced by our forces and the local Afghan population, this information is critical, and in some cases 96 hours will not be long enough to gain that information from the detainees. Indeed, many insurgents are aware of the 96 hours policy and simply say nothing for that entire period. In these circumstances the Government have concluded that Ministers should be able to authorise detention beyond 96 hours, in British detention facilities to which the ICRC has access. Each case will be thoroughly scrutinised against the relevant legal and policy considerations; we will do this only where it is legal to do so and when it is necessary to support the operation and protect our troops.
>
> Following a Ministerial decision to authorise extended detention, each case will be thoroughly and regularly monitored by in-theatre military commanders and civilian advisors. Individuals will not remain in UK detention if there is no further intelligence to be gained. We will then either release the detainee or transfer the detainee to the Afghan authorities."

48. NATO was informed of the Ministerial decision by a letter dated 5 November 2009 from the UK Deputy Permanent Representative to the Secretary General of NATO. The letter stated:

> "The UK Secretary of State for Defence will today inform in writing the UK Parliament of a change to UK policy on detention in Afghanistan. Recognising the sensitivities around the issue, I have been instructed to write to you, and to other members of the NAC, explaining the rationale for the decision.
> ...
>
> ISAF guidelines on detention state that detainees should be transferred to Afghan authorities within 96 hours or released. However, there are some cases where insurgents detained have valuable information which can save lives – British, Allied and Afghan – and assistance in defeating the insurgency and where

> that information can be lost if that person is released too early. ... The UK Government has therefore decided, in exceptional cases, UK Ministers may agree to extend detention beyond 96 hours, exceeding ISAF guidelines.
>
> The UK will extend detention only in exceptional circumstances. Each application for extension beyond 96 hours' detention will be thoroughly scrutinised in accordance with strict legal and policy provisions. A UK Minister, or, exceptionally, a designated senior official, will be required to authorise each application. Those detained beyond 96 hours will remain subject to UK law and governed by strict legal and policy frameworks which detail the process, practice and oversight of detention operations. …
>
> I have been asked to stress that extensions to the 96-hour detention guideline will be sought in extremis only. We understand that different nations have different views on detention, which is why we have not sought to change the guidelines, indeed we will continue to abide by them the majority of the time. But I hope that you, and Permanent Representatives will also agree that in the face of the challenges we are encountering, we must do everything we can to protect our forces and to protect the Afghan people."

Mr Devine in his oral evidence confirmed that no objection was made by NATO to the change to UK policy on detention notified by this letter.

49. There was no evidence that the agreement of the Afghan government was sought to the change in UK policy nor that any attempt was made to amend the MOU to reflect the new policy.

50. Amendment 2 to SOI J3-9, which outlines the procedures for stops, search, questioning and detention by all UK troops operating in Afghanistan, was issued on 12 April 2010. It was this version of SOI J3-9 which applied at the time of SM's arrest and detention. Under the heading "Detention Principles", this guidance stated:

> "6. **Detention Criteria**. UK forces are authorised to conduct stops, search, detention and questioning procedures in accordance with [UNSCRs] for reasons of Force protection, Mission Accomplishment and Self-Defence. ISAF authorises detention for up to a maximum of 96 hours following the point of detention. …
>
> 7. **Post-detention Requirements**. Within 96 hours detainees will in most cases be either handed over to the Afghan Authorities in accordance with [the MOU] or released. Detention and evidence-gathering processes must be managed as a capability to ensure that they support the collection of tactical intelligence and assist the Afghan criminal justice

> system in achieving lawful convictions. … Detainees should only ever be detained beyond 96 hours in exceptional circumstances as follows:
>
> a. On medical or logistic grounds, with HQ ISAF authorisation (and Ministerial authority where appropriate) …
>
> b. With PJHQ and Ministerial authority"

Part 2 of this guidance included the following:

> "19. The Detention Authority must decide whether to release, transfer or further detain the detainee. This decision must be made within 48 hours of detention of the detainee. To authorise continued detention, the Detention Authority will need to be satisfied, on the balance of probabilities, that it is necessary for self-defence or that the detainee has done something that makes him a threat to Force Protection or Mission-Accomplishment.
>
> …
>
> 22. NDS [the Afghan National Directorate of Security] are only allowed to hold a detainee for 72 hrs without any evidence before they are forced to charge or release the detainee. …
>
> 23. **Detention Timelines**. Detainees should not routinely be held to the limit of detention. Although the Detention Authority has up to 96 hours from the point of detention to hand over a Detainee to the Afghan Authorities, as soon as he is satisfied that all evidence has been collated and is available … then the Detention Review should proceed.
>
> 24. **Logistical Extensions**. On some occasions, practical, logistic reasons will entail a requirement to retain a UK detainee for longer than the 96 hrs. Such occasions would normally involve the short-notice non-availability of pre-planned transport assets or NDS facilities to receive transferred detainees reaching full capacity. These occasions may lead to a temporary delay until physical means to transfer or release correctly can be reinstated. Where this is the case, authority to extend a detention for logistic reasons is to be sought from both HQ ISAF and from Ministers in the UK through the Detention Authority.
>
> …
>
> 27. **Extension of Detention**. … The following criteria are used to assist Ministers in deciding whether or not approve applications for extension of detention:
>
> a. Will the extension of this individual provide significant new intelligence vital to force protection?

> b. Will the extension of this individual provide significant new information on the nature of the insurgency?
>
> c. How long a period of detention has been requested?
>
> …
>
> 31. **Ministerial Approval of Logistical Delays to Extension**. In cases where UK forces wish to hold a detainee for longer than 96 hours or for longer than the existing ministerially-approved timeline … on the basis of logistic grounds as at para 23 above, further Ministerial approval is required. … It should be noted that Ministers view 24 hours as a reasonable period for transfer to be effected and that the case for logistic extension will have to be robust and unavoidable."

51. In his witness statement dated 7 June 2013, Mr Devine explained that almost all individuals held by UK armed forces in Afghanistan beyond the initial 96 hour period fall into two categories:

    i) Those held beyond 96 hours for the purposes of intelligence exploitation; and

    ii) Those held pending their transfer to the Afghanistan authorities for investigation and potential prosecution.

52. With regard to those in the second category, Mr Devine explained that there have been periods when the Afghan authorities have wished to accept the transfer of a detainee but have had insufficient prison capacity. The UK has detained people in such circumstances until the Afghan authorities have space available. The cases of SM and of the PIL claimants show that, on some occasions at least, such detention for 'logistical' reasons has been extended far beyond the ordinary 96 hour limit. Thus, as mentioned earlier, SM was held in 'logistical' detention for 81 days from 6 May 2010 until 25 July 2010. Of the PIL claimants, Mr Qazim was held on this basis from 18 October 2012 until 6 July 2013 (261 days); Mr Nazim from 17 November 2013 until 6 July 2013 (231 days); and Abdullah from 15 September 2012 until 2 July 2013 (290 days).

53. As a matter of policy, the UK does not permit the transfer of detainees to the Afghan authorities if, judged at the time of intended transfer, there are substantial grounds for believing that there is a real risk of torture or serious mistreatment following transfer. The operation of this policy, which was considered by the Divisional Court in the case of R (Maya Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin), has resulted in the suspension of transfers to certain Afghan facilities at certain times.

IV. AFGHAN LAW

54. Of the two claims which SM makes, I will first consider his claim under Afghan law which raises fewer issues than his claim under the Human Rights Act. The basis of the claim under Afghan law is straightforward. Afghanistan is a sovereign state and ISAF is operating in Afghanistan at the invitation of the Afghan government. It is to be expected that in these circumstances UK armed forces participating in ISAF will operate in a way which complies with Afghan law and does not violate the law of the host state. SM claims that, in detaining him, the UK armed forces violated the law of Afghanistan because they have no right under Afghan law to imprison people on Afghan territory. He further claims that under Afghan law he is entitled to damages for such unlawful imprisonment.

The applicable law

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.

The expert witnesses

56. Because foreign law is treated in English proceedings as a matter of fact which must be proved by evidence, evidence was given at the trial by witnesses called as experts on Afghan law. Two witnesses, Professor Martin Lau and Mr Shafeek Seddiq, were called by the MOD; and two witnesses, Mr Michael E. Hartmann and Mr Saeeq Shajjan, were called by SM. The PIL claimants are pursuing claims under the Human Rights Act alone and do not assert claims under Afghan law. They therefore did not participate in this part of the trial.

57. Professor Lau, the first and principal expert witness called by the MOD, is a Professor of South Asian Law at the Law Department of the School of Oriental and African Studies ("SOAS"), University of London. He describes his current position as involving intensive research on modern Afghan law, and since the fall of the Taliban at the end of 2001 he has visited Afghanistan on a regular basis. Although Professor Lau gave additional evidence orally in chief of which no advance notice had been given – as it should have been – in a supplemental report, I formed the impression that he was faithful in other respects to his duties as an expert, including in particular his overriding duty to help the court on matters within his expertise.

58. The second witness called by the MOD, Mr Shafeek Seddiq, is a US lawyer and litigator. Since 2008, he has been involved in training judges, prosecutors and defence lawyers and providing other assistance to help build the legal system in Afghanistan. He has, however, never studied Afghan law or any system of law other than those of the United States. In training prosecutors, he deploys his general knowledge and background as a US lawyer and litigator. Although he expressed an opinion in his report on the effect of Article 7 of the Afghan Constitution, he gave no reason for that opinion and appeared to have no relevant expertise. When asked whether he had looked to see if there were any academic articles bearing on the issues, Mr Seddiq said that he had found some but he disagreed with them and for that reason did not think it appropriate to mention them in his report. This showed a complete disregard for the duty of an expert witness to provide independent assistance to the court, which includes a duty to draw attention to opinions on a matter dealt with in his report other than his own. I consider that Mr Seddiq was neither independent nor an expert on the questions which I have to decide and that I should attach no weight to his evidence.

59. Mr Saeeq Shajjan, who gave evidence for SM, graduated from the Faculty of Law and Political Sciences, Kabul University, in 2003 and is a practising lawyer in Afghanistan, although he has also been educated at Harvard Law School. He is completely fluent in Dari which is one of the two languages spoken in Afghanistan in which the original text of the Constitution is written. He gave uncontradicted evidence on the content and effect of the Afghan Civil Code. He has no special expertise in constitutional law and I give less weight to his opinions on the interpretation of the Afghan Constitution than to those of Professor Lau and Mr Hartmann. However, as the only practising Afghan lawyer to give evidence I found his perspective informative.

60. Mr Hartmann, the other expert called by SM, was an expert witness of the highest calibre. He has been working for over 16 years on justice sector development within five peace-keeping missions as an international prosecutor, former UN senior judicial affairs officer and rule of law consultant. He has over 30 years' experience in criminal justice, working principally in the areas of criminal law and procedure, rule of law and national law reform. He worked in Afghanistan for five years from 2005 to 2010, initially as the Advisor to the Attorney General of Afghanistan. In that role he co-founded and chaired a criminal law reform working group involved in drafting Afghan criminal legislation. After two years, he joined the Rule of Law Unit of the UN Assistance Mission to Afghanistan, where he worked as Acting Chief for approximately six months. In this role he worked with the Afghan judiciary and was involved in discussions with Supreme Court judges, prosecutors and defence attorneys, including discussions of relevant provisions of the Afghan Constitution. He then worked as Senior Advisor and Manager for the criminal justice programme of the UN Office on Drugs and Crime (UNODC), mostly involved in revising and drafting criminal legislation.

61. Mr Hartmann left Afghanistan in June 2010. After working in Indonesia, South Sudan and for the Australian peace keeping mission in the Solomon Islands, he rejoined the United Nations in September 2013 as Chief of Rule of Law. As a member of the United Nations staff, he cannot act as a paid expert in litigation. However, having already provided an expert report for this case, he felt duty bound to

attend the trial and give oral evidence without remuneration. Mr Hartmann's opinions were independent, scholarly and informed by wide knowledge and research. At the joint meeting between the four experts large parts of his report dealing with the sources of Afghan law, the law making process in Afghanistan and the Afghan criminal and constitutional law relating to detention were accepted as common ground amongst all four experts.

The relevant questions

62. There are two relevant questions of Afghan law:

i) On the assumed facts, was SM's detention lawful?

ii) If not, does he have a right to compensation for his unlawful detention?

Approach to the evidence

63. Before addressing these questions, I make some general observations about the evidence of Afghan law and how I have approached it.

64. The Afghan legal system was almost entirely destroyed when Afghanistan was ruled by the Taliban and has had to be rebuilt. Professor Lau described how, when he visited the Ministry of Justice in 2001, he found it ransacked and empty. One of the first projects in which he was involved was to collect Afghan legislation from all over the world (including SOAS), re-print it and redistribute it to the Ministry of Justice and courts in Afghanistan. As I will discuss, Afghanistan has established a new Constitution ratified on 26 January 2004. However, there is no system of law reporting and there are no precedents to work with. Apart from articles in the press, the only form of publication of any court decisions is the reference to some decisions on the Supreme Court's website. Mr Shajjan described his legal practice in Afghanistan as "just dealing with the blank text of the law".

65. It does not follow, however, as counsel for the MOD sought to suggest, that there are no 'judicial or manageable standards' by which to resolve the disputed issues of Afghan law. As Elias LJ said of a similar submission regarding Iraqi law in Al-Jedda v Secretary of State for Defence (No 2) [2011] QB 773, at para 191:

> "The courts are well able, with the assistance of expert evidence, to make findings on the meaning of foreign law, including its Constitution. It is something they do all the time. The lack of any authorities on the point does not alter matters."

The most that can be said is that, given that many of the concepts of the new Afghan Constitution are international and the absence of any case law, there is less of a gulf than would normally be the case between the understanding of the expert witnesses

and that which an English judge or lawyer can bring to bear. The position in that regard is similar to that described by Underhill J in relation to Iraqi law in Al Jedda v Secretary of State for Defence (No 2) [2009] EWHC 397 (QB) at para 41, where he observed that he "need not be as wholly dependent on [the expert evidence] as an English judge generally is when having to decide issues of foreign law".

66. That does not mean, however, that I am free to strike out on my own and adopt interpretations of the Afghan Constitution or other aspects of Afghan law which have not been addressed in the expert evidence. The position remains that the effect of foreign sources of law is primarily a matter for the expert witnesses: see *Dicey, Collins & Morris, The Conflict of Laws* (15th Edn, 2012), para 9-018. As with any expert evidence, the court is permitted to use its own intelligence and is not bound to accept an expert's opinion. But it would not be permissible nor in accordance with procedural fairness to adopt an analysis which has no foundation in the expert evidence and has not at least been canvassed with an expert witness on each side so that the court has the assistance of their opinions.

67. It is necessary to make this point because in written submissions on Afghan law provided after the hearing (at the court's request) counsel for the MOD advanced a number of arguments which are not supported by any of the expert evidence and which were not even put to either of the claimant's experts to give them an opportunity to comment and point out any objections in the light of their knowledge of Afghan law. I have disregarded such arguments and do not mention them (with one exception) in this judgment. I would add, however, for what it is worth, that if I had thought it necessary to reach conclusions on these arguments without the assistance of expert evidence, I would have rejected all of them.

68. In questioning the expert witnesses and in their submissions, it was assumed by counsel on both sides that the test applicable when interpreting provisions of the Afghan Constitution and other legislation is how those provisions would be interpreted by the Afghan Supreme Court. This must in principle be correct, given that the English court is seeking to identify the correct answer to questions of Afghan law on which the Afghan Supreme Court is the ultimate authority. However, some of the questions asked in cross-examination of the expert witnesses verged into territory of inviting speculation about how Afghan Supreme Court judges would approach matters by reference to their supposed attitudes towards Afghan sovereignty, national pride and other non-legal considerations. It is essential to keep in mind that the English court is not engaged in an exercise in sociology. Its task is not to try to predict what on any particular issue the Afghan Supreme Court would actually in practice decide: it is to attempt to identify, so far as possible, the correct answer in Afghan law – in other words, what an ideal Supreme Court applying purely legal norms would decide.

Arguments from silence

69. I have mentioned the lack of any case law. There is also no evidence that anyone detained by UK or other international armed forces operating in Afghanistan has sought to challenge the validity of their detention or to claim damages for unlawful

detention in the Afghan courts. The MOD has sought to draw inferences about the position in Afghan law from that fact. Reliance was also placed on the absence of any complaint by the Afghanistan Independent Human Rights Commission, which under Article 58 of the Constitution is responsible for monitoring human rights in Afghanistan, that detention by ISAF is unlawful. I do not find arguments of this kind persuasive. It is clear from the expert evidence that Afghanistan does not at present have a fully functioning legal system, and there may be many political and practical reasons why, if ISAF detentions are not authorised by Afghan law, the law is nevertheless not being enforced. The absence of any legal challenge or complaint cannot in any event be a substitute for a legal analysis.

70. In so far as its opinion might be regarded as authoritative, there is no evidence as to what view the Afghanistan Independent Human Rights Commission would express if asked for its view as to the legality of ISAF detentions. There is, however, evidence as to the opinion of the Independent Commission for supervision of the implementation of the Constitution, established under Article 157 of the Constitution. On 10 July 2013 the solicitors acting for SM wrote to the chairman of the Commission seeking its opinion on the right of the UK government to detain Afghan nationals in Afghanistan. A letter in reply dated 17 July 2013 stated that the Commission finds any kind of foreign prison or detention centre clearly contrary to Article 4 of the Constitution which recognises that national sovereignty in Afghanistan belongs to the Afghan nation, manifested through its elected representatives.

71. With these preliminary observations, I turn to consider the relevant questions of Afghan law, as illuminated by the expert evidence.

Legality of detention

72. To ascertain the circumstances in which Afghan law permits detention of an individual, the starting point is Chapter 2 of the Constitution, entitled (as translated into English) "Fundamental Rights and Duties of Citizens". The following articles in that chapter are of particular relevance:

> "Article 24
>
> Liberty is the natural right of human beings. This right has no limits unless affecting others freedoms as well as the public interest, which shall be regulated by law. Liberty and human dignity are inviolable. The state shall respect and protect liberty as well as human dignity.
>
> Article 25
>
> Innocence is the original state. The accused shall be innocent until proven guilty by the order of an authoritative court.
>
> Article 27

> No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offence. No one shall be pursued, arrested or detained without due process of law. No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offence.
>
> Article 31
>
> Upon arrest, or to prove truth, every individual can appoint defence attorney. Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation and appear before the court within the time limit specified by law. In criminal cases, the state shall appoint a defence attorney for the indigent. …"

73. Mr Hartmann and Professor Lau were in agreement that the definition of "law" for the purpose of these articles is to be found in Article 94 of the Constitution, which states:

> "Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise. …"

"Law", in other words, unless stated otherwise, refers to duly enacted Afghan legislation.

74. Mr Hartmann explained the Afghan legislation relevant for these purposes and its effect in a section of his report which was agreed as common ground by the other experts. The relevant laws include the Afghan Penal Code, the 2004 Interim Criminal Procedure Code for Courts and the pre-existing Criminal Procedure Code. Significant features of these laws, as explained by Mr Hartmann, include the following:

i) Save for the possibility of a citizen's arrest, the only bodies authorised to carry out arrests are the Afghan police and prosecutors.

ii) Upon arrest, the police have the right to detain a suspect for a maximum of 72 hours, after which the person must be transferred to the prosecutor or released.

iii) A person transferred to the prosecutor may be detained without charge for an additional 12 days (thus a maximum total of 15 days since the arrest) and, unless within that time the prosecutor files a criminal indictment with the court, the arrested person must be released.

iv) The only possibility of extending the 15 day period is for the prosecutor to apply to the court to extend the detention "for not more than 15 additional days"; such an application can only be made once.

v) Once a criminal indictment has been filed, the court decides whether the accused should be kept in detention until trial for a period which may last for two months.

vi) The only place in which a person may be lawfully detained is a detention house under the jurisdiction of Afghan authorities.

75. It is clear that there is no scope within these provisions for detention by foreign armed forces operating in Afghanistan – or for that matter by the Afghan army. In Mr Hartmann's view, the only power of detention which the Afghan army has under Afghan law is the power which any citizen has to detain a suspected criminal and hand them over immediately to the proper authority (that is, either the police or the prosecutor). The same must apply to foreign armed forces lawfully present in Afghanistan. At most, in Mr Hartmann's opinion, the Afghan Supreme Court might possibly go so far as to hold that detention of an Afghan citizen by ISAF was permissible for up to 72 hours, consistent with the powers of the Afghan police. However, he believes it more likely that the Supreme Court would find that the relevant Afghan law requires the immediate handover of anyone detained to the appropriate Afghan authority.

76. None of the other experts disagreed with this analysis of the applicable Afghan criminal law, and I accept it as accurate.

Status of the UNSCRs

77. In his report, Professor Lau expressed the opinion that armed forces deployed in Afghanistan as part of ISAF have a right conferred by the applicable United Nations Security Council Resolutions to detain Afghan nationals where necessary for force-protection, self-defence or the accomplishment of the ISAF mission. In his view, the source of this right is UNSCR 1386 (2001), as extended in temporal and geographical scope by later UNSCRs, which authorised the Member States participating in ISAF to "take all necessary measures to fulfil its mandate" and defined its mandate as being to assist the Afghan government in the maintenance of security. Professor Lau also referred to the Military Technical Agreement ("MTA") dated 14 January 2002 between the Afghan Interim Administration and ISAF under which the Interim Administration agreed that "the ISAF Commander will have the authority, without interference or permission, to do all the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission."

78. Assuming – as I will for present purposes – that Professor Lau is right in interpreting the UNSCRs and MTA as conferring on UK armed forces participating in ISAF a power of detention as a matter of international law, the next question is whether this power has been incorporated into Afghan domestic law.

79. The key provision in this regard is Article 7 of the Afghan Constitution, which states:

> "The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights. …"

80. Mr Seddiq suggested in his report, without any supporting reasoning, that the effect of Article 7 is to make the relevant UNSCRs (and agreements such as the MTA) part of Afghan law. I have already indicated that I do not regard Mr Seddiq as a qualified or independent expert and I am satisfied that this assertion is wrong.

81. I accept the cogently reasoned opinion of Mr Hartmann that Article 7 does no more than confirm Afghanistan's pre-existing obligation to observe the UN Charter and other international agreements which Afghanistan has ratified, and does not make the obligations imposed by such agreements directly applicable as a matter of Afghan domestic law. That interpretation is a natural reading of the English translation of Article 7, which at most would require the Afghan state to take steps where necessary to enact domestic law to give effect to its international obligations. There is nothing in the language of Article 7 which suggests that such legislation is unnecessary. In fact, it appears that Article 7 does not even go as far as this, as I accept the evidence of Mr Shajjan that the Dari word translated as "observe" is more accurately translated as "respect": in other words, the language used is not that of mandatory obligation.

82. Mr Hartmann supported his interpretation of Article 7 by reference to his understanding that, where states intend to give international law direct application within their domestic law, the norm is to state this explicitly in their constitution. Mr Hartmann compared the terms of Article 7 with provisions in three other constitutions with which he is familiar, being the constitutions of Bosnia, Serbia and Kosovo. Their equivalent provisions to Article 7 are as follows:

> "Article 2(2) of the Constitution of Bosnia and Herzegovina
>
> The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly. These shall have priority over all other law.
>
> Article 16 of the Constitution of Serbia
>
> The foreign policy of the Republic of Serbia shall be based on generally accepted principles and rules of international law.
>
> Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system of the Republic of Serbia and applied directly.
>
> Article 19 of the Constitution of Kosovo
>
> 1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when

> they are not self-applicable and the application requires a promulgation of a law.
>
> 2. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo."

83. I accept Mr Hartmann's unchallenged evidence that this level of explicit statement of intent is the norm for states which intend to make international agreements part of their domestic law via their constitution.

84. Mr Hartmann drew further support for his interpretation of Article 7 of the Afghan Constitution from academic commentary. In particular, he cited an article by Dr Michael Schoiswohl, '*Linking the International Legal Framework to Building the Formal Foundations of a 'State at Risk': Constitution-Making and International Law in Post-Conflict Afghanistan*' (2006) 39 Vand J Transnat'l Law 819. In this article Dr Schoiswohl analyses the different possible relationships between international law and national law and the various constitutional mechanisms available for defining that relationship. He describes Article 7 of the Afghan Constitution as "superficial" and a "missed opportunity" to define the relationship between international law and Afghanistan's internal legal order (pp.852, 859). Dr Schoiswohl says of Article 7 (at p.852):

> "Similar to the declarations of intent contained in the constitutions of Albania, Angola, Italy and Mongolia, the provision merely reaffirms Afghanistan's commitment to previously-entered international treaties with particular reference to the UN Charter. The obligations arising from international treaties, however, are binding upon Afghanistan regardless of the commitment expressed in Article 7; those treaties are binding by virtue of signature and ratification not constitutional incorporation. Simply put, Article 7 does nothing other than pay lip service to Afghanistan's pre-existing obligation to uphold the terms of international treaties."

85. To similar effect, Dr Schoiswohl states later in the article (at p.859):

> "Viewed from the public international law perspective, the legal value of the provision is minimal because Afghanistan remains bound to its international obligations regardless of whether the Constitution re-affirms its commitment to abide by its international obligations."

86. In their written submissions filed after the hearing, counsel for the MOD sought to advance an argument, not supported by any of the expert evidence nor put to Mr Hartmann in cross-examination, that Dr Schoiswohl's article on proper analysis supports the contention that Article 7 of the Afghan Constitution should be construed as directly incorporating international law instruments into Afghan domestic law. I can only observe that this argument is worthy of the lawyers described in 'Gulliver's

Travels' who were skilled in the "art of proving, by words multiplied for the purpose, that white is black, and black is white".

87. Dr Schoiswohl's view is also endorsed by André Nollkaemper in his book '*National Courts and the International Rule of Law*' (OUP, 2012) at p.71, where he states (albeit without analysis):

> "It is not insignificant that in the processes of constitution-building in Iraq and Afghanistan, international law was not made automatically applicable."

88. Mr Hartmann also pointed out that neither the UNSCRs nor the MTA fall within the categories of international obligations described in Article 7. In particular, they are not "inter-state agreements" nor "international treaties to which Afghanistan has joined". The UN Charter itself is expressly mentioned in Article 7, and Article 25 of the Charter states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." As Mr Hartmann observed, however, even if Article 7 is regarded as imposing a domestic obligation on the state in addition to its obligation in international law to comply with the Charter and UNSCRs, it does not follow that either the Charter or UNSCRs create rights and obligations which are directly applicable to citizens under domestic law, and indeed it would appear from the wording of the Charter that they do not. Article 25, like most of the Charter's provisions, is aimed at states and their relationships with each other as members of the United Nations and not at their citizens. Nor is there anything in the language of Article 25 of the Charter to suggest that decisions of the Security Council are intended automatically to form part of the domestic law of UN members without the need for implementation through the normal democratic process for changing domestic law.

89. A yet further problem with the argument that international agreements entered into by Afghanistan automatically form part of its domestic law is that the argument proves too much. As pointed out by Mr Hartmann, it would mean, if correct, that the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights ("ICCPR"), which Afghanistan has ratified, also forms part of Afghan domestic law. Notably, Article 9 of the ICCPR is in identical terms to Article 5 of the Convention (save that Article 9(1) does not include the list of particular cases contained in Article 5(1) of the Convention). Accordingly, if the UNSCRs were incorporated in Afghan domestic law by a mechanism which automatically incorporated international agreements, any power of detention conferred by the UNSCRs would need to be interpreted consistently with Article 9 of the ICCPR.

90. I did not understand Professor Lau to disagree with Mr Hartmann's interpretation of Article 7 or to suggest that Article 7 has the effect of making any international legal obligations directly applicable as part of the domestic law of Afghanistan. In his report Professor Lau regarded it as "apparent from a plain reading of Article 7 that it binds only the state to abide by *inter alia* international treaties and conventions that Afghanistan has signed", and said that Article 7 does not indicate that international treaties automatically form part of Afghanistan's domestic law. In his oral evidence he confirmed that he considers this "the better view" and expressly accepted that

under the 2004 Constitution there is no automatic incorporation of international treaty obligations into Afghan domestic law and that this requires implementing legislation.

91. The point was made by counsel for the MOD in re-examination of Professor Lau and cross-examination of Mr Hartmann – which they both accepted – that the judiciary is an organ of the state. However, none of the experts suggested that Article 7 can reasonably be interpreted as bypassing the law-making process established by Article 94 of the Constitution by imposing an obligation on the judiciary to apply international agreements ratified by Afghanistan directly as part of Afghan domestic law without the need for legislation.

Professor Lau's argument

92. The main argument which Professor Lau advanced to support the opinion expressed in his report that rights and obligations flowing from the UN Charter form part of Afghan law was not based on Article 7 but on the legal order established by the Bonn Agreement which pre-existed the 2004 Constitution. Professor Lau referred to the request made by the participants in the UN Talks in Annex 1, paragraph 3 of the Bonn Agreement to the Security Council to "consider authorising the early deployment to Afghanistan of a United Nations mandated force." As mentioned earlier, that request was reiterated in a letter dated 19 December 2001 from the Interim Administration of Afghanistan to the Security Council. A further letter from the Afghan government to the UN dated 10 October 2003 requested the Security Council to consider expanding the mandate of ISAF to other areas of Afghanistan outside Kabul.

93. Professor Lau argued in his report that, by making these requests, the government of Afghanistan authorised the deployment of international forces in the territory of Afghanistan and impliedly authorised such forces to act in accordance with their mandate – which included the power to detain Afghan nationals when necessary to fulfil the mandate. This, in his opinion, made the power of detention conferred by the UN mandate part of Afghan law. That power survived the adoption of the 2004 Constitution because the Constitution did not affect laws already in existence except in so far as they were inconsistent with the new Constitution. Thus, Article 162 of the Constitution provides that:

> "… upon its enforcement, laws and decrees contrary to provisions of this Constitution are invalid."

94. The fundamental difficulty with Professor Lau's reasoning is that it does not explain how consent by the executive branch of government in Afghanistan to the deployment of ISAF in Afghanistan could by itself give ISAF a power of detention under Afghan law. To create a power of detention which did not previously exist in Afghan law, a legislative act was needed. Professor Lau did not explain how a letter of request addressed to the United Nations Security Council could possibly be regarded as a legislative act. Under Section III(C)(1) of the Bonn Agreement, the Interim Administration had the right "to issue decrees for the peace, order and good government of Afghanistan". Professor Lau did not, however, suggest that the

Interim Administration had issued any decree which granted a power of detention to ISAF.

95. In seeking to explain his opinion in his oral evidence, Professor Lau said that the deployment of international troops sent by the UN Security Council at the request of the Afghan administration "carried with them international law obligations" and that by inviting ISAF troops into the country, an additional source of law was "imported" into Afghanistan. He did not, however, provide any coherent explanation of how this importation of law occurred or could conceptually have occurred.

96. As mentioned earlier, under the 2004 Constitution laws can only be made with the approval of both houses of the National Assembly and of the President. Moreover, Professor Lau accepted that under the 2004 Constitution there is no automatic incorporation of international treaty obligations into Afghan domestic law and that this requires implementing legislation. He nevertheless speculated that this might not have been so before the 2004 Constitution was adopted and might therefore not apply to what he called "grandfather treaty obligations". It was pointed out to him, however, that the legal framework established by the Bonn Agreement on an interim basis until the adoption of the new Constitution was based on the Constitution of 1964 (to the extent not inconsistent with the Bonn Agreement) and that the 1964 Constitution did not provide for the automatic incorporation of any international legal obligations into domestic law.

97. Professor Lau was unable to point to any law already in existence when the 2004 Constitution was adopted which could be said to have incorporated any UNSCRs or otherwise authorised ISAF to detain people in Afghanistan.

Primacy of the Constitution

98. Even if it was possible to show that – whether under Article 7 of the Constitution or by some other means – the UNSCRs which established ISAF's mandate formed part of Afghan domestic law, there is a further difficulty, pointed out by Mr Hartmann, with the suggestion that this justified the detention of SM under Afghan law. The difficulty is that any power of detention conferred by the UNSCRs would be limited by Articles 24, 27 and 31 of the Constitution, which must prevail over any other source of law. Professor Lau accepted that the Constitution takes precedence over other national or international laws. This is reflected in Article 162 (quoted earlier) and also in Article 121 of the Constitution, which states:

> "At the request of the Government, or courts, the Supreme Court shall review laws, legislative decrees, international treaties, as well international covenants for their compliance with the Constitution and their interpretation in accordance with the law."

99. Even if the reference to "law" in Articles 24, 27 and 31 is not limited to law enacted through the democratic process identified in Article 94 and somehow includes the UNSCRs, Article 31 gives a specific right to "appear before the court within the time

limit specified by law". The UNSCRs do not specify any such time limit, and it was common ground between the experts that the time limits for appearance before a court are those mentioned earlier which are specified by Afghan criminal law. In the case of SM, those time limits were not complied with.

100. Professor Lau was unable to suggest any legal argument or analysis by which, even if the UNSCRs were incorporated into Afghan law, a power of detention under the UNSCRs could be reconciled with, and avoid being trumped by, the express provisions of Chapter 2 of the Constitution. Ultimately, his position was that he could not be "100% certain" that, if the Afghan Supreme Court was asked to decide the question, it would find the detention policy of ISAF to be unlawful and that "perhaps at a stretch it would find legal avenues to justify it" – albeit that he could not identify what those legal avenues might be.

Conclusion on power of detention

101. While I of course accept that 100% certainty, in so far as it is ever attainable, is not possible in the absence of an authoritative decision of the Afghan Supreme Court, the expert evidence led to the clear conclusion that the UK armed forces operating in Afghanistan have had no legal power of detention under Afghan law other than a power to arrest suspected criminals and deliver them to the Afghan authorities immediately, or at the latest within 72 hours.

102. Although Professor Hartmann thought it more likely that the Supreme Court would find that Afghan law requires immediate handover of anyone arrested by ISAF, I am not persuaded that such a finding would in practice have materially different consequences from his alternative possibility that the Supreme Court would consider detention for up to 72 hours permissible, by analogy with the powers of the Afghan police. It seems reasonable to assume that, in deciding what constitutes immediate handover, an Afghan court would take account of the realities of the situation in which UK armed forces have been operating in southern Afghanistan and the logistics involved in getting someone captured on the battlefield to an Afghan detention facility (or, if they were not to be handed over to the Afghan authorities, to a place where they could be released safely). For reasons given later in this judgment, I do not think it realistic to require this to be accomplished within less than three or four days. At the same time, I accept the logic of Professor Hartmann's opinion that, in the absence of any law which expressly provides such a power, foreign armed forces assisting in the maintenance of security in Afghanistan cannot be taken to have a more extensive power of detention than the law gives to the Afghan police, whose right to detain a suspect is limited by the Interim Criminal Procedure Code and Police Law to a maximum period of 72 hours following arrest within which time the suspect must be transferred to the prosecutor.

Right to compensation

103. I can deal with the second relevant question of Afghan law shortly because it was the uncontradicted evidence of Mr Shajjan that the Civil Code of Afghanistan provides a right to compensation for unlawful detention. Neither Professor Lau nor Mr

Hartmann expressed a view on this question, as they did not profess any knowledge of the Afghan civil law of wrongs.

104. Articles 774, 776 and 777 of the Civil Code (as translated by Mr Shajjan) state as follows:

> "Article 774
>
> A person who commits a harmful act such as murder, beating resulting in injury etc or bodily harm, is obliged to compensate the damages sustained.
>
> Article 776
>
> Whenever damage is inflicted to another person intentionally or by mistake, the perpetrator should compensate for the damages.
>
> Article 777
>
> In case of any other damages inflicted to others, excluding those defined in the above articles, the perpetrator is obliged to pay compensation."

105. In the view of Mr Shajjan, "harm" in this context includes not only death and physical injury, but also unlawful detention.

106. Mr Shajjan's evidence on this point was not challenged in cross-examination. That is not surprising as his opinion was not contradicted by the MOD's experts, is consistent with the text of the provisions of the Afghan Civil Code set out above and makes obvious sense. Unlawfully depriving someone of their liberty is clearly a form of harm to that person. Moreover, it is expressly recognised as such in Article 24 of the Afghan Constitution, quoted earlier. In Article 774 of the Civil Code, "murder, beating resulting in injury etc or bodily harm" are given only as examples rather than as an exhaustive description of "harmful acts"; but even if unlawful deprivation of liberty is not a harmful act falling within Article 774, it seems plain that it must fall within Article 776 or 777.

107. Reference was also made by Mr Shajjan and other experts to Article 51 of the Constitution, which states:

> "Any individual suffering damage without due cause from the administration shall deserve compensation, and shall appeal to a court for acquisition. Except in conditions stipulated by law, the State shall not, without the order of an authoritative court, claim its rights."

108. Although Mr Shajjan said that the Dari word translated in Article 51 as "the administration" can refer to any kind of organisation and is not a word which specifically means "the state", he accepted that in Article 50 where the same word is

used it must be understood from the context to be referring to the Afghan state. It seems to me clear that the same is true in Article 51, which is dealing (as would be expected in a constitution) with the enforcement of rights as between individuals and the state. I therefore do not regard Article 51 of the Constitution as having any relevance to a claim against a foreign government or any organisation other than the Afghan state.

109. It is, however, unnecessary for SM to rely on Article 51 of the Constitution given the right to compensation for harmful acts including unlawful detention which is provided by the Afghan Civil Code.

Conclusion on lawfulness of SM's detention under Afghan law

110. On the assumed facts, SM was arrested on 7 April 2010 when attempting to escape from the scene of a crime in which shots had been fired at British soldiers, and at a time when he was still reasonably believed to present an imminent threat. In these circumstances it was lawful under Afghan law to arrest him. However, to comply with Afghan law, UK armed forces were required to deliver him to the Afghan authorities immediately and at the latest within 72 hours of his capture. No attempt was in fact made to comply with that requirement.

111. I conclude that under Afghan law SM's detention by UK armed forces from 10 April 2010 until 25 July 2010 was unlawful and that Afghan law gives him a right to be paid compensation for that unlawful detention.

112. The MOD has a separate argument that this right is not enforceable in the English courts. This argument is based on the doctrine of 'act of state'. The MOD also argues that the 'act of state' doctrine precludes SM from claiming damages under the Human Rights Act 1998 for any breach of Article 5 of the Convention. It is convenient to consider these arguments together, after I have decided the question whether SM's detention was in accordance with Article 5 of the Convention.

V. THE ARTICLE 5 CLAIM

113. The second legal basis on which SM's claim is founded is Article 5 of the Convention as incorporated into English law by Schedule 1 to the Human Rights Act 1998. He claims that UK military personnel for whose acts the MOD is responsible violated Article 5 by depriving him of his liberty and holding him in detention in Afghanistan from 7 April until 25 July 2010, when he was handed over to the Afghan authorities. For this alleged breach of his Convention rights, SM claims compensation under Article 5(5) of the Convention and section 8 of the Human Rights Act.

114. The MOD disputes this claim at many levels. The defences raised, in the order that I will consider them, are in summary that:

i) SM's claim is not within the territorial scope of the Convention and hence of the Human Rights Act – which do not apply to detention taking place in Afghanistan.

ii) In any event, the UK armed forces who detained SM were acting as part of ISAF on the authority of the United Nations Security Council, and legal responsibility for their actions in detaining SM lies with the UN, and not with the UK.

iii) SM's detention was lawful under international law because it was authorised by a resolution of the UN Security Council, which displaced or qualified any rights that he would otherwise have had under Article 5 of the Convention.

iv) SM's detention was also lawful under international humanitarian law, which applies in the context of the non-international armed conflict in Afghanistan and again displaced or qualified Article 5 of the Convention.

v) Alternatively, Article 5 must be interpreted in a way which has regard to the realities of the situation in southern Afghanistan at the time of SM's detention and, so interpreted, was complied with by the MOD.

vi) In any event and apart from the above, the MOD can rely on the 'act of state' doctrine to preclude a claim for damages based on Article 5.

115. I will consider the issues raised by each of these defences in turn.

VI. TERRITORIAL SCOPE OF THE CONVENTION

116. The starting point of SM's case, and that of the PIL claimants, under the Human Rights Act is that Article 5 of the Convention applies to the detention of individuals by UK armed forces in Afghanistan. In the absence of authority, I would have regarded that contention as problematic. I find it far from obvious why a citizen of Afghanistan, a sovereign state which has not adopted the Convention, should have rights under the Convention in relation to events taking place in Afghan territory.

117. I note with interest (albeit, as will shortly be apparent, only academic interest) the decision of the Canadian Federal Court in Amnesty International Canada v Canada [2009] 4 FCR 149 that the Canadian Charter of Rights and Freedoms does not apply during the armed conflict in Afghanistan to the detention of non-Canadians by Canadian forces. The Federal Court observed in its judgment (at para 26) that the Canadian armed forces are not an occupying force – they are in Afghanistan at the request and with the consent of the Afghan government. That government has not agreed to the extension of Canadian law over its nationals. In those circumstances the Canadian Federal Court held that the Charter does not have territorial application over Afghan people in Afghan territory.

118. It is not open to me, however, to follow the approach of the Canadian courts. That is because there is a decision of the UK Supreme Court, binding on me, which follows a decision of the European Court of Human Rights in holding that the concept of jurisdiction in Article 1 of the Convention is to be given a much broader meaning, so as to cover a situation where a contracting state exercises physical power and control over an individual outside its territory.

119. The route to this result has been a tortuous one. Without retracing it in detail, I need to mention a few milestones in order to identify where the relevant law now stands.[1]

Article 1

120. Article 1 of the Convention provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

It seems evident from the text, interpreted in the light of the travaux préparatoires and general principles of public international law, that the term "jurisdiction" in Article 1 is to be understood primarily by reference to the territory over which a state has sovereign authority.

Bankovic v Belgium

121. The essentially territorial nature of jurisdiction under Article 1 has been confirmed by the European Court, most notably by its Grand Chamber in Bankovic v Belgium [2001] 11 BHRC 435. That case arose out of a missile strike by NATO aircraft on a building in Belgrade in the territory of the then Federal Republic of Yugoslavia, which was not a party to the Convention. Proceedings were brought by relatives of people killed in the attack claiming violations of their right to life under Article 2. The applicants argued for a test of jurisdiction based on "effective control" such that the extent of jurisdiction under Article 1 would be proportionate to the level of control exercised by the state in any given extra-territorial situation. The European Court rejected that approach (see para 73).

122. At least five points of apparent significance emerged from the judgment. First, the Court affirmed the view that Article 1 reflects an essentially territorial notion of jurisdiction and that any extraterritorial application is exceptional (paras 57-65). Second, the Court indicated that to establish extraterritorial jurisdiction on the basis of "effective control", it was necessary to show that a state had such control over an area of territory and its inhabitants: this required that the state "as a consequence of military occupation or through consent, invitation or acquiescence of the Government

[1] For a perspicacious account of this history, see Lord Dyson, *'The Extraterritorial Application of the European Convention of Human Rights: Now on a Firmer Footing, but is it a Sound One?'*: Lecture for Essex University (30 January 2014).

of that territory exercises all or some of the public powers normally to be exercised by that Government" (para 69). The Court appeared to reject the notion that jurisdiction can be based simply on effective control over an individual on the ground that this concept was limitless and was tantamount to saying that jurisdiction would arise whenever an act imputable to a contracting state had an adverse effect on anyone anywhere in the world (para 71). Third, the Court also rejected the contention that a state's obligations under the Convention could be "divided and tailored in accordance with the particular circumstances of the extraterritorial act in question" (para 73). The Court thus appeared to endorse the view that Convention rights constitute a single, indivisible package. Fourth, the Court emphasised the regional nature of the Convention and indicated that its extraterritorial application is limited to acts done on the territory of a state which is, or would "but for the specific circumstances", be covered by the Convention (para 80). Fifth, the Court appeared to limit the scope for developing a more expansive interpretation of jurisdiction in the future by implying that Article 1, unlike the provisions of the Convention defining substantive rights, was not to be interpreted as a "living instrument" in accordance with changing conditions (paras 62-63).

The Al-Skeini case

123. The decision in the Bankovic case was clearly intended to be authoritative and definitive on the scope of Article 1, and was treated as such by the English courts when questions of extraterritorial jurisdiction arose in R (Al-Skeini) v Secretary of State for Defence [2008] AC 153. The Al-Skeini case involved claims brought by relatives of six civilians who were killed by UK armed forces in Iraq. In four of these cases the deceased was shot by a British military patrol, and in another case by British soldiers during a raid on his home, in Basra. The deceased in the sixth case, Mr Baha Mousa, was detained and taken to a British military base in Basra, where he was brutally beaten by British soldiers and died of his injuries. The claimants argued that in each case the UK had an obligation to carry out an investigation of whether there had been a violation of Article 2 of the Convention.

124. The Secretary of State contested the claims on the basis that neither the Convention nor the Human Rights Act applied to acts that occurred in Iraq. The argument that the claims fell outside the scope of the Convention prevailed in the English courts, with one exception: at first instance the Divisional Court found that the Convention applied to the claim of Mr Mousa in circumstances where he died at a British military base. On appeal the Secretary of State did not seek to challenge that finding but argued that, even though the Convention applied, the Human Rights Act did not because the Human Rights Act has no application to acts done outside the UK.

Territorial scope of the Human Rights Act

125. The latter argument was rejected by the House of Lords, and it is convenient to mention it first. The Secretary of State relied on the general presumption that, unless a contrary intention appears, Acts of Parliament extend to the territory of the United Kingdom but not to any territory outside the United Kingdom. The Human Rights Act does not expressly state that it is intended to have any application outside the UK.

The Secretary of State argued that in those circumstances the general presumption applies and it would be wrong to interpret the Act as having extraterritorial effect.

126. The appellate committee of the House of Lords (by a 4-1 majority) rejected that argument for the principal reason that to interpret the Human Rights Act as having no effect outside the UK, even when the Convention does, would be inconsistent with the central purpose of the Act. The central purpose of the Act is to give people whose rights under the Convention have been violated by a UK public authority a remedy in the UK courts, rather than having to bring a complaint against the UK in the European Court of Human Rights in Strasbourg. It would be inconsistent with that purpose if, in a case where the Convention applies to acts of a UK public authority done outside the United Kingdom, the Human Rights Act did not apply. The House of Lords accordingly held that the territorial scope of the Human Rights Act coincides with the territorial scope of the Convention. To the extent that the Convention applies to acts done abroad – as it was common ground before the House of Lords that it did apply to the death of Mr Mousa in British custody in Iraq – so does the Human Rights Act.

The Al-Skeini case: scope of the Convention

127. The House of Lords held, however, that – except for the case of Mr Mousa – none of the six cases fell within the jurisdiction of the UK under the Convention. Lord Rodger and Lord Brown (with whom Baroness Hale and Lord Carswell agreed) concluded that the UK did not have jurisdiction under Article 1 because (i) Iraq was not within the territorial region covered by the Convention and (ii) the UK was not in effective control of Basra and the surrounding area at the relevant time. They reached that conclusion by faithfully applying the approach of the European Court in the Bankovic case and in particular the propositions which I have mentioned above. At the end of his judgment (at para 150) Lord Brown said that he was "confident … that the Strasbourg Court will continue to maintain the Bankovic approach which seems to me only logical".

128. That confidence, however, proved to be misplaced. After the House of Lords had dismissed their appeal, the claimants in the Al-Skeini case applied to the European Court in Strasbourg. The Court unanimously held that there was a sufficient jurisdictional link between the claimants and the UK for the purposes of Article 1 in all six cases: see Al-Skeini v United Kingdom (2011) 53 EHRR 18.

129. In its judgment the European Court repeated its earlier assertions that jurisdiction under Article 1 is "primarily territorial" and that extraterritorial acts will give rise to jurisdiction "only in exceptional cases" (para 131). However, the Court went on to set out a comprehensive restatement of the general principles which determine when a state's jurisdiction under Article 1 extends to actions outside its own territory.

130. The Court identified as one such case the situation where a contracting state, "as a consequence of lawful or unlawful military action, exercises "effective control of an area" outside its national territory (para 138). Jurisdiction in such a case "derives from the fact of such control, whether it be exercised directly, through the Contracting

state's own armed forces, or through a subordinate local administration." Where the requisite degree of control exists:

> "[t]he controlling state has the responsibility under art.1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights."

131. In addition, however, the Court now recognised that, where a contracting state does not have effective control over an area of territory such that the state is required to secure to the inhabitants of that territory all the rights set out in the Convention, extraterritorial jurisdiction may still arise based on a principle of responsibility for acts of the state's agents operating outside its territory (para 133).

132. Three instances were given. The first concerned acts of diplomatic and consular agents (para 134). The second concerned the situation where, through the "consent, invitation or acquiescence" of the government of the territory, a state "exercises all or some of the public powers normally exercised by that government" (para 135). Third, the Court's case law was said to demonstrate that "in certain circumstances, the use of force by a state's agents operating outside its territory may bring the individual thereby brought under the control of the state's authorities into the state's art.1 jurisdiction". Four cases, all decided after the Bankovic case, were cited to show that this principle has been applied "where an individual is taken into the custody of state agents abroad" (para 136). These cases were:

i) Öcalan v Turkey (2005) 41 EHRR 45, where jurisdiction was held to have arisen when Turkish officials took custody of the applicant from Kenyan officials on Kenyan territory;

ii) Issa v Turkey (2004) 41 EHRR 567, where, had it been established (which on the facts it was not) that Turkish soldiers had taken the applicants' relatives into custody in northern Iraq, taken them to a nearby cave and killed them, the deceased would have been within Turkish jurisdiction "by virtue of the soldiers' authority and control over them".

iii) Al-Saadoon v United Kingdom (2009) 49 EHRR SE 11, where two individuals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the UK, since the UK "exercised total and exclusive control over the prisons and the individuals detained in them"; and

iv) Medvedyev v France (2010) 51 EHRR 39, where the French navy exercised "full and exclusive control" over a ship and its crew which they intercepted in international waters.

133. The Court rejected the notion that jurisdiction in these cases "arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held", and stated (para 136):

> "What is decisive in such cases is the exercise of physical power and control over the person in question."

The Court continued (para 137):

> "It is clear that, whenever the state through its agents exercises control or authority over an individual, and thus jurisdiction, the state is under an obligation under art.1 to secure to that individual the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'."

134. In applying these principles to the facts of the Al-Skeini case itself, the Court found that at the relevant time, after the overthrow of the Ba'ath Regime and until the accession of the Interim Iraqi Government, the UK (together with the United States) assumed in Iraq the exercise of some of the public powers normally exercised by a sovereign government and, in particular, the UK assumed authority and responsibility for the maintenance of security in South-East Iraq. The Court held (at para 149) that:

> "In these exceptional circumstances … the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."

135. Although the Court did not say which of the general principles stated in the judgment it was applying, the reference to "control over individuals" indicates that the Court did not find that the UK exercised sufficient control over the Basra area to secure in that area all the rights set out in the Convention, and that jurisdiction was based on the control exercised by conducting security operations which potentially involved the use of lethal force. That was sufficient to engage Article 2 of the Convention. The example of control over individuals to which the facts came closest was the second example which the Court had given (in para 135) where, through the "consent, invitation or acquiescence" of the government of the territory, a state "exercises all or some of the public powers normally exercised by that government". The UK was not, however, exercising powers through the consent, invitation or acquiescence of the government of Iraq since at the relevant time there was no government in existence.[2] This confirms that the test of control over individuals, like the test of control over an area, is a factual one which depends solely on the actual effectiveness of control and not on its legal basis or legitimacy.

[2] See Smith v Ministry of Defence [2014] AC 52 at para 40.

136. A disappointing feature of the judgment of the European Court in the Al-Skeini case is its lack of transparency in dealing with its previous decision in the Bankovic case. Nowhere did the Court confront or expressly acknowledge the fact that it was departing from its previous approach or explain why it was doing so. The Bankovic case is not even mentioned except for citations to it in some footnotes.

137. It is clear, however, that in the Al-Skeini case the European Court has indeed departed from its approach in the Bankovic case on all the five points which I mentioned above. In particular:

i) The Court has now endorsed a principle of jurisdiction based on the exercise of effective control by a state over an individual;

ii) The Court has expressly resiled from the notion that Convention rights constitute a single, indivisible package and has said that they can be "divided and tailored";

iii) The Court held that jurisdiction under article 1 is not limited to the territory of states which are parties to the Convention;

iv) In endorsing an approach which goes well beyond what the Court had found in the Bankovic case to be ordinary meaning and original intention of Article 1, the Court has effectively treated Article 1 as a "living instrument";

v) Although the Court continued to pay lip-serve to the notion that jurisdiction is "essentially territorial" and that extraterritorial jurisdiction is exceptional, it is difficult to see how this can remain so when jurisdiction arises wherever in the world a state exercises effective control over an individual.

Smith v Ministry of Defence

138. In Smith v Ministry of Defence [2014] AC 52, the UK Supreme Court has recognised the judgment of the European Court in the Al-Skeini case as an authoritative exposition of the principles relevant to the issue of jurisdiction under Article 1 of the Convention which should now be applied in British domestic courts.

139. The claimants in Smith were relatives of British soldiers who were killed in Iraq. The claimants alleged that the soldiers died as result of negligence of the MOD in failing to provide suitable equipment in breach of an obligation to safeguard their right to life guaranteed by Article 2 of the Convention. The MOD successfully applied to have the claims struck out on the ground that the Convention did not apply because the soldiers' deaths occurred outside the territorial jurisdiction of the United Kingdom. By a majority of 4-3, the Supreme Court allowed the claimants' appeal on this issue.

140. Lord Hope, who spoke for the majority of the Court, outlined the history of the Al-Skeini case and analysed the judgment of the Grand Chamber in that case, which he described as providing a "comprehensive statement of general principles" for the guidance of national courts (see paras 27, 46). In particular, Lord Hope extracted as a principle of general application that "extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual" (para 49). He reasoned that the exercise of such authority and control by the armed forces of the state over local inhabitants, which was held to found jurisdiction in the Al-Skeini case, presupposes that the state has such authority and control over its own armed forces who are its agents for this purpose and therefore brings them also within the state's article 1 jurisdiction (para 52). The decision that the UK owed duties under Article 2 of the Convention to its own armed forces serving outside its territory was therefore expressly based on the control principle articulated by the European Court in the Al-Skeini case.

Jurisdiction in the present case

141. The decision of the European Court in the Al-Skeini case leaves many unanswered questions which will no doubt have to be worked out in later cases. For example, it is unclear whether, once jurisdiction is understood to rest on the exercise of control over individuals, there is any stopping point short of what the European Court in the Bankovic case saw as the logical conclusion that jurisdiction under Article 1 exists whenever an act attributable to a contracting state has an adverse effect on anyone anywhere in the world; and if so, what that stopping point is. In the present case, however, such difficult questions do not arise because the facts fall squarely within one of the core examples of the control principle set out in the Al-Skeini case and not merely within its penumbra.

142. The present case involves detention on a British military base in Afghanistan. It is important to recall that, even on the approach to jurisdiction taken by the English courts before the decision of the European Court in the Al-Skeini case, the Convention was held to apply in relation to individuals detained on British military bases in Iraq. I have mentioned that in the Al-Skeini case the Divisional Court so held in relation to Mr Mousa, who was killed while in detention on a British military base, and the Court of Appeal and House of Lords expressly endorsed that conclusion. In Al-Jedda v Secretary of State for Defence, the Secretary of State accepted the correctness of the finding in the Al-Skeini case that a person detained in a British military prison in Iraq falls within the jurisdiction of the United Kingdom under Article 1: see [2005] EWHC 1809 (Admin) at para 25. What was unclear was not the existence of jurisdiction in such a case but the conceptual basis on which jurisdiction arose.

143. That conceptual basis has now been clarified by the decisions of the European Court in the Al-Skeini case and of the UK Supreme Court in Smith v Ministry of Defence, which establish that jurisdiction arises from the exercise by agents of the state of control and authority over an individual. Moreover, whatever the precise scope of the control principle, it clearly and expressly includes cases where "an individual is taken into the custody of state agents abroad": see Al-Skeini v United Kingdom (2011) 53 EHRR 18 at para 136. As the European Court has since summarised the position in

Chagos Islanders v United Kingdom (2013) 56 EHRR SE15, para 50, the circumstances in which 'state agent authority and control' give rise to extraterritorial jurisdiction include "using force to take a person into custody or exerting full physical control over a person through apprehension or detention."

The MOD's argument

144. The MOD has attempted to distinguish the present case from the cases involving detention on British military bases in Iraq by emphasising references in the judgments of the European Court to the "full and exclusive control" exercised by the UK over those bases and arguing that the UK did not have such complete control over the detention facilities in Afghanistan where SM was held. Thus, in Al-Saadoon v United Kingdom (2009) 49 EHRR 11, cited in the Al-Skeini case, the European Court found that two individuals detained in a British-run detention facility in Iraq were within the jurisdiction of the UK "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the UK authorities over the premises in question": see para 86. Similarly, in Al-Jedda v United Kingdom (2011) 53 EHRR 23 at para 85, the Court found that the internment of Mr Al-Jedda fell within the jurisdiction of the UK for the purposes of Article 1 in circumstances where the internment took place within a detention facility "controlled exclusively by British forces".

145. As a matter of fact it is clear that the detention facilities at Camp Bastion and Kandahar Airfield where SM was held were exclusively controlled by British forces and that no one else had access to them. The claimants adduced unchallenged evidence to this effect from Mr Henderson, a retired Lieutenant Colonel in the British armed forces who between 2007 and 2012 served on the Afghanistan team at the MOD and then on the ground in Afghanistan where he had first-hand experience of all the main British military bases.

146. The MOD did not dispute that British forces exclusively controlled the relevant facilities in practice but relied on evidence given by Mr Devine that there was no Afghan legislation providing that the UK detention facilities in Afghanistan were "inviolable", as there was in Iraq in the post-occupation period. There would, therefore, have been no legal basis for resisting the entry of the Afghan authorities if they had sought entry to procure the transfer of SM into their custody. Counsel for the MOD submitted that the earlier cases concerned with detention in Iraq could be distinguished on this ground.

Conclusion

147. The distinction which the MOD seeks to draw is in my view plainly unsustainable. It is unsustainable, first of all, because some of the relevant detentions in Iraq occurred at a time when the UK control over its military bases was entirely *de facto*. That was the position when Mr Mousa was detained and during the initial period when the applicants in the Al-Saadoon case were detained. More fundamentally, the argument is unsustainable because the decision of the European Court in the Al-Skeini case unequivocally decides that jurisdiction under Article 1 over an individual detained in a prison controlled by a state on foreign soil does not depend on whether the state has

sovereignty over the prison, such that officials of the state on whose territory the prison is situated have no legal right to enter it. Indeed, the state's jurisdiction does not even derive from the control exercised over the prison as such at all. In the Court's words (para 136):

> "What is decisive in such cases is the exercise of physical power and control over the person in question."

148. Applying this test of physical control over the person, as I am bound to do, it is clear that SM was within the jurisdiction of the UK under Article 1 of the Convention from the time of his capture by UK armed forces until the time when he ceased to be in their custody upon his transfer into the custody of the Afghan authorities.

Dividing and tailoring

149. The MOD also relies on the express acceptance by the European Court in the Al-Skeini case that rights under the Convention can be "divided and tailored". As I have indicated, this was a departure from the judgment in the Bankovic case where the Court had expressly rejected the suggestion that the positive obligation in Article 1 to secure the rights and freedoms defined in the Convention "can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question". The notion that Convention rights constitute an indivisible package implied, as Sedley LJ put it in R (Al-Skeini) v Secretary of State for Defence [2007] QB 621 at para 197, that a state which does not have sufficient control to enforce the full range of Convention rights, "because it is unable to guarantee everything, is required to guarantee nothing". The European Court has now resiled from that suggestion and embraced the approach eschewed in the Bankovic case that the obligation under Article 1 is not 'all or nothing' but must reflect the extent of the relevant authority and control which a state exercises outside its territory.

150. In my opinion, counsel for the MOD in their written reply submissions correctly identified the essential rationale as being that, where an act takes place on territory over which the state does not exercise some of the powers which are or would normally be exercised by the government of that territory, there will be Convention provisions with which the state cannot comply. In circumstances where that inability to comply is a consequence of the state's lack of extraterritorial power, the Article 1 obligation cannot be interpreted as requiring compliance with such provisions.

151. The ability of the MOD to rely on this principle in the present case seems to me, however, to be severely limited by the fact that the claim that UK armed forces violated Convention rights arises out of the very conduct which gives rise to jurisdiction, namely, the exercise of physical control over SM through his arrest and detention. In these circumstances it seems to me to be impossible to divide or tailor the basic obligation under Article 5(1) that any deprivation of liberty must be lawful and must fall within one of the cases specified in Article 5(1).

152. This does not entirely remove the potential relevance of the 'divide and tailor' principle. The claimants also rely on Article 5(3) which requires anyone arrested or

detained on reasonable suspicion of having committed an offence to be brought promptly before a judge or "other officer authorised by law to exercise judicial power", and on Article 5(4) which gives a person deprived of his liberty a right to take "proceedings by which the lawfulness of his detention shall be decided speedily by a court". The MOD makes the point that Afghanistan is a sovereign state which exercises, amongst other functions, the judicial functions of the state, and argues that this makes the provisions of Article 5(3) and (4) inapplicable. I will consider that argument in part X of this judgment, as well as an argument that the application of Article 5(1)(f) must be tailored to the circumstances in which the UK exercises Article 1 jurisdiction in Afghanistan.

Article 15

153. I will, however, mention at this stage an aspect of the approach to extraterritorial jurisdiction articulated in the Al-Skeini case which seems to me to be of considerable importance. A consequence of the recognition of a principle of jurisdiction based on the exercise of physical control over individuals on foreign territory is that it hugely expands the potential application of the Convention in situations of armed conflict. The use of physical force in fighting, capture and detention is after all the essence of armed conflict.

154. It is a fact of life that in times of war states cannot always be expected to secure all the rights and freedoms of everyone within their jurisdiction to the same extent as in peace time and that compromises have to be made. The authors of the Convention recognised that reality, and they specifically addressed the point in Article 15. Article 15 of the Convention provides:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4 (paragraph 1) and 7 shall be made under this provision."

155. Article 15 accordingly permits a state, within defined limits, to derogate from its obligations under the Convention "in time of war or other public emergency threatening the life of the nation." This wording, however, (in particular the word "other") tends to suggest that Article 15 was not intended to apply to a war overseas which does not threaten the life of the nation. That is no doubt because those who drafted the Convention did not envisage that a state's jurisdiction under Article 1 would extend to acts done outside its territory. Now that the Convention has been interpreted, however, as having such extraterritorial effect, it seems to me that Article 15 must be interpreted in a way which reflects this. It cannot be right to interpret jurisdiction under Article 1 as encompassing the exercise of power and control by a state on the territory of another state, as the European Court did in the Al-Skeini case,

unless at the same time Article 15 is interpreted in a way which is consonant with that position and permits derogation to the extent that it is strictly required by the exigencies of the situation.

156. Article 15, like other provisions of the Convention, can and it seems to me must be "tailored" to such extraterritorial jurisdiction. This can readily be achieved without any undue violence to the language of Article 15 by interpreting the phrase "war or other public emergency threatening the life of the nation" as including, in the context of an international peacekeeping operation, a war or other emergency threatening the life of the nation on whose territory the relevant acts take place.

157. I recognise that in expressing this view I am diverging from *dicta* of Lord Bingham in Al-Jedda v Secretary of State for Defence [2008] 1 AC 332 at para 38, which are plainly entitled to the greatest respect. Lord Bingham said that it was "hard to think that [the requirements of Article 15] could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw". However, it seems to me that the landscape has been fundamentally changed since that remark was made by the decisions of the European Court in the Al-Jedda and Al-Skeini cases. In the first place those decisions have radically altered the extent to which the Convention is applicable in armed conflicts and peacekeeping operations overseas of the kind which have occurred in Iraq and Afghanistan. Secondly, at the time when Lord Bingham was writing in the Al-Jedda case the European Court appeared to have ruled out the notion that Convention rights could be divided and tailored in relation to its extraterritorial application; that possibility was therefore not in contemplation. Different considerations apply now that the possibility has been ruled in.

VI. RESPONSIBILITY FOR ACTS OF UK ARMED FORCES

158. In considering the question of territorial jurisdiction, I have been assuming that the British soldiers who captured and detained SM were acting as agents of the United Kingdom such that the UK is answerable for their actions under the Convention and the Human Rights Act. The MOD, however, disputes this. The MOD has argued that the UK government is not legally responsible for the actions of its armed forces in capturing and detaining SM because they were operating as part of ISAF under a mandate from the United Nations Security Council and the legal responsibility for their actions lies solely with the UN.

The Behrami and Saramati cases

159. The foundation for this argument is the decision of the Grand Chamber of the European Court in Behrami v France, Saramati v France, Germany and Norway (2007) 45 EHRR SE10, which related to events in Kosovo. UNSCR 1244 of 10 June 1999 (para 5) decided "on the deployment in Kosovo, under United Nations auspices, of international civil and security presences", and (in para 7) authorised UN member states and relevant international organisations to "establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities …" Point 4 of annex 2 to the Resolution stated that:

> "The international security presence with substantial [NATO] participation must be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo …"

160. Pursuant to this resolution, an "international civil presence" was duly established in Kosovo which included the provision of an interim administration ("UNMIK") along with an "international security presence" ("KFOR"). KFOR troops came from 35 countries and were grouped into four multinational brigades under the operational command of a NATO commander.

161. The facts of the Behrami and Saramati cases were different. It is sufficient to mention the facts of the Saramati case which are closer to those of the present case. Mr Saramati was arrested on 13 July 2001 by UNMIK police officers by order of the Commander of KFOR ("COMKFOR"), who was a Norwegian officer at the time. His detention was subsequently continued pending and during a trial, which ended with his conviction for attempted murder on 23 January 2002. (The conviction was later quashed on appeal.) During this period of detention a French General took over the position of COMKFOR. Mr Saramati complained that his detention was contrary to Article 5 of the Convention and that the states of Norway and France were responsible for it on the grounds that COMKFOR was first a Norwegian and then a French army officer.

162. The European Court rejected that contention, holding that the actions of COMKFOR in authorising Mr Saramati's detention were solely attributable to the UN. In reaching this conclusion, the Court considered that the key question was whether the UN Security Council "retained ultimate authority and control so that operational command only was delegated" (para 133). The Court found (para 134) that the Security Council had retained such ultimate authority and control and that this was borne out by the facts that: (i) Chapter VII of the UN Charter allowed the Security Council to delegate; (ii) the relevant power was a delegable power; (iii) the delegation was "neither presumed nor implicit, but rather prior and explicit in the Resolution itself"; (iv) the extent of the delegation was defined with sufficient precision; and (v) the leadership of the military presence was required to report to the Security Council. The Court further found (para 135) that UNSCR 1244 gave rise to a chain of command whereby operational command was delegated by the Security Council to NATO and by NATO via a chain of command to COMKFOR. Detention was authorised by COMKFOR on the basis of a KFOR operational policy (para 51). Moreover, the Court found no evidence of any order concerning, or interference in, Mr Saramati's detention by any of the troop contributing nations (para 139).

163. Having found that the relevant actions of COMKFOR in authorising Mr Saramati's detention were attributable to the UN, the Court went on to hold that those actions could not be attributed to the respondent States (Norway and France). The Court's reasoning (at para 149) was based principally on the policy consideration that:

> "Since operations established by UNSC Resolutions under Ch. VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they

> rely for their effectiveness on support from Member States, the Convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by the UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations."

The Al-Jedda case

164. In Al-Jedda v Secretary of State for Defence [2007] UKHL 58, [2008] 1 AC 332, the claimant sought judicial review of his detention by British troops in Iraq on the ground that it violated Article 5 of the Convention. That argument failed in the English courts for reasons that I will discuss in the next part of this judgment. On the claimant's appeal to the House of Lords, however, a new issue was raised by the Secretary of State which had not been argued in the courts below but was prompted by the decision of the European Court in the Behrami and Saramati cases. This issue was whether, by reason of the UNSCRs authorising the multinational force (MNF) in Iraq, the claimant's detention was attributable to the UN and thus outside the scope of the Convention.

165. The appellate committee of the House of Lords (by a 4-1 majority) decided this issue in favour of the claimant. Lord Bingham, who gave the leading speech, identified (at para 5) the governing principle in attributing responsibility as that expressed by the International Law Commission ("ILC") in Article 5 (now draft Article 7) of its Draft Articles on the Responsibility of International Organisations:

> "The conduct of an organ of a state or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct."

After describing the factual background, Lord Bingham said (at para 22) that:

> "... a number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather that the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative."

166. After referring to the role of UK armed forces in Iraq, Lord Bingham said (at para 24):

> "The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multi-national force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control."

167. Baroness Hale and Lord Carswell agreed with Lord Bingham, for the reasons he gave. Lord Brown also concurred but did not find the issue easy and, after reading the dissenting speech of Lord Rodger, was left doubting the correctness of his conclusion: see the postscript to his judgment at para 156.

168. The Al-Jedda case was subsequently considered by the European Court of Human Rights, who agreed with the majority of the House of Lords that Mr Al-Jedda's detention was attributable to the UK and not to the UN: see Al-Jedda v United Kingdom (2011) 35 EHRR 23. The Court considered (at para 84) that the UN Security Council "had neither effective control nor ultimate authority and control over the acts and omissions of troops within the [MNF]". By contrast (para 85):

> "The internment took place within a detention facility in Basrah City, controlled exclusively by British Forces, and the applicant was therefore within the authority and control of the United Kingdom throughout. The decision to hold the applicant in internment was made by the British officer in command of the detention facility. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-UK representatives from the Multi-National Force, the Court does not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom."

The MOD's argument

169. The MOD contends that the situation in Afghanistan has greater similarity to that in Kosovo than to the situation in Iraq. Counsel for the MOD submitted that:

i) All the factors which led the European Court in the Behrami and Saramati cases to find that the UN Security Council retained "ultimate authority and control" applied equally in Afghanistan; and

ii) ISAF, to whom the Security Council delegated operational command, itself exercised effective command and control over operational matters, including ultimately the detention of SM by UK troops.

170. As reflected in the MOD's submissions, the question whether the detention of SM is attributable to the United Nations and not to the United Kingdom can logically be approached in two stages. The first stage is to consider whether actions of ISAF in Afghanistan are attributable to the UN. The second stage is to consider whether the responsibility for the detention of SM lies with ISAF or the UK (or both).

Are actions of ISAF attributable to the UN?

171. In the Behrami and Saramati cases the European Court considered that the key question was whether the UN Security Council retained "ultimate authority and control" over actions of KFOR so that "operational command only was delegated". In the Al-Jedda case Lord Bingham recorded it as common ground that the applicable test was whether the UN Security Council exercised "effective control" over the conduct in question. The European Court in the Al-Jedda case applied both tests, and considered that the UN Security Council had neither "effective control" nor "ultimate authority and control" over the acts of troops within the Multi-National Force.

172. Like Lord Brown in the Al-Jedda case (para 148), I confess to finding the precise meaning of these expressions and the nature of the test to be applied somewhat elusive. In the Behrami and Saramati cases the European Court drew a distinction between "delegation" by the UN Security Council in the sense of empowering another entity to exercise its function and "authorising" an entity to carry out functions which it could not itself perform (see para 43). However, as Lord Brown pointed out (at para 143), in this respect the situation in Kosovo and Iraq was the same, in that the UN could not in either country carry out its central function of maintaining or restoring international peace and security itself and could only authorise member states to perform that role.

173. Furthermore, in relation to the five factors which the Court regarded in the Behrami and Saramati cases as bearing out the conclusion that the UN Security Council retained ultimate authority and control (see paragraph 162 above), it is difficult to see any material distinction between the position in Kosovo and Iraq. As Lord Brown identified (paras 144-145), the only potentially relevant distinction between the UNSCRs applicable in Kosovo and those applicable in Iraq would appear to lie in the decision to deploy KFOR "under UN auspices", which had no counterpart in the resolutions relating to Iraq. However, I agree with Mr Eadie's submission that it is difficult to see why there should be any particular magic in the use of this formula and it does not appear from the judgment that any particular significance was attached to it by the European Court in the Al-Jedda case.

174. What seems to me to be the critical feature of the arrangements in Kosovo which was not present in Iraq is that the Court in the Behrami and Saramati cases was able to identify a clear chain of command from the UN Security Council through NATO to COMKFOR, the commander of KFOR, who authorised the detention of the applicant

(see para 135). The position in Iraq was different in this crucial respect because there never was established a clear or effective chain of command from the Security Council to the MNF.

175. It is in this context, as I see it, that in the Al-Jedda case both Lord Bingham in the House of Lords and the European Court regarded it as relevant that the MNF in Iraq was not established at the behest of the UN but was already operating in Iraq when it was given a mandate by the Security Council. Like Lord Rodger (para 61), I find it difficult to see why the mere fact that the British and other coalition forces were in Iraq before Resolution 1546 was adopted (whereas Resolution 1244 was adopted before the forces making up KFOR entered Kosovo) should in itself be legally relevant. However, what does seem to me to matter is the finding of the European Court in the Al-Jedda case at paras 78-81 that, at the time when the Security Council resolutions which conferred a mandate on the MNF were adopted, the troops within the MNF were already operating under a unified command structure which was not changed as a result of the resolutions. Similarly, Lord Bingham emphasised (at para 23) that: "at no time did the US or the UK disclaim responsibility for the conduct of their forces [in Iraq] or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the UN …"

176. A similar view was taken by the US Supreme Court in Munaf v Geren, 533 US 1 (2008). In that case petitions for *habeas corpus* were filed by individuals detained in Iraq by US forces. The US government argued that the US courts lacked jurisdiction over the petitions because the forces detaining the petitioners were operating as part of the MNF pursuant to international authority and not the authority of the United States. However, the US government acknowledged that the petitioners were in the immediate "physical custody" of American soldiers who answered only to an American chain of command and that, as a practical matter, it was "the President and Pentagon, the Secretary of Defence, and the American Commanders that control what … American soldiers do": see 553 US 1, 8. Chief Justice Roberts, delivering the unanimous opinion of the Supreme Court, considered these concessions to be "the end of the jurisdictional enquiry".

177. Turning to the position in Afghanistan, it is true that – as Mr Hermer QC emphasised – UK along with US armed forces were already present in Afghanistan as part of Operation Enduring Freedom before the UN talks took place which led to a request to the United Nations to provide an international security force. However, ISAF was established pursuant to UNSCR 1386 as a newly created force. As explained by Mr Devine in evidence, the UK contribution to ISAF was distinct from its contribution to Operation Enduring Freedom. Crucially, as I see it, ISAF had its own command structure. Initially, the leadership of ISAF was provided by different nations on a rotating basis: first the UK, then Turkey, followed by Germany and the Netherlands jointly. Subsequently, on 11 August 2003 NATO took command of ISAF on the request of the UN and the government of Afghanistan. Since then, overall operational command of ISAF has been vested in NATO, to whom the Commander of ISAF (COMISAF) reports. It seems to me that the chain of delegation of command for ISAF is essentially similar to the chain of delegation and command for KFOR, as described in the judgment of the European Court in the Behrami and Saramati cases (para 135).

178. In these circumstances, although I do not find the question easy, I consider that the UN Security Council has "effective control" (and "ultimate authority and control") over ISAF in the sense required to enable conduct of ISAF to be attributed to the UN. Thus, if the detention of SM had been authorised by COMISAF (in the way that COMKFOR authorised the detention of Mr Saramati) and a claim had been brought against the state from whose armed forces COMISAF was drawn on the basis that that state was in breach of Article 5 of the Convention, I would expect the European Court to hold that the detention was not attributable to the respondent state, applying the same analysis as it did in the Behrami and Saramati cases. (I am assuming for the purpose of this hypothetical case that COMISAF at the relevant time was an officer in the armed forces of a state which is a contracting party to the Convention.)

179. Would it make a difference whether SM's detention fell outside the scope of the authority conferred by the UNSCRs which established ISAF's mandate in Afghanistan? This question was not addressed in argument. It appears, however, that it would not, in the light of Article 8 of the ILC Draft Articles on the Responsibility of International Organisations:

> "The conduct of an organ or an agent of an international organisation shall be considered an act of that organisation under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of the organ or agent or contravenes instructions."

Is ISAF responsible for SM's detention?

180. Where, in my view, the MOD's argument breaks down is that neither COMISAF nor any other ISAF 'detention authority' authorised the detention of SM. As I have described in part III of this judgment, the UK has established its own national detention policy in Afghanistan, which differs from that of ISAF. Furthermore, the chain of command for authorising detention set out in the MOD Standard Operating Instruction J3-9 shows that the detention authority is the Commander of Joint Force Support (Afghanistan) ("Comd JFS p(A)"), who reports directly to the UK Permanent Joint Headquarters ("PJHQ"), which in turn reports to the MOD. By contrast, the chart shows that the relation between the UK detention authority and the ISAF chain of command is one of liaison and coordination only.

181. Under the ISAF Standard Operating Procedures authority to extend detention beyond 96 hours was vested in COMISAF. A military assessment report dated 24 September 2006 refers to an occasion when ISAF headquarters sought to object to the detention period for an individual held by UK armed forces being extended by the UK rather than through the ISAF chain of command. The report states:

> "COS [Chief of Staff] ISAF has intervened personally, asserting that the ISAF SOP is binding on the UK and that there is no reason why the UKTF [Task Force] should not be operating under ISAF procedures. These procedures require that COMISAF authorise any detention of an individual beyond the 96-hour deadline. It has been explained that the UK

> position is that this responsibility, based as it is in international and domestic law, is legally binding and requires that decisions on this subject are taken by UK Officials, in order to ensure that the legal obligations of the UK are properly discharged. It is understood that PJHQ Officials have now made this point to NATO HQ, and so it is hoped that HQ ISAF will soon be directed to accept the UK position."

I infer that ISAF headquarters did subsequently accept the UK position as detention decisions continued to be taken by UK officials without involving ISAF and there is no evidence of any further complaints.

182. The fact that the UK has operated its own detention policy and procedure in Afghanistan is reflected in the fact that the UK concluded a Memorandum of Understanding with the government of Afghanistan concerning the transfer of detainees on a bilateral basis rather than through ISAF (see paragraph 43 above). It is also reflected in the fact that, when the UK decided to change its policy on detention in Afghanistan in November 2009, NATO was simply informed of the change in policy rather than being asked to authorise it (see paragraph 48 above).

183. A UK Detention Oversight Assessment Report dated September 2011 is also instructive. Commenting on a proposal by the ISAF Joint Command to form regional detention operations teams, the report noted that the UK's current detention regime was "TCN [Troop Contributing Nation] sovereign business" and "based upon UK national sovereignty", as evidenced by the fact that the detention authority was Comd JFSp(A) who is not an ISAF officer (see above).

184. The MOD has argued that the UK did not operate a detention policy which was separate from ISAF policy because ISAF policy envisaged and accommodated some variations in national practice and, in particular, ISAF accepted the need for the UK to depart from the ISAF 96 hour detention limit in exceptional circumstances in light of the fact that UK armed forces were operating in an area of Afghanistan where there is a particularly high level of insurgent activity. I have accepted the evidence of Mr Devine that NATO was informed of the UK's decision to apply a "national policy caveat" to the ISAF 96 hour limit and did not object to this. But that is a very long way from showing that either UK detention operations generally or individual detentions by UK armed forces were under the command and control of ISAF. It is clear that they were not.

185. In relation to the specific case of SM:

i) SM was captured by UK armed forces and held throughout the period of his detention at UK military bases, mainly Camp Bastion, which I have found was under the full and exclusive *de facto* control of the UK.

ii) SM's detention was authorised by a UK Commander and, until he was transferred to the Afghan authorities, was reviewed periodically within a

purely UK chain of command; decisions to extend his detention were taken by UK Ministers or high-ranking officials within the MOD, and no authorisation was sought from COMISAF.

iii) The UK detention policy under which SM's detention was authorised differed materially from ISAF's policy – the most striking difference being that under ISAF's policy SM could not have been detained for more (or much more) than 96 hours whereas pursuant to the UK policy his detention could be and was authorised for a much longer period.

186. I agree with the submission made by counsel for SM that the position in this case is even starker than it was in the Al-Jedda case. Mr Al-Jedda's detention in Iraq was, at various points, reviewed by committees which included representatives of the Iraqi government and non-UK representatives from the MNF: see Al-Jedda v United Kingdom (2011) 53 EHRR 23 at paras 12-13 and 85. The European Court did not consider that the existence of these reviews prevented the detention from being attributable to the UK. By contrast, SM's detention was authorised and reviewed exclusively by UK officials and Ministers.

187. In these circumstances, it is in my view quite clear that the detention of SM is attributable to the United Kingdom. It is unnecessary for me to consider the possibility of joint responsibility, as I think it equally clear that the acts involved in the detention of SM are not attributable to ISAF or the UN.

VIII. UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

188. I have referred in Part II of this judgment to the United Nations Security Council Resolutions ("UNSCRs") pursuant to which UK armed forces have operated as part of ISAF in Afghanistan. Relevant features of those resolutions are that the Security Council: (1) recognised Afghan sovereignty and independence and that the responsibility for providing security and law and order throughout the country resides with the government of Afghanistan; (2) gave ISAF a mandate to assist the Afghan government to improve the security situation; and (3) authorised the UN member states participating in ISAF to "take all necessary measures to fulfil its mandate".

189. The relevant UNSCRs – including UNSCR 1890 (2009) which was applicable at the time of SM's detention – were adopted under Chapter VII of the UN Charter. As such, they create obligations binding on all states which are members of the United Nations by reason of Article 25 of the UN Charter. This states that:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

190. The UNSCRs therefore provide a legal basis for the presence and activities of UK armed forces operating as part of ISAF in Afghanistan. Specifically, the UK government relies on the authorisation conferred on the member states participating in

ISAF to "take all necessary measures to fulfil its mandate" as providing a legal basis for detaining people where to do so is considered necessary to assist the Afghan government to improve the security situation in Afghanistan.

191. The MOD further argues that this power of detention displaces or qualifies Article 5 of the Convention. This argument is based on Article 103 of the UN Charter, which states:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

It is the MOD's case that UNSCR 1890 imposed an obligation on the UK to detain SM which conflicted with and prevails over the UK's obligation to secure to SM the rights defined in Article 5 of the Convention.

192. Analytically, there are three stages to the MOD's argument, as follows:

i) Detention considered necessary to fulfil ISAF's mandate is authorised by the applicable UNSCR even where such detention is contrary to Article 5 of the Convention.

ii) Detention carried out pursuant to this authorisation is a matter, not just of right, but of obligation under the UN Charter.

iii) By reason of Article 103 of the UN Charter, that obligation prevails over the UK's obligation to secure rights under Article 5 of the Convention.

The Al-Jedda case: decision of the House of Lords

193. A similar argument was relied on by the Defence Secretary in the Al-Jedda case to justify Mr Al-Jedda's detention by UK armed forces in Iraq, and was accepted by the English courts at all levels including the House of Lords.

194. Following the invasion of Iraq in 2003, a temporary administration was established know as the Coalition Provisional Authority ("CPA"). On 16 October 2003 the UN Security Council adopted Resolution 1511 which (amongst other things) authorised a multi-national force ("MNF") under unified command to "take all necessary measures to contribute to the maintenance of security and stability in Iraq". The UK armed forces already operating in Iraq became part of the MNF. On 28 June 2004 the occupation of Iraq ended and authority was transferred from the CPA to an Interim Administration recognised by the United Nations as sovereign and independent. In anticipation of this transfer of authority, the Security Council on 8 June 2004 adopted Resolution 1546.

195. Two letters both dated 5 June 2004 were written to the President of the Security Council by, respectively, the Prime Minister of the Interim Government of Iraq (Dr Allawi) and the US Secretary of State (Mr Powell). The letter from Dr Allawi sought a new UNSCR to authorise the MNF to contribute to maintaining security in Iraq, "including through the tasks and arrangements set out in the letter from [Mr Powell]". The letter from Mr Powell confirmed that the MNF was prepared to continue to contribute to the maintenance of security in Iraq and stated:

> "Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. …" [emphasis added]

196. UNSCR 1546 (in para 9) reaffirmed the authorisation for the MNF established under UNSCR 1511 and (in para 10) decided that:

> "the multi-national force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution …"

The letters annexed to the resolution were the two letters written to the President of the Security Council, referred to above.

197. By the time of his appeal to the House of Lords, Mr Al-Jedda had been detained by UK armed forces at detention facilities in Iraq for over three years (since October 2004). He was suspected of being a member of a terrorist group, but had not been charged with any offence, and no charge or trial was in prospect. He sought judicial review of his detention on the ground that it was contrary to Article 5 of the Convention. His claim failed on the basis that his rights under Article 5 were overridden by an obligation on the UK to detain him pursuant to UNSCR 1546.

198. Counsel for Mr Al-Jedda did not dispute that UNSCR 1546 authorised UK forces in Iraq to exercise powers of detention which included a power to detain him. But he argued that the resolution conferred a power only, and not an obligation. There was therefore no conflict of obligations to which Article 103 of the UN Charter applied. In any event, UNSCR 1546 could not properly be interpreted as requiring the UK to act in breach of its international human rights obligations. Accordingly, the UNSCR did not displace or qualify Article 5 of the Convention.

199. The House of Lords unanimously rejected that argument: see Al-Jedda v Secretary of State for Defence [2008] 1 AC 332. Lord Bingham (with whom all the other members of the appellate committee agreed on this issue) held that, although the

relevant UNSCRs used the language of authorisation, they should be construed as creating obligations, for three main reasons.

200. First, Lord Bingham considered that the intention of the relevant UNSCRs was to continue the pre-existing security regime rather than to change it; and that under that regime the UK, as an occupying power, was obliged to take necessary measures to protect the safety of the public and its own safety. That included an obligation, where it was considered necessary, to detain a person judged to be a serious threat to the safety of the public or the occupying power (see para 32).

201. Second, Lord Bingham pointed out that, in relation to military operations overseas, the practice of the Security Council is to use the language of authorisation to reflect the fact that it cannot compel member states to carry out such tasks and is dependent upon their willingness to do so. Lord Bingham found (at para 33) that there is however:

> "a strong and to my mind persuasive body of academic opinion which would treat Article 103 as applicable where conduct is authorised by the Security Council as where it is required …"

202. Third, Lord Bingham considered that the term "obligations" in Article 103 should be given a broad meaning in the light of the importance of maintaining peace and security in the world, which is the mission of the UN. In particular, having agreed to contribute troops to the MNF, the UK became bound by Article 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its mission. In those circumstances the UK was "bound to exercise its power of detention where this was necessary for imperative reasons of security" (para 34).

203. Lord Bingham recognised (at para 37) that, while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. However, he found it difficult to see how any exercise of the power to intern could do otherwise than breach the detainee's rights under Article 5(1) of the Convention. Lord Bingham concluded (at para 39):

> "Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent that is inherent in such detention."

204. Baroness Hale, in agreeing with Lord Bingham that the UNSCR authorised detention where it was thought "necessary for imperative reasons of security", entered a caveat

that the argument before the House of Lords about authorisation by the United Nations had been conducted at an abstract level. She said (at para 129):

> "We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case."

The Al-Jedda case: decision of the European Court

205. After losing his case in the English courts, Mr Al-Jedda sought just satisfaction in Strasbourg. The European Court held that there had been a violation by the UK of Article 5(1) of the Convention and rejected the argument which had succeeded in the English courts that Article 5 was overridden by the relevant UNSCRs: see Al-Jedda v United Kingdom (2011) 35 EHRR 23. The Court approached the case by considering the purposes for which the United Nations was created and noted (as had Lord Bingham) that, as well as the purpose of maintaining international peace and security, these purposes include under Article 1 of the UN Charter "promoting and encouraging respect for human rights and fundamental freedoms". In addition, Article 24(2) of the Charter requires the Security Council, in discharging its responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court found (at para 102) that:

> "... in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend states to take particular measures which would conflict with their obligations under international human rights law."

206. Applying this presumption, the European Court did not consider that the language used in UNSCR 1546 indicated unambiguously that the Security Council intended to place member states within the MNF "under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention." In the Court's view, although internment was specifically referred to in the letter from Mr Powell annexed to the Resolution as one of the "broad range of tasks" which the MNF stood ready to undertake, "the terminology of the Resolution appears to leave the choice of the means to achieve this end to the Member States within the [MNF]". In those circumstances the Court applied the presumption that the Security Council intended member states to contribute towards the maintenance of

security in Iraq whilst complying with their obligations under international human rights law.

207. The European Court concluded (at para 109) that neither Resolution 1546 nor any other UNSCR imposed an obligation on the UK to detain an individual considered to constitute a risk to the security of Iraq indefinitely without charge. In those circumstances there was no conflict between the UK's obligations under the UN Charter and its obligations under Article 5(1) of the Convention.

To what extent is the House of Lords' decision binding?

208. On behalf of the MOD, Mr Eadie QC submitted that I am bound by the decision of the House of Lords in the Al-Jedda case to hold that in relation to the detention of SM in this case Article 5 is displaced or qualified by UNSCR 1890. Insofar as the decision of the European Court points to a different conclusion, Mr Eadie submitted that I must not follow it because, whereas under the doctrine of precedent a decision of the House of Lords is binding on all lower courts in the United Kingdom, a decision of the European Court is not. Hence, where there is a conflict between a decision of the House of Lords and a decision of the European Court, until such time as the House of Lords overrules its own past decision, the duty of a lower court is to follow the decision of the House of Lords.

209. I accept Mr Eadie's submission that I am bound by the decision of the House of Lords in the Al-Jedda case, even where it conflicts with the decision of the European Court.[3] It is necessary, however, to analyse with some care exactly what propositions of law were decided by the House of Lords.

210. The obligations imposed on the UK by the UN Charter and UNSCR 1546 were obligations under international law. Neither the Charter nor the Resolution have been incorporated into English law. It was nevertheless necessary for the House of Lords in the Al-Jedda case to determine the effect of those instruments in order to decide whether as a matter of English law the claimant's detention violated the Human Rights Act 1998. In these circumstances it seems to me that the decision of the House of Lords on the relevant questions of international law is binding on me as a matter of precedent insofar as they were a necessary part of the reasoning which led to the rejection of the claim under the Human Rights Act.

211. One point decided by the House of Lords which was necessary to that conclusion was that, where they conflict, rights under Article 5 of the Convention are displaced by obligations imposed by resolutions of the United Nations Security Council. I am accordingly bound by the decision of the House of Lords on that point (which I note was not addressed by the European Court).

212. A second point decided by the House of Lords was that, although the relevant UNSCRs used the language of authorisation, they should be treated as imposing legal

[3] See Kay v Lambeth LBC [2006] 2 AC 465 at paras 40-45.

obligations on the UK. Ms Fatima, in submissions made on behalf of the PIL claimants, pointed out that the first of the reasons given by Lord Bingham for this conclusion related to the particular circumstances of the UK's involvement in Iraq and to the background of its role as an occupying power. She emphasised that the situation in Afghanistan was different, as the UK was never an occupying power in Afghanistan. While I accept this distinction, Lord Bingham gave two further reasons of more general application which would, as I read his judgment, have led him to the same conclusion even without the background of the UK's previous role as an occupying power. In particular, he was persuaded that the reference to "obligations" in Article 103 of the UN Charter is to be given a broad, purposive interpretation such that it includes conduct authorised by the Security Council in relation to military operations. I therefore consider this proposition too to be binding authority.

213. The third point decided by the House of Lords was that UNSCR 1546 authorised the UK armed forces forming part of the MNF to detain Mr Al-Jedda in contravention of his rights under Article 5 of the Convention. That conclusion depended on the meaning of UNSCR 1546. I do not, however, consider that the interpretation given by the House of Lords to UNSCR 1546 which applied in Iraq is binding authority on the question of how differently worded resolutions of the Security Council relating to Afghanistan are to be interpreted.

214. It is possible to envisage circumstances in which the House of Lords decision in the Al-Jedda case would have provided such authority: for example, if the House of Lords had found that the phrase "all necessary measures" whenever it is used in resolutions of the Security Council has an established or conventional meaning. However, there is no such suggestion in the judgments.

215. In my view, Ms Fatima is correct in identifying the key factor in the reasoning of the House of Lords on this point as being the express statement in the letter to Mr Powell annexed to UNSCR 1546 that the tasks which the MNF stood ready to continue to undertake included "internment where this is necessary for imperative reasons of security". In the light of that express statement, all the members of the appellate committee thought it clear that the Security Council was authorising internment which could not do otherwise than breach the detainee's rights under Article 5 of the Convention. Thus, when Lord Bingham referred (at para 34) to the UK's "power of detention where this was necessary for imperative reasons of security", and (at para 39) to the "power or duty to detain exercisable on the express authority of the Security Council", he was clearly referring to the letter from Mr Powell.

216. Lord Rodger, who agreed with Lord Bingham on this issue, thought it notable that UNSCR 1546 "gave specific authorisation for the MNF to undertake the task of 'internment where this is necessary for imperative reasons of security'" (see para 77). Baroness Hale, while not as certain as the other members of the committee how far the authorisation given by UNSCR 1546 went, also regarded the statement in Mr Powell's letter as the factor which made it at least arguable that the claimant's detention was authorised (see paras 127–128). Finally, Lord Carswell and Lord Brown both expressly based their interpretation of the resolution as authorising internment where this was necessary for imperative reasons of security on the specific reference to this "task" in Mr Powell's letter (see paras 134, 136 and 150–152).

217. By contrast, the UNSCRs relating to Afghanistan, including UNSCR 1890, do not make or incorporate any express reference to internment or detention. There are, moreover, other relevant differences in the wording of the resolutions to which I refer below. In these circumstances I do not consider that the decision of the House of Lords in the Al-Jedda case provides support, let alone binding authority, for the MOD's case as to the meaning and effect of the relevant UNSCRs.

Did the UNSCRs confer a power to detain?

218. Although the UNSCRs relating to Afghanistan did not contain any express reference to detention, the MOD contends that the authorisation to "take all necessary measures" to fulfil the mandate of ISAF impliedly included an authority to capture and detain persons who posed a threat to ISAF forces, Afghan citizens or to the accomplishment of the mission. In support of this contention, Mr Eadie QC adopted the opinion of Professor Christopher Greenwood QC (now a judge on the International Court of Justice) expressed in an expert report given in Canadian proceedings regarding the international law applicable to military operations in Afghanistan. Referring to the authorisation to "take all necessary measures", Professor Greenwood said:

> "That (or very similar) language has been employed by the UNSC when it wished to authorise the use of force and it was plainly intended to carry such a connotation in Afghanistan. It would be wholly illogical for the authorisation to extend to the use of lethal force against persons but not to include their detention."

219. I accept this argument so far as it goes. In particular, I accept that the UNSCRs relating to Afghanistan were plainly intended to authorise the use of lethal force at least for the purposes of self-defence. I also accept that in these circumstances it must be the case that ISAF personnel were authorised to take the lesser step of accepting the surrender of individuals who were believed to pose an imminent threat to them or to the civilian population. I see no necessary implication, however, that this authorisation was intended to give ISAF a power to continue to hold individuals in detention outside the Afghan criminal justice system after they had been arrested and therefore ceased to be an imminent threat.

220. As mentioned earlier, the mandate of ISAF was to assist the Afghan government in the maintenance of security. In addition, the UNSCRs expressly affirmed the sovereignty, independence and territorial integrity of Afghanistan and recognised that the responsibility for providing security and law and order throughout Afghanistan resided with the Afghan authorities. In these circumstances, and in circumstances where (as discussed in part IV of this judgment) ISAF had no power under Afghan law to detain individuals other than to hand them over immediately to the police or a prosecutor, I can see no reason to interpret the authorisation to "take all necessary measures" to fulfil the ISAF mandate as permitting detention for any longer than was necessary to deliver them to the Afghan authorities.

221. Nor can I see any reason to interpret that authorisation as permitting detention by ISAF which violated international human rights law. In ascertaining the scope of the relevant authority, it seems to me that I must take into account the principles endorsed by the European Court in Al-Jedda v United Kingdom (2011) 53 EHRR 23. Section 2(1) of the Human Rights Act requires me to do so in circumstances where the opinion of the European Court is relevant to the question that I have to determine concerning the scope of the claimant's Convention rights. As mentioned, the European Court considered there to be a presumption that, unless it uses clear and unambiguous language to the contrary, the Security Council does not intend states to take measures which could conflict with their obligations under international human rights law. In the Al-Jedda case the European Court did not regard even the language used in UNSCR 1546 and the letter from Mr Powell annexed to it which expressly referred to internment as sufficiently clear and unambiguous to override this presumption. In the resolution applicable in the present case there is no express reference at all to internment or detention. Although I consider that a power to detain is implied, there is nothing in the language of UNSCR 1890 which demonstrates – let alone in clear and unambiguous terms – an intention to require or authorise detention contrary to international human rights law.

222. Furthermore, there are features of UNSCR 1890 which indicate positively that the Security Council expected states participating in ISAF to comply with their international human rights obligations. In particular, the resolution included a recital which expressly called for "compliance with international humanitarian and human rights law". Further recitals stressed the importance of further progress by the Afghan government in strengthening respect for human rights within Afghanistan and expressed concern over the harmful consequences of violent and terrorist activities on the capacity of the Afghan government to ensure the full enjoyment by the Afghan people of their human rights and fundamental freedoms. More generally, there is nothing in UNSCR 1890 (nor in any other relevant UNSCRs) which authorised the Afghan government to take measures to improve the security situation which violate its obligations under international human rights treaties. Afghanistan is not only a member of the United Nations but has ratified the International Covenant on Civil and Political Rights (the ICCPR), Article 9 of which is in substantially similar terms to Article 5 of the Convention.

223. As I have indicated, under the mandate conferred on ISAF by the UNSCRs, including Resolution 1890, its role was essentially ancillary to and supportive of the role of the Afghan government in providing security in Afghanistan. In circumstances where the applicable UNSCRs gave no authorisation to the Afghan government, which carried the primary responsibility for security, to detain people in violation of international human rights standards, they cannot reasonably have been intended to grant such licence to ISAF in carrying out its mandate of assisting the Afghan government in discharging that responsibility.

Was UK detention policy within the UN mandate?

224. In Helmand Province where SM was detained, UK armed forces were operating in difficult and dangerous conditions. Collecting evidence at the time of arrest which could be given to the Afghan authorities for use in a potential prosecution was an

arduous task which had to be accomplished in a hostile environment. The logistics of transfer to the Afghan authorities were also far from straightforward, requiring agreement from the Afghan authorities to accept a prisoner and then making practical arrangements for transfer. If the decision was made to release the prisoner, this had to be arranged and accomplished safely. According to Mr Henderson, the retired Lieutenant Colonel who gave evidence for SM, this was normally conducted via a release *shura* and involved local government officials and village elders.

225. In these circumstances I consider that detention in accordance with ISAF policy for up to 96 hours (or, exceptionally, a very short further period in order to effect release or transfer in safe circumstances) where considered necessary to assist the Afghan authorities to maintain security was within the mandate conferred by the relevant UNSCRs provided that it did not violate international human rights law. I conclude in part X that such detention was compatible with Article 5 of the Convention; and there is no suggestion that it violated any other relevant international norm. It follows that such detention was authorised by the relevant UNSCRs.

226. However, I do not consider that the change in UK detention policy introduced in November 2009 in so far as it departed from the standard ISAF policy was so authorised. There are two reasons for this. The first is my interpretation of the relevant UNSCRs as authorising detention of any individual who did not pose an imminent threat only for the purpose of delivering the detainee to the Afghan authorities and for no longer than was necessary for that purpose. The second reason is my conclusion in part X that detention (a) for longer than 96 hours without bringing the detainee before a judge and/or (b) solely for the purposes of interrogation was contrary to Article 5 of the Convention. As indicated, I do not consider that the UNSCRs are properly to be interpreted as authorising the UK government to violate the Convention.

Conclusions

227. I accordingly conclude that:

i) The applicable UNSCRs conferred on UK armed forces participating in ISAF authority to detain people where this was considered necessary to fulfil ISAF's mandate;

ii) However, this authorisation did not permit detention for any longer than was necessary to deliver the detained person to the Afghan authorities;

iii) Further and in any event, this authorisation did not displace or qualify the UK's obligations under the Convention and did not permit detention which violated Article 5 of the Convention;

iv) ISAF detention policy, which permitted detention for up to 96 hours, was within the scope of the authorisation given by the UNSCRs; however, the UK

national policy which allowed UK Ministers to extend this period for the purpose of 'intelligence exploitation' was not authorised by the UNSCRs.

IX. INTERNATIONAL HUMANITARIAN LAW

228. International humanitarian law ("IHL") is the body of international law which governs the way in which war is conducted. As with all international law, its two primary sources are international treaties and custom. A major part of IHL is contained in the four Geneva Conventions of 1949 by which nearly every state in the world has agreed to be bound. The Geneva Conventions have been supplemented by two Additional Protocols of 1977.

Armed conflicts

229. IHL applies only in relation to armed conflicts. A central distinction is drawn between two types of armed conflict. An international armed conflict is one between states.[4] A non-international armed conflict is one between a state and one or more organised non-state armed groups or between such groups themselves. Before a situation is classified as a non-international armed conflict, a certain intensity of hostilities and degree of organisation of the non-state armed group (or groups) is required.

230. IHL relating to non-international armed conflicts is much less developed than the law relating to international armed conflicts. The reasons for this are discussed in some of the large body of academic commentary with which I have helpfully been provided by counsel. It is clear that, historically, the reasons include: (1) the view that it is unnecessary to rely on international law in such conflicts, as states can rely on their domestic law to arrest and detain members of organised armed groups who engage in armed conflict within their territory; and (2) the reluctance of states to confer any form of recognition, legal status or legitimacy on rebels or insurgents.[5]

The conflict in Afghanistan

231. It is generally accepted – and common ground between the parties in this case – that, since the overthrow of the Taliban and establishment of a new Afghan government pursuant to the Bonn Agreement, there has been a non-international conflict in Afghanistan. In the taxonomy of such conflicts, the situation in Afghanistan can be classified as a "multi-national non-international armed conflict", i.e. one in which multi-national armed forces are fighting alongside the armed forces of a 'host' state, in its territory, against one or more organised armed groups.[6]

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[4] See Common Article 2 to the Geneva Conventions. Under article 1 of Additional Protocol I, armed conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" are also included.

[5] See e.g. Debuf, *Captured in War: Lawful Internment in Armed Conflict* (2013) ch III-I, pp.451-461.

[6] See J Pejic, '*Conflict Classification and the Law Applicable to Detention and the Use of Force*' in E Wilmhurst (ed), *International Law and the Classification of Conflicts* (OUP, 2012) ch 4, p.82.

The MOD's arguments

232. It is common ground that the branch of IHL relating to non-international armed conflicts applies to the activities of UK armed forces in Afghanistan. The MOD has advanced two arguments based on IHL, however, both of which are strongly disputed by the claimants. The first is that IHL provides a legal basis for detention by UK armed forces. The second argument, which builds on the first, is that Article 5 of the Convention is displaced or qualified by IHL.

233. In order to evaluate these arguments, it is necessary to identify the rules of IHL which apply to detention in non-international armed conflicts. As indicated, such rules consist of (a) relevant treaty provisions and (b) customary law.

Treaty law

234. The main treaty provision which applies to non-international armed conflicts is Common Article 3 of the Geneva Conventions. This states:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and at any place whatsoever with respect to the above-mentioned persons:
>
> a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> b) taking of hostages;
>
> c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly

> constituted court, affording all the judicial guarantees which are recognised as indispensible by civilised peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

235. Common Article 3 ("CA3") has been supplemented by Additional Protocol II of 1977 "relating to the protection of victims of non-international armed conflicts" ("AP2"). Article 1 of AP2 defines the "material field of application" of AP2 as armed conflicts which:

> "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

236. A key principle of IHL, reflected in both these treaty provisions, is that its obligations apply equally to all parties to a conflict. As stated in the Commentary on AP2 published by the International Committee of the Red Cross (1987 ed) at p.1345:

> "[AP2 and CA3] are based on the principle of the equality of the parties to the conflict. ... These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character."

237. It must be doubtful whether the Taliban or any other organised armed group exercises sufficient control over a part of Afghanistan to enable them to implement AP2. It is also unclear from the wording of Article 1 whether AP2 applies to the armed forces of states other than the state in whose territory the conflict is taking place. There is a strong body of opinion, however, relied on by the MOD, that AP2 has become part of customary IHL, and I shall assume this to be the case.

238. Article 5 of AP2, entitled "Persons whose liberty has been restricted", states as follows:

> "1. … the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for

reasons relating to the armed conflict, whether they are interned or detained:

(a) the wounded and the sick shall be treated in accordance with Article 7;

(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

(c) they shall be allowed to receive individual or collective relief;

(d) they shall be allowed to practise their religion …

(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

(a) except when men and woman of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;

(b) they shall be allowed to send and receive letters and cards …

(c) places of internment and detention shall not be located close to the combat zone. …

(d) they shall have the benefit of medical examinations;

(e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. …

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely …

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding."

Is there an implied power to detain?

239. Neither CA3 nor Article 5 of AP2 contains any express statement that it is lawful to deprive persons of their liberty in an armed conflict to which these provisions apply. All that they do is to set out certain minimum standards of treatment which must be afforded to persons who are detained during such an armed conflict. The MOD argues, however, that a power to detain is implicit in CA3 and AP2.

240. This argument has the support of some academic writers and of the International Committee of the Red Cross ("ICRC"). Thus, Jelena Pejic, the legal advisor to the ICRC, has written:

> "Internment is … clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of [AP2], which mentions internment in Articles 5 and 6 respectively …"

See Pejic, '*Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*' (2005) 87 (858) International Review of the Red Cross 375, 377. A similar view is expressed in *Gill & Fleck, The Handbook of the International Law of Military Operations* (2010) at p.471:

> "The law of non-international armed conflict is less explicit in stipulating the legal basis for operational detention than the law of international armed conflicts. However, a generic power to that effect is implicit in Common Article 3, in as much as it identifies as one category of persons taking no active part in hostilities 'those placed hors de combat by … detention'. Articles 5 and 6 of [AP2] also refer to 'persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', which makes it clear that the deprivation of physical liberty of a person is contemplated in the law applicable to non-international armed conflicts."

241. I am unable to accept the argument that CA3 and/or AP2 provide a legal power to detain, for five reasons.

242. First, I think it reasonable to assume that if CA3 and/or AP2 had been intended to provide a power to detain they would have done so expressly – in the same way as, for example, Article 21 of the Third Geneva Convention provides a power to intern prisoners of war. It is not readily to be supposed that the parties to an international convention have agreed to establish a power to deprive people of their liberty indirectly by implication and without saying so in terms.

243. Second, all that seems to me to be contemplated or implicit in CA3 and AP2 is that during non-international armed conflicts people will <u>in fact</u> be detained. Such detention may be lawful under the law of the state on whose territory the armed

conflict is taking place, or under some other applicable law; or it may be entirely unlawful. There is nothing in the language of CA3 or AP2 to suggest that those provisions are intended to authorise or themselves confer legality on any such detentions. The argument made by Pejic and by Gill & Fleck in the passages quoted above depends on eliding the crucial distinction between the factual reality of detention and the legal basis for it. Thus, when Pejic says that internment is clearly a measure that "can" be taken in non-international armed conflict, this is obviously true as a matter of fact and is in that sense "contemplated" in CA3 and AP2 (as stated by Gill & Fleck). It does not follow, however, that there is anything in these provisions which implies that internment is a measure that "can", in the sense of "may lawfully", be taken – still less that these provisions are themselves intended to provide a legal basis for detention.

244. Third, it seems to me that the clear purpose of CA3 and Article 5 of AP2 is inconsistent with the notion that they are intended to provide a legal power to detain. As noted by the ICRC in its Commentary on the Additional Protocols (1987 ed) at p.1344:

> "Like [CA3], [AP2] has a purely humanitarian purpose and is aimed at securing fundamental guarantees for all individuals in all circumstances."

Thus, as regards detention, the aim of both CA3 and Article 5 of AP2 is to guarantee certain basic minimum standards of treatment to all individuals who are deprived of their liberty for reasons relating to the armed conflict. The need to observe such minimum standards is equally relevant to all people who are in fact detained, and does not depend on whether or not their detention is legally justified.

245. Fourth, there are cogent reasons, mentioned earlier, which explain why states subscribing to the Geneva Conventions and Additional Protocols would not have agreed to establish by treaty a power to detain in the circumstances of a non-international armed conflict. In particular, given that CA3 applies to "each Party to the conflict" and AP2 applies to organised armed groups who are able to implement it, providing a power to detain would have meant authorising detention by dissident and rebel armed groups. That would be anathema to most states which face a non-international armed conflict on their territory and do not wish to confer any legitimacy on rebels and insurgents or accept that such groups have any right to exercise a function which is a core aspect of state sovereignty.

246. Fifth, I do not see how CA3 or AP2 could possibly have been intended to provide a power to detain, nor how they could reasonably be interpreted as doing so, unless it was possible to identify the scope of the power. However, neither CA3 nor AP2 specifies who may be detained, on what grounds, in accordance with what procedures, or for how long.

247. In the context of non-international armed conflicts, defining these matters poses intractable problems. The rules applicable to international armed conflicts are based on the assumption that there is a reasonably clear distinction between combatants and

civilians. Thus, the Geneva Conventions confer certain privileges and immunities on prisoners of war, who may be interned until the end of hostilities. In non-international armed conflicts such as that taking place in Afghanistan the distinction between combatants and civilians may often be elusive. UNSCR 1890 (2009), for example, refers to "violent and terrorist activities by the Taliban, Al-Qaida, illegally armed groups, criminals and those involved in the narcotics trade" – descriptions which themselves indicate that there are no clear distinctions between those who can be said to be parties to an armed conflict and ordinary criminals.

248. Another feature of non-international armed conflicts is that they may be of long and uncertain duration, as illustrated by the fact that such a conflict has now been continuing in Afghanistan for nearly 12 years. There may also be no clearly identifiable point at which it can be said that the hostilities have come to an end. In such circumstances a power to detain until the end of hostilities would be particularly problematic.

249. A solution to some of these difficulties advocated by the ICRC is to advocate a power of detention which depends, not on the status of the detainee, but on a determination that detention of the individual is justified by "imperative reasons of security": see e.g. ICRC Regional Consultations 2012 Background Paper '*Strengthening legal protection for persons deprived of their liberty in relation to non-international armed conflict'*. On this approach detention is justified as long as such "imperative reasons of security" continue to exist. Even if this approach were to become generally accepted, it would still be necessary to identify procedures by which such determinations are to be made.

250. None of these matters, however, is addressed by CA3 or AP2. This confirms that it is not the purpose of these provisions to establish a legal basis for detention.

251. All these reasons lead, in my view, to the clear conclusion that CA3 and AP2 are not intended to, and do not, provide a legal basis for detention. Rather, their purpose is simply to guarantee a minimum level of humanitarian treatment for people who are in fact detained during a non-international armed conflict.

Does a licence to kill imply a power to detain?

252. A further argument pressed by Mr Eadie QC on behalf of the MOD is that the ability to detain insurgents, whilst hostilities are ongoing, is an essential corollary of the authorisation to kill them. The MOD argues that those engaged in a military operation must be able to accept the surrender of somebody who poses a threat to them and their mission and must be able to engage an adversary without necessarily having to use lethal force. It would be a serious violation of IHL to deny quarter; yet how, counsel for the MOD asked rhetorically, would soldiers be able to accept the surrender of someone who represents an imminent threat to them unless they are permitted to detain the person who constitutes the threat and thereby render that person *hors de combat*?

253. This argument justifies the capture of a person who may lawfully be killed. But it does not go further than that.[7] It therefore does not begin to justify the detention policy operated by the UK in Afghanistan. In terms of the present case, the argument would justify the arrest of SM on the assumed facts, in circumstances where he was believed to represent an imminent threat. However, as soon as he had been detained and the use of lethal force against him could not be justified, the argument no longer provides a basis for his detention. Nor would the argument have justified the arrest – let alone the subsequent detention – of any of the PIL claimants, none of whom is alleged to have posed an imminent threat which could lawfully have been met by lethal force at the time of his arrest.

Customary international law

254. The MOD further contends that, even if there is no power to detain in a non-international armed conflict implicit in CA3 and AP2, such a power exists as a matter of customary international law.

255. The Statute of the International Court of Justice describes customary international law as "a general practice accepted as law": see Article 38(1)(b). It is generally agreed that the existence of a rule of customary international law requires the presence of two elements. The first is the existence of a general state practice. That practice need not be of any particular duration but it must be extensive and representative and virtually uniform. As stated by the International Court of Justice in the North Sea Continental Shelf cases, ICJ Reports 1969, p.43, para 74:

> "Although the passage of only a short period of time is not necessarily, or, of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligations is involved."

256. The second requirement, mentioned at the end of this passage, is a belief that the practice is a matter of right or obligation (*opinio juris*). As further stated in the North Sea Continental Shelf cases (para 77):

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The existence of such a belief, i.e. the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*."

[7] See e.g. Debuf, *Captured in War: Lawful Internment in Armed Conflict* (2013) p.389.

257. I have been shown no evidence of any recognition by states involved in non-international armed conflicts of IHL as providing a legal basis for detention. It is notable that in neither the Al-Jedda case nor the Al-Skeini case was it suggested by the UK government that IHL provided a legal basis for detention during the non-international phase of the armed conflict in Iraq. Nor has the MOD pointed to any official statement by the UK government (or any other government) which suggests that IHL does, or could, provide a legal basis for detention in any non-international armed conflict. Moreover, official MOD doctrine is inconsistent with any such assertion. Thus, the Joint Service Manual of the Law of Armed Conflict (2004), described in its preface as "a reference work for members of the United Kingdom's Armed Forces and officials within the Ministry of Defence and other departments of Her Majesty's Government", states (at p.388, para 15.5):

> "There is no consensus between states as to the extent to which rules of the law of armed conflict other than those specifically laid down in treaties apply to internal [i.e. non-international] armed conflicts."

In addition, I referred earlier (in paragraph 39) to Joint Doctrine Publication 1-10 which states MOD doctrine for detention operations in overseas military operations. Section 113 of JDP 1-10 (2006) says:

> "During hostilities not amounting to International Armed Conflict, UK Forces can expect to deal with two classes of captured or detained persons: a. internees. UK forces operating abroad may have a power to intern civilians under the host nation's law where they pose an imperative threat to the security of the force; such power may derive from the host state's own domestic law or from a UN Security Council Resolution. b. Criminal Detainees. UK Armed Force operating abroad may have the power (derived from the host state's own domestic law) to participate in the arrest of criminal suspects, or may assist the host nation's authorised personnel in the arrest of persons. …" [emphasis added]

This clearly indicates that the only potential sources of a power to detain are considered to be the host state's own domestic law (i.e. in this case the domestic law of Afghanistan) and UNSCRs. See also the Joint Services Manual, which states (at para 15.6.1) that "the law of the place where the conflict takes place continues to apply".

258. Furthermore, it seems to me that all the difficulties and uncertainties referred to above regarding the scope of any alleged power to detain under CA3 or AP2 equally affect any attempt to seek to identify such a power as a matter of customary IHL. In order to demonstrate a general practice of detention in non-international armed conflict recognised as a matter of legal right, it would need to be possible to identify with reasonable certainty the scope of the alleged rule of law in terms of who may be detained, on what grounds, subject to what procedures and for how long.

259. Efforts aimed at developing international legal standards in this area have evidently been hampered by various factors, including the reluctance of many to accept that new rules are needed and disagreement among those who wish to develop the law as to how it should be developed. Some scholars and the ICRC have argued that the rules for international armed conflict should be applied in non-international armed conflicts. Other scholars and human rights groups have advocated the use of national laws, guided by human rights law, to fill gaps. Others have argued that a new set of rules is needed.[8]

260. An influential study of customary international humanitarian law has been carried out by the ICRC: see ICRC, Henckaerts & Doswald-Beck, '*Customary International Humanitarian Law*' (2005) vol.1, pp.344-352. This study identifies what the authors consider to be 161 rules of customary IHL, one of which (rule 99) relates to deprivation of liberty. This rule is said to be that "arbitrary deprivation of liberty is prohibited". In relation to non-international armed conflicts, the commentary on the rule states that:

> "The prohibition of arbitrary deprivation of liberty … is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law. While all States have legislation specifying the grounds on which a person may be detained, more than 70 of them were found to criminalise unlawful deprivation of liberty during armed conflict. Most of this legislation applies the prohibition of unlawful deprivation of liberty to both international and non-international armed conflicts. Several military manuals which are applicable in or have been applied in non-international armed conflicts also prohibit unlawful deprivation of liberty."

The commentary goes on to identify what are said to be three procedural requirements established by human rights law. These are: (i) an obligation to inform a person who is arrested of the reasons for arrest; (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge; and (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.

261. Whether these matters can properly be regarded as established rules of customary international humanitarian law seems to me questionable. Even assuming that they can, however, rule 99 does not itself provide a legal basis for detention. It requires that there be such a basis provided by law; but it does not itself authorise or establish grounds for detention during an armed conflict.

The Copenhagen Process

262. The MOD's contention that a legal power to detain exists as a matter of customary IHL is primarily based on a set of principles and guidelines developed in the

[8] See e.g. Bellinger & Padmanabahan, *'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law'* (2011) 105(2) American Journal of International Law, p.201.

Copenhagen Process on the Handling of Detainees on International Military Operations. The Copenhagen Process was initiated by the Danish government in October 2007 and involved 24 states as participants, as well as representatives from the African Union, the European Union, NATO, the UN and the ICRC as observers. The process concluded in October 2012 with the publication of principles and guidelines which are intended to apply to international military operations in the context of non-international armed conflicts and peace operations ("the Copenhagen Process Principles").

263. The Copenhagen Process Principles apply to "the detention of persons who are being deprived of their liberty for reasons related to an international military operation" (Principle 1). The Principles include the following:

> "4. Detention of persons must be conducted in accordance with applicable international law. When circumstances justifying detention have ceased to exist a detainee will be released.
>
> 5. Detaining authorities should develop and implement standard operating procedures and other relevant guidance regarding the handling of detainees.
>
> …
>
> 12. A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.
>
> 13. A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to, as soon as circumstances permit, be transferred to or have proceedings initiated against him or her by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law.
>
> …"

264. Importantly, Principle 16 states:

> "16. Nothing in The Copenhagen Process Principles and Guidelines affects the applicability of international law to international military operations conducted by the states or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-state actors."

265. The official commentary on Principle 16 includes the following statement:

> "This savings clause … recognises that The Copenhagen Process Principles and Guidelines is not a text of a legally binding nature and thus, does not create new obligations or commitments. Furthermore, The Copenhagen Process Principles and Guidelines cannot constitute a legal basis for detention. Although some language, e.g. Principle 2, may reflect legal obligations in customary and treaty law, The Copenhagen Process Principles and Guidelines are intended to reflect generally accepted standards. In such instances, the applicability and binding nature of those obligations is established by treaty law or customary international law, as applicable, and not by The Copenhagen Process Principles and Guidelines. Since The Copenhagen Process Principles and Guidelines were not written as a restatement of customary international law, the mere inclusion of a practice in The Copenhagen Process Principles and Guidelines should not be taken as evidence that states regard the practice as required out of a sense of legal obligation."

266. This clear statement seems to me to be fatal to the attempt by the MOD to rely on the Copenhagen Process Principles as evidence of customary international law.

267. I note in any event that the Copenhagen Process Principles again do not themselves purport to provide a legal basis for detention. Principle 4 merely requires that detention must be justified on the basis of "applicable international law". According to the commentary (at para 4.1):

> "The applicable law may vary depending on whether there is a situation of armed conflict or not. As stated by the International Court of Justice 'some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law'."

The commentary also states (at para 4.3) that detention in some international military operations may be justified "pursuant to authorisations by the UN, or on the basis of international law by other competent international organisations such as the NATO, AU or the EU, or arrangements between a host state and state contributing military forces or international organisations."

Conclusion

268. For the above reasons, I am unable to accept the MOD's contention that IHL provides a legal basis for detention by UK armed forces operating in Afghanistan.

IHL as *lex specialis*

269. As mentioned, the second argument made by the MOD based on IHL, which seeks to build on the first, is that IHL displaces or qualifies Article 5 of the Convention.

270. This argument is founded on the principle that, where two bodies of law apply to a situation, the body of law which is more specialised or specific to the situation should be taken to qualify the more general body of law. This principle is expressed in the Latin maxim *lex specialis derogat lex generali*; and where this principle is invoked in international law the more specific body of law is referred to as the '*lex specialis*'. The essential rationale for the *lex specialis* principle is that, because special rules are designed for and targeted at the situation at hand, they are likely to regulate it better and more effectively than more general rules.

271. In essence, the MOD's argument is that armed conflict is an exception to the normality of peace. Human rights law is designed to apply in peace time or, even if also applicable during an armed conflict, is not specifically designed for such a situation. By contrast, IHL is specifically designed to apply in situations of armed conflict. In such circumstances, rules of IHL as *lex specialis* qualify or displace applicable provisions of a human rights treaty, such as Article 5 of the Convention.

272. In support of this argument, counsel for the MOD referred to advisory opinions of the International Court of Justice as well as to the opinions of some legal scholars. In particular:

i) In its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Rep 226, the ICJ stated (at para 25):

> "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."

ii) In its advisory opinion concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) ICJ Rep 136, the ICJ stated (at para 106):

> "As regards the relationship between IHL and human rights law, there are thus three possible situations: some rights may be exclusively matters of IHL; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, IHL."

The meaning of the *lex specialis* principle

273. Although easy enough to state in general terms, the exact meaning and effect of the *lex specialis* principle is more elusive and has been the subject of a substantial body of academic writing.[9] A central ambiguity in the principle seems to me to be reflected in the MOD's alternative contentions that Article 5 of the Convention is "displaced or qualified" by IHL. I think it useful to distinguish three ways in which, conceptually, the *lex specialis* principle could be said to operate.

Total displacement

274. The first and most radical of these would be to say that, in a situation of armed conflict, IHL as the *lex specialis* displaces Convention rights altogether.

275. Such a contention, however, seems to me impossible to maintain. In the first place, it cannot be said that there is any general acceptance of such a principle. If anything, the opposite is true. Thus, both advisory opinions of the ICJ quoted above hold that IHL and international human rights law are not mutually exclusive. In particular, although the ICJ's *dicta* in the Palestinian Wall opinion do little to illuminate the relationship between IHL and human rights law, they do at least serve to indicate that it is necessary to "take into consideration both these branches of international law". They are therefore inconsistent with the notion that IHL simply displaces international human rights law altogether in a situation of armed conflict. It may or may not be significant that, when citing these *dicta* in its more recent case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (2005) IJC Rep 116, para 216, the ICJ did not include the reference to IHL as *lex specialis*. But what is certainly significant is the Court's finding in the Armed Activities case that, as a result of acts committed by its armed forces, Uganda as an occupying power violated obligations under IHL and also violated various provisions of international human rights law: see para 219. That again demonstrates that the two branches of law are not mutually exclusive.

276. In addition, the United Nations has affirmed the principle that international human rights law continues to apply alongside IHL in situations of armed conflict. Thus, a Resolution of the UN General Assembly has stated:[10]

> "Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict."

Referring to the International Covenant on Civil and Political Rights, the UN Human Rights Committee has said that: [11]

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[9] I have found particularly instructive: Sassoli, '*The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflict*' and Milanović, '*Norm Conflicts, International Humanitarian Law, and Human Rights Law*', in ed. Orna Ben-Naftali, '*International Humanitarian Law and International Human Rights Law*' (OUP, 2011).

[10] UN GAOR, 29th Sess., Supp. No. 31.

> "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant for the purposes of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive."

277. In these circumstances it does not seem to me to be a tenable proposition that, as a matter of international law, IHL displaces international human rights law altogether in times of armed conflict.

278. Furthermore, even if such a proposition could be supported at the level of international law, I am unable to see how it could be translated into an argument capable of recognition by a court required to interpret the Convention or to apply the Human Rights Act. I can see no warrant in the text of the Convention for treating Article 5 as displaced by any other body of legal rules in a situation of armed conflict.

279. The difficulty is increased by the fact that the Convention contemplates and makes provision within itself for situations of war. Thus Article 15 (quoted at paragraph 154 above) permits a state to derogate from its obligations under the Convention in a time of emergency. The clear and necessary implication of Article 15 is that the Convention continues to apply in a situation of armed conflict except to the extent that (a) a contracting state derogates from its obligations under the Convention and (b) such derogation is permitted by Article 15.

280. The fact that the Convention continues to apply during armed conflict is, moreover, confirmed by the many decisions of the European Court in which it has been so applied. These include decisions concerning allegations of unlawful killing, ill treatment and detention during armed conflicts in Cyprus, Chechnya, Anatolia and Iraq. The Al-Skeini case, for example, concerned deaths which occurred during the military occupation of Iraq, and the Grand Chamber expressly affirmed (at para 164) that the obligation under Article 2 to investigate deaths – and hence also, by implication, the substantive obligation to protect life – "continues to apply in difficult security conditions, including in a context of armed conflict".

281. I conclude that it is impossible to maintain that in a situation of armed conflict IHL, by reason of the principle of *lex specialis*, displaces Convention rights altogether.

Does IHL prevail if it conflicts with the Convention?

282. A second, weaker version of the *lex specialis* principle would accept that the Convention continues to apply generally in a situation of armed conflict but would hold that, where there is a conflict between IHL and a state's obligations under the

[11] General Comment No. 31 [80]: Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2006) para 11.

Convention, IHL should prevail as the body of law more specifically tailored to the situation.

283. An area where such a conflict of obligations occurs concerns the detention of prisoners of war during an international armed conflict. Under Article 21 of the Third Geneva Convention, members of enemy armed forces may be interned as POWs on purely preventive grounds so that they do not rejoin the fighting. This may be done for the duration of the hostilities without any judicial or even administrative review of the detention, except where it is necessary in order to determine whether a detained person does have POW status. This internment regime is therefore inconsistent with Article 5 of the Convention which (as discussed in the next part of this judgment) does not permit purely preventive detention and provides for judicial review of decisions to detain.

284. At least arguably, however, even in a case where such a conflict of obligations occurs, the only way in which the European Court or a national court required to apply Convention rights can hold that IHL prevails over Article 5 is by applying the provisions for derogation contained in the Convention itself, and not by invoking the principle of *lex specialis*. In considering the extent to which derogation is "strictly required by the exigencies of the situation" and therefore permissible, Article 15(1) expressly allows regard to be had to a state's "other obligations under international law", which plainly includes IHL. The obligation of a state to comply with IHL would thus be a compelling justification for derogating from Article 5 in relation to the detention of POWs during an international armed conflict. However, in circumstances where the Convention itself defines the conditions in which and the extent to which derogation from its obligations is permitted, and makes specific provision for derogation in time of war, it is difficult to see that there is any room for the *lex specialis* principle to operate as a basis for disapplying the Convention when it conflicts with IHL.

285. I note also that in the Palestinian Wall opinion, immediately before the passage already quoted, the ICJ stated:

> "the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation ..."

286. The only authority to which counsel for the MOD are able to point to support the contention that the *lex specialis* principle can be applied to resolve a conflict between the Convention and IHL is the decision of the European Commission of Human Rights in Cyprus v Turkey (1982) 4 EHRR 482. That case concerned the detention of Greek Cypriots following the invasion and during the subsequent belligerent occupation of the north of Cyprus by the Turkish army in 1974. The Commission considered that the internment of Greek Cypriot military personnel and civilians violated Article 5 of the Convention. However, some of those interned had been accorded the status of POWs and, in circumstances where both Cyprus and Turkey were parties to the Third Geneva Convention and Turkey had made its intention to respect the Geneva Convention clear to the ICRC, the Commission did not find it "necessary to examine the question of a breach of Article 5" with regard to these

persons: see para 313. Although the principle is not expressly mentioned, this could be explained as a tacit application of the *lex specialis* principle to decide that the applicable IHL rules prevailed over Article 5. An alternative explanation appears from the dissenting opinion of two Commissioners (at para 7), who expressed the view that, even without a formal and public act of derogation, "measures which are in themselves contrary to a provision of the [Convention] which are taken legitimately under the international law applicable to an armed conflict are to be considered as legitimate measures of derogation from the obligations flowing from the Convention". That view was not shared, however, by the majority of the Commission who considered that Article 15 could not apply in the absence of a formal and public act of derogation by Turkey (paras 527-528).

287. The majority decision in Cyprus v Turkey (1982) 4 EHRR 482 contains no reasoning on the point and is a slender authority on which to base an argument that, in the event of a conflict between IHL and Article 5, the former prevails by reason of the principle of *lex specialis* and without the need for derogation. On the view I take, however, it is not necessary for me to decide this question, because I do not consider that there is any such conflict of obligations in relation to detention during a non-international armed conflict. That follows from my earlier conclusion that IHL does not provide a legal basis for detention in situations of non-international armed conflict.

Lex specialis as a principle of interpretation

288. A third version of the *lex specialis* principle treats it not as a principle for resolving conflicts between different bodies of law but as a principle of interpretation. On this view, the force of the principle is simply that, in a situation where a more specialised body of international law also applies, the provisions of the Convention should be interpreted so far as possible in a manner which is consistent with that *lex specialis*. Thus, in conditions of armed conflict, Article 5 (and other relevant articles) of the Convention should be interpreted so far as possible in a manner which is consistent with applicable rules of IHL.

289. I can see no difficulty with this, most modest version of the argument that IHL operates as *lex specialis*. The European Court has often stated that, as an international treaty, the Convention cannot be interpreted and applied in a vacuum and that it should be interpreted as far as possible in harmony with other principles of international law: see e.g. Loizidou v Turkey (1997) 23 EHRR 513 at para 43; Bankovic v Belgium (2001) 11 BHRC 435 at para 55; Al-Adsani v United Kingdom (2002) 34 EHRR 11 at paras 52-67; and Jones v United Kingdom, Application Nos 34356/06 and 40528/06 (14 Jan 2014) at paras 189, 195.

290. It was in this sense, as a principle of interpretation, that the ICJ applied the *lex specialis* principle in the Nuclear Weapons advisory opinion. In the passage quoted earlier, the ICJ in its advisory opinion stated that "the right not arbitrarily to be deprived of one's life applies also in hostilities", but then said that the question of what amounts to an arbitrary deprivation of life "falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict". A similar

approach could be adopted in interpreting Article 9(1) of the ICCPR, which prohibits "arbitrary arrest or detention".

291. Unlike Article 9(1) of the ICCPR, however, Article 5(1) of the Convention is much more specific and prohibits arrest or detention "save in the following cases" which are then exhaustively defined. Given the specificity of Article 5, there is little scope for *lex specialis* to operate as a principle of interpretation. Furthermore, in view of my conclusion that in a non-international armed conflict IHL does not specify grounds for detention or procedures to be followed, there are in my view no relevant rules of IHL with which to try to harmonise the interpretation of Article 5.

292. As I see it, where IHL would be relevant in applying the Convention is in situation where a state resorted to measures derogating from Article 5 on the basis that it was involved in a non-international armed conflict. In such circumstances it could be argued that, under customary IHL, certain fundamental guarantees against the arbitrary deprivation of liberty should still be respected (see paragraph 260 above). To the extent that such guarantees form part of customary IHL, derogations from them would be "inconsistent with [a state's] other obligations under international law" and therefore not permitted by Article 15.

Conclusion

293. Whichever version of the principle is relied on, the MOD's case that IHL as *lex specialis* displaces or qualifies Article 5 of the Convention seems to me to encounter formidable difficulties. One, insuperable difficulty derives from my conclusion that IHL does not provide a legal basis for detention in situations of non-international armed conflict. I have concluded that in its present stage of development IHL does not provide a legal power to detain nor does it specify grounds on which detention is permitted nor procedures governing detention in the context of a non-international armed conflict such as that taking place in Afghanistan. If these conclusions are correct, it follows that IHL is not intended to displace and is not capable of displacing human rights law in this context.

294. I conclude that in applying the Convention there is no scope for contending, as the MOD seeks to do, that IHL operates during a non-international armed conflict to displace or qualify Article 5.

VIIII. WAS THERE A BREACH OF ARTICLE 5?

295. Article 5 of the Convention states:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

296. The claimants contend that SM was deprived of his liberty in contravention of paragraphs 1, 3 and 4 of Article 5. In particular, they contend that Article 5(1) was contravened because SM's arrest and detention did not fall within any of the cases specified in Article 5(1) and were not in accordance with a procedure prescribed by law. Alternatively, if SM was arrested or detained in accordance with the provisions of Article 5(1)(c), he was not brought promptly before a judge, as required by Article 5(3). SM also and separately contends that he was denied the right under Article 5(4) to take proceedings to challenge the lawfulness of his detention.

297. The 110 days which SM spent in UK detention before he was handed over to the Afghan authorities can be broken down into three distinct periods:

i) The 96 hours following his capture/arrest on 7 April 2010 during which SM's detention was in accordance with ISAF policy;

ii) 25 days from 10 April until 5 May 2010 during which SM was detained on the authority of Ministers for intelligence purposes; and

iii) A further period of 81 days from 6 May until 25 July 2010, during which SM was detained for 'logistical' reasons pending his transfer to an Afghan prison.

298. I have to consider whether SM's detention during each of these periods complied with the requirements of Article 5.

Core principles

299. The essential purpose of Article 5 is to prevent people from being deprived of their liberty except in accordance with the rule of law. Three core principles embodied in Article 5 are (i) that there must be a legal basis for depriving someone of their liberty, (ii) that this basis must be reasonably certain, and (iii) that the deprivation of liberty must be in accordance with judicial process.

Article 5(1): was SM's detention lawful?

300. The first of these principles is expressed in the requirements of Article 5(1) that any arrest or detention of a person must be "lawful" and "in accordance with a procedure prescribed by law". In Medvedyev v France (2010) 51 EHRR 39, at para 79, the European Court explained that:

> "Where the 'lawfulness' of detention is an issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness."

In the Medvedyev case the Court found that the detention by the French navy of a ship and its crew suspected of drug smuggling had no legal basis either under international law or under French national law.

301. It seems to me to be an open question whether in a case where international law is relied on as providing a legal basis for detention, it is also necessary for the detention to comply with the applicable national law. Arguably, it is – at least in circumstances where the detaining authority (i.e. in this case the UK government) is operating on the territory of an independent sovereign state at the invitation or with the consent of the government of that state. If so, then on the basis of my findings in part IV as to the position in Afghan law SM's detention became unlawful for the purposes of Article 5(1) when he was kept in UK custody and not transferred to the Afghan authorities immediately following his capture. However, no argument was addressed to this point, and I shall proceed on the assumption that it is sufficient in order to establish the lawfulness of SM's detention to show that there was a legal basis for it under international law.

302. As outlined in part III, paragraph 35 above, ISAF policy permitted detention where necessary for ISAF force protection, self-defence or the accomplishment of ISAF's mission for a maximum of 96 hours, after which time an individual had either to be released or handed into the custody of the Afghan authorities. On the assumed facts, SM's arrest and the first 96 hours of his detention were in accordance with ISAF policy. I have found in part VIII of this judgment that ISAF's policy was within the mandate conferred by the relevant UNSCRs. I therefore conclude that SM's arrest and initial period of detention were lawful under international law and hence also for the purpose of Article 5(1).

303. However, I have also found in part VIII that the UK national policy introduced in November 2009 which permitted detention to be continued after 96 hours for the purpose of seeking to obtain intelligence, inconsistently with ISAF policy, was not within the authorisation given by the UNSCRs. In addition, in part IX I have rejected the MOD's contention that IHL provided a legal basis for detention. It follows that there was in my opinion no legal basis for SM's continued detention after 96 hours either in national or in international law. That conclusion is reinforced by my findings below that SM's detention after this time violated further requirements of Article 5 which represented obligations of the UK under international human rights law.

Article 5(1): the requirement of certainty

304. The requirement in Article 5(1) that detention must be "lawful" and "in accordance with a procedure prescribed by law" also includes the principle that the basis of detention must be reasonably certain. As the European Court went on to emphasise in the Medvedyev case (at para 80):

> "... where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow

> the citizens – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail."

See also R (Lumba) v Secretary for State for the Home Department [2012] 1 AC 245, 267 at para 32.

305. As described in part III of this judgment at paragraphs 49-50 above, UK detention policy was set out in Standard Operating Instruction J3-9, which in my view defined the conditions for deprivation of liberty with sufficient clarity and precision to meet the requirement of legal certainty.

306. There is no doubt that on the assumed facts SM's initial detention and subsequent extended detention for intelligence purposes were in accordance with SOI J3-9. However, it appears to me that his further period of detention of 81 days for logistical reasons was not.

307. As quoted earlier, the UK policy governing "logistical extensions" set out in part 2 of SOI J3-9 (at para 24) stated:

> "On some occasions, practical, logistic reasons will entail a requirement to retain a UK detainee for longer than the 96 hrs. Such occasions would normally involve the short-notice non-availability of pre-planned transport assets or NDS facilities to receive transferred detainees reaching full capacity. These occasions may lead to a temporary delay until physical means to transfer or release correctly can be reinstated."

This guidance clearly envisaged that an extension of detention for logistic reasons would be sought only as a temporary or short term measure. It would not reasonably be understood as allowing detention for a period measured not in days but in months.

308. It is also relevant to note that the UK had not given notice of any "national policy caveat" in relation to this aspect of ISAF detention policy. As quoted at paragraph 35 above, the relevant ISAF policy stated:

> "A detainee may be held for more than 96 hours where it has been necessary in order to effect his release or transfer in safe circumstances. This exception is not authority for longer term detention but is intended to meet exigencies such as that caused by local logistical conditions e.g. difficulties involving poor communication, transport or weather conditions or where the detainee is held in ISAF medical facilities and it would be medically imprudent to move him."

309. I think it clear that SM's detention for 'logistical' reasons for a period of 81 days fell outside the scope of what was contemplated in the applicable UK and ISAF detention

policies. Alternatively, if it be suggested that the UK policy was intended to encompass periods of extended detention for such reasons longer than a few days, then the policy fails the test of legal certainty because it provides no guidance which specifies with any clarity or precision the permitted length of such extended detention. In either case this period of SM's detention was arbitrary because it was not carried out under standards which were clearly defined and reasonably foreseeable in their application.

Article 5(1): the purpose of detention

310. The manner in which Article 5 embodies the third principle mentioned earlier – that the deprivation of liberty must be in accordance with judicial process – is more complex. The archetypal case in which deprivation of liberty is justified is where a person has been convicted of a criminal offence by a court. Article 5 takes account of the fact that it is sometimes necessary to detain an individual who has not (or not yet) had a criminal trial, but it tightly specifies the circumstances in which this is permissible by allowing detention only for the purposes which are specified in sub-paragraphs (a)-(f) of Article 5(1). As emphasised by the European Court in Al-Jedda v United Kingdom (2011) 53 EHRR 23 at para 99 (and in many other cases), these paragraphs "contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty". Importantly, the mere fact that someone is reasonably believed to represent a security threat is not a justifiable ground for detention under Article 5(1), nor is detention permitted solely for the purpose of interrogation with a view to obtaining valuable intelligence. As a general principle, detention is permitted under Article 5(1) only pursuant to the order of a court or for the purpose of judicial process.

Article 5(1)(b): alleged obligation to detain

311. The MOD has sought to argue that the detention of SM fell within Article 5(1)(b), which permits the lawful arrest or detention of a person "in order to secure the fulfilment of any obligation prescribed by law". The MOD contends that the UK was under an obligation to detain SM pursuant to the UN Charter, as held by the House of Lords in Al-Jedda v Secretary of State for Defence [2008] 1 AC 332 (see paragraphs 198-202 above), and that SM was detained in order to secure the fulfilment of that obligation within the meaning of Article 5(1)(b).

312. That contention is inconsistent with the case law of the European Court on the meaning of Article 5(1)(b), which was recently restated and applied in the case of Ostendorf v Germany, Application No 15598/08 (7 March 2013). In particular, a long line of decisions of the Court establishes that Article 5(1)(b) "concerns cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation incumbent on him, and which he has until then failed to satisfy": see the Ostendorf case at para 69; and e.g. Engel v The Netherlands (1979-80) 1 EHRR 647, para 69; Guzzardi v Italy (1981) 3 EHRR 333, para 101; Ciulla v Italy (1991) 13 EHRR 346, para 36. Thus, the obligation referred to in Article 5(1)(b) is an obligation incumbent on the detainee, and not an obligation incumbent on the detaining authority. Further requirements are that, in order to be covered by Article

5(1)(b), the arrest and detention must aim at or directly contribute to securing the fulfilment of the obligation, and that, as soon as the relevant obligation has been fulfilled, the basis for detention under Article 5(1)(b) ceases to exist: see the Ostendorf case at paras 71-72 (and the cases there cited). The latter requirement, in particular, would be nonsensical if the relevant obligation could be an obligation incumbent on the authority to detain, since it would mean that at the moment when detention was effected the basis for detention under Article 5(1)(b) would cease to exist.

313. Article 5(1)(b) is therefore not capable of applying in this case.

314. I do not in any event accept the premise that the UK was under an obligation to detain SM. I have found that states participating in ISAF were not authorised, let alone obliged, either by Afghan law or by the applicable UNSCRs to detain suspected insurgents for longer than the maximum of 96 hours permitted by the ISAF policy on detention. Even if I am wrong about this, I cannot accept that the UK would have been in breach of an obligation under international law if it had not chosen to adopt a national detention policy which differed from the standard ISAF policy or if, in the particular case of SM, a Minister had not decided to extend his detention for intelligence purposes or if the UK had not kept him in detention for a further 81 days before he was transferred to the Afghan authorities. It is true that, as discussed earlier in this judgment, the House of Lords in the Al-Jedda case considered that, for reasons relating to the role of the United Nations, the term "obligations" as it is used in Article 103 of the UN Charter is to be given a broad meaning which includes conduct authorised by the Security Council as well as conduct which is required. There is, however, no similar justification for giving the term "obligation" such a broad and unnatural meaning where it appears in Article 5(1)(b) of the Convention. To the contrary, to do so would be inconsistent with the jurisprudence which requires the cases set out in Article 5(1) to be interpreted narrowly and the "obligation prescribed by law" referred to in paragraph (b) to be a "specific and concrete" obligation: see the Ostendorf case at para 69 and the other cases cited above.

Articles 5(1)(c) and 5(3)

315. The MOD also relies on Article 5(1)(c). This permits:

> "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

The requirement that the arrest or detention must be for the purpose of bringing the person before the competent legal authority applies to each of the three categories of case referred to in this provision. That is, it applies irrespective of whether the person is detained (i) on reasonable suspicion of having committed an offence or (ii) to prevent him committing an offence or (iii) to prevent him from fleeing after having

committed an offence: see Lawless v Ireland (No 3) (1979-80) 1 EHRR 15 at paras 13-14.

316. Article 5(1)(c) needs to be read together with Article 5(3), which states:

> "Everyone arrested or detained in accordance with the provision of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power."

317. Four points about the effect of these provisions, relevant in the present case, are confirmed by the case law of the European Court.

318. First, the phrase "competent legal authority" in Article 5(1)(c) means the same as "a judge or other officer authorised by the law to exercise judicial power", which is the description used in Article 5(3). This description is wider than the term "court", but the officer authorised to exercise "judicial power" must be independent of the executive and of the parties: see e.g. Schiesser v Switzerland (1979) 2 EHRR 417 at para 29.

319. Second, it has also been clearly established since the case of Schiesser v Switzerland (1979-80) 2 EHRR 417 (para 31) that the review by a judicial officer guaranteed by Article 5(3) has both a procedural and a substantive requirement. The procedural requirement obliges the judicial officer to hear in person the individual brought before him; and the substantive requirement obliges the officer to consider whether there are reasons to justify the detention and to order release if there are not such reasons: see also McKay v United Kingdom (2007) 44 EHRR 41 at para 35.

320. Third, the case law confirms that the purpose of bringing a suspect before a competent legal authority has to be considered independently of the achievement of that purpose. Thus, to justify detention under Article 5(1)(c), it is not necessary that the detaining authority has sufficient evidence to bring criminal charges. The purpose can be conditional in the sense that the intention is to bring the detainee before the competent authority if sufficient usable evidence is obtained through investigations following arrest: see Brogan v United Kingdom (1988) 11 EHRR 117 at para 53. By the same token, the fact that a detained person is released without ever being charged or brought before a judicial officer does not in itself amount to a breach of Article 5(3). As the Court said in the Brogan case (at para 58):

> "No violation of Article 5(3) can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible."

321. Fourth, the period for which a person may be detained on suspicion of committing an offence without being brought before a judicial officer is short. Where the English text of Article 5(3) uses the word "promptly", the French text uses the word "aussitôt", which literally means "immediately". In Brogan v United Kingdom (1988) 11 EHRR 117 at para 59, the European Court said that:

> "The use in the French text of the word 'aussitôt', with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is the point of effectively negativing the state's obligation to ensure a prompt release or a prompt appearance before a judicial authority."

322. The Brogan case concerned four suspected members of the IRA and INLA who were detained in Northern Ireland under the Prevention of Terrorism Act for periods ranging from four days and six hours to six days and 16 ½ hours, before being released without charge. The UK government argued that, in view of the nature and extent of the terrorist threat at the time and the resulting problems in obtaining evidence sufficient to bring charges, the power to detain for up to seven days was an indispensible part of the efforts to combat that threat: see Brogan v United Kingdom (1988) 11 EHRR 117 at para 56. The European Court, however, found (at para 62) that, even the shortest period of detention of four days and six hours did not comply with Article 5(3), and that:

> "to attach such importance to the special features of this case as to justify so lengthy periods of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word 'promptly'. An interpretation to this effect would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision."

323. Similarly, in McKay v United Kingdom (2007) 44 EHRR 41, at para 33, the European Court emphasised that:

> "The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberties. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision."

The Court identified the period within which an individual must be brought before a judge in order to comply with Article 5(3), by reference to the Brogan case, "as being a maximum [of] four days": see para 47.

324. The conclusion to be drawn from the case law is thus that where a person is detained on reasonable suspicion of having committed an offence any period of detention in excess of four days without bringing the person before a judge is *prima facie* too long. In circumstances where most of the nations participating in ISAF are also parties to the Convention, I do not suppose it to be a coincidence that ISAF policy set 96 hours as the maximum permitted period of detention within which the individual had to be released or transferred into the custody of the Afghan authorities.

325. Counsel for the PIL claimants submitted that Article 5(1)(c) and Article 5(3) are to be read together in such a way that it is part of the "purpose" referred to in Article 5(1)(c) that the detained person will be brought promptly before the competent legal authority. In support of this contention, they cited Ireland v United Kingdom (1979-80) 2 EHRR 25, para 199, where the Court said that the measures of arrest and detention must be:

> "effected for the purpose of bringing the persons concerned 'promptly' before the 'competent legal authority', namely 'a judge or other officer authorised by law to exercise judicial power'."

326. I accept that Article 5(1)(c) and Article 5(3) must be read together in the sense that they provide a single scheme. However, I see no warrant for reading into Article 5(1)(c) the word "promptly" which is not used in that provision. Nor, given the protection provided by Article 5(3) is it necessary to do so in order to make the protection given by Article 5(1)(c) effective. Furthermore, re-writing Article 5(1)(c) in such a way would be inconsistent with the principle mentioned above that the purpose of bringing a suspect before a competent legal authority has to be considered independently of the achievement of that purpose.

327. If appearance before a judge is not achieved promptly and the individual is nevertheless still kept in detention, his right to liberty is at that point infringed. There is no need or justification to back-date the infringement to an earlier point at which, although detained for the purpose of bringing him before a competent legal authority, the purpose was not to do so "promptly". Insofar as the *dictum* of the European Court in Ireland v United Kingdom suggests otherwise, it cannot in my view be regarded as correct.

328. That contention is, in addition, inconsistent with the decision of the European Court in De Jong, Baljet and Van den Brink v The Netherlands (1984) 8 EHRR 20. In that case the applicants were military conscripts who were arrested for refusing to obey orders. They did not dispute that they were reasonably suspected of having committed an offence under the Dutch Military Code and that the suspicion persisted throughout the period of their detention. They contended, however, that the mere persistence of a suspicion was not sufficient, after a certain lapse of time, to warrant continued custody (see para 43). The Court rejected that contention, stating (at para 44):

> "Whether the mere persistence of suspicion suffices to warrant the prolongation of a lawfully ordered detention on remand is

> covered, not by Article 5(1)(c) as such, but by Article 5(3); it is essentially the object of Article 5(3), which forms a whole with paragraph 1(c), to require provisional release once detention ceases to be reasonable."

The Court went on to hold that there was a breach of Article 5(3) because the applicants were not brought "promptly" before a judicial officer nor were they released "promptly" before any judicial control of their detention would have been feasible.

329. This decision confirms that there is no time constraint built into Article 5(1)(c) and that the point at which detention for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence becomes unjustified is when the period within which Article 5(3) requires this to be done promptly expires without the individual being released.

The first period: SM's arrest and first 96 hours of detention

330. According to Mr Devine, the transfer of detainees to the Afghan authorities for investigation and prosecution is the intended aim of all UK detention operations. Certainly, on the assumed facts of the present case I have no doubt that SM was arrested and initially detained for the purpose of bringing him before an Afghan prosecutor or judge in circumstances where (a) he was captured after a fire fight having attempted to flee and apparently discarded a RPG launcher and ammunition and (b) he was believed from intelligence to be a Taliban commander who had been involved with the production of improvised explosive devices.

331. I have found in part VIII of this judgment that although the applicable UN Security Council Resolutions authorised detention by UK armed forces participating in ISAF only for such time as was necessary to deliver the detained person to the Afghan authorities, ISAF's policy was within the scope of this authorisation. For similar reasons I consider that detention in accordance with ISAF policy for up to 96 hours was compliant with Article 5(3). If SM had been released within that period, he would have been released 'promptly' before any judicial control of his detention was feasible.

332. However, it is equally clear that detention for longer periods was not consistent with the requirement to bring a person promptly before a judicial officer. On any view, the detention of SM in this case for 110 days without bringing him before a judge was a stark violation of Article 5(3).

The second period: SM's detention for 25 days for interrogation

333. The extension of SM's detention after 96 hours was authorised by Ministers solely for the purpose of interrogating him with the aim of gaining valuable intelligence. Not only is that the sole purpose of the extension alleged in the MOD's Defence, but there

was no other criterion set out in the UK policy guidance SOI J3-9 which could have been used by Ministers to approve an extension of detention at that time. As already indicated, that is not a purpose for which detention is permitted under Article 5(1).

334. Even if (contrary to my view) it could be said that SM was being detained during this period for the purpose of bringing him before the competent authority on reasonable suspicion of having committed an offence, his detention did not comply with Article 5(3) as he was not brought promptly – or indeed at all – before a judicial officer.

The third period: SM's 'logistical' detention for 81 more days

335. Following SM's last detention review on 4 May 2010, the Afghan authorities said that they wished to accept SM into their custody but did not at that time have the capacity to do so at the prison to which he was to be transferred. During this third period of detention between 6 May 2010 and 25 July 2010, therefore, SM was again being held for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.

336. SM's detention during this period was contrary to Article 5(3) because he was not brought before a judicial officer promptly or at all. The MOD attempted to meet this point in a number of ways, none of which in my opinion provides any sufficient answer to it.

Lack of prison capacity

337. The MOD contended that, in assessing promptness, account should be taken of the fact that, at times, Afghanistan lacked sufficient capacity to accommodate detainees. That fact might justify an arrangement under which, by agreement with the Afghan authorities, detainees were held on UK bases instead of Afghan prisons until space in an Afghan prison became available. But it cannot by itself justify keeping people in detention without bringing them before a judicial officer. It is the duty of the UK to secure that there are forms of judicial control adapted to the circumstances and compatible with the Convention: see Demir v Turkey (2001) 33 EHRR 43 at para 41; Ozkan v Turkey, App No 21689-93 (6 April 2004) at para 368. The MOD has not adduced any evidence to show that it was impracticable either to arrange for detainees to be brought before an Afghan judicial officer in liaison with the Afghan authorities or, alternatively, to arrange for detention reviews to be carried out by a British judicial officer. If, however, neither of these arrangements was feasible then, as discussed above, difficulty in complying with Article 5(3) cannot dilute its meaning.

338. Counsel for the MOD also submitted that, in assessing promptness, the court should strike a balance between the interests of the person who is detained and the right to life of those civilians and armed forces personnel who would be put at real and immediate risk by the release of a person who puts their lives in peril. It was submitted that the Convention must be read as a whole and that, in the hierarchy of fundamental human rights, the rights of others to life under Article 2 must take precedence over the right to liberty.

339. If this argument were accepted, it would emasculate Article 5 by allowing a state to detain someone whom it believes to be sufficiently dangerous without complying with the safeguards set out in that provision. Such an approach would be inconsistent with the express terms of Article 5, which leave no scope for any balancing exercise of the kind suggested. It would also undermine the essence of the right protected by Article 5(3), which requires that individuals are not deprived of their liberty based simply on the belief of the executive that they have committed an offence without an opportunity to have the merits of their detention reviewed by an independent judge.

340. Similar arguments have, moreover, been rejected on several occasions by the European Court. For example, in A v United Kingdom (2009) 49 EHRR 29 the Court declined to accept an argument made by the UK government that Article 5(1) "permits a balance to be struck between the individual's right to liberty and the state's interest in protecting its population from terrorist threat". The Court held this argument to be inconsistent with the principle that paragraphs (a) to (f) amount to an exhaustive list of cases which detention is permitted and said (at para 171):

> "If detention does not fit within the confines of the paragraph as interpreted by the Court, it cannot be made to fit by appeal to the need to balance the interests of the state against those of the detainee."

The Court further observed (at para 172) that it has, on a number of occasions, found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5(1). It would be equally incompatible with that fundamental right, as well as inconsistent with the express language of the Convention, to permit internment or preventive detention without charge by allowing a balancing exercise to be conducted in applying Article 5(3).

Did detention reviews comply with Article 5(3)?

341. An alternative contention put forward by the MOD is that, in the context of the armed conflict in Afghanistan, the "competent legal authority" referred to in Article 5(1)(c) can be interpreted as including a non-judicial authority, as can the corresponding reference to "a judge or other officer authorised by law to exercise judicial power" in Article 5(3). For the reasons indicated above, this contention is inconsistent with the language and purpose of these provisions, as well as with the long established case law of the European Court which confirms that it is a defining characteristic of the "judge or other officer authorised by law to exercise judicial power" that he or she is independent of the executive.

342. Although the merits of SM's detention were reviewed by UK officials and by a UK Minister within 96 hours of his capture, the review did not comply with Article 5(3) in two fundamental respects:

i) The review was carried out by the executive, and not by a judicial officer independent of the executive as Article 5(3) requires; and

ii) SM was not brought before and heard by the detaining authority, and was given no opportunity to make representations.

Divide and tailor

343. I referred in part VI above to the principle endorsed by the European Court in the Al-Skeini case that the obligation under Article 1 to secure Convention rights can be "divided and tailored" to reflect the extent of the relevant control on which extraterritorial jurisdiction is founded. Counsel for the MOD submitted that, in accordance with this principle, if Article 5(3) cannot be interpreted sufficiently flexibly to accommodate the fact that the UK had no power to bring SM before an Afghan court, then it must be regarded as inapplicable.

344. As already mentioned, the MOD has not shown that it was impracticable either to arrange for detainees awaiting transfer to an Afghan prison to be brought before an Afghan judicial officer in liaison with the Afghan authorities or, alternatively, to arrange for detention reviews to be carried out by a British judicial officer. Even if, however, neither of these arrangements was feasible, there is in my view sufficient flexibility in Article 5(3) by reason of the fact that it did not require the UK authorities to procure that an arrested person was brought promptly before a judicial officer unless they chose to keep that person in their custody. Thus, Article 5(3) could be complied with by releasing the arrested person if he could not be transferred promptly into the custody of the Afghan authorities. It cannot therefore be said that it was impossible for the UK to secure the right to liberty guaranteed by the Convention. Furthermore, the reasons which constrained the ability of UK forces to keep people lawfully in their custody derived from the inability to fulfil the object of detention operations – which was to deliver those arrested to the Afghan authorities – and not from a lack of extraterritorial power.

Article 5(1)(f): action taken with a view to "deportation or extradition"

345. The requirement in Article 5(3) to bring the detained person promptly before a judicial officer applies only in relation to anyone arrested or detained in accordance with Article 5(1)(c), and not where the detention is effected under one of the other paragraphs of Article 5(1). Another argument advanced by the MOD is that Article 5(3) was not applicable as the detention was justified under Article 5(1)(f).

346. Article 5(1)(f) permits "the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation or extradition". Counsel for the MOD argued that, if the UK is treated as having jurisdiction under Article 1 of the Convention over people held in UK detention centres in Afghanistan, then Article 5(1)(f) must be interpreted consistently with this so as to apply to a person who is detained with a view to being transferred from the jurisdiction of the UK to the jurisdiction of Afghanistan.

347. I see force in the argument that "deportation" and "extradition" are not terms of art and refer essentially to the transfer of an individual from the jurisdiction of one state

to that of another; and also that this provision should be interpreted in a way which is consistent with the interpretation given to Article 1, so that it is capable of applying when jurisdiction is based on physical control exercised over an individual on foreign territory as well as in the ordinary case where it is founded on territorial sovereignty. However, it is a requirement of Article 5(1)(f) that "action is being taken" against the detained person with a view to deportation or extradition. This clearly contemplates ongoing activity, typically if not necessarily in the nature of legal proceedings. Thus, in A v United Kingdom (2009) 49 EHRR 29, at para 164, the European Court said:

> "Any deprivation of liberty under the second limb of Article 5(1)(f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f)."

See also Chahal v United Kingdom (1997) 23 EHRR 413 at para 113.

348. On the assumed facts it cannot be said that any action was being taken with a view to the "deportation or extradition" of SM before the Afghan authorities had stated on 6 May 2010 that they wished to accept SM into their custody. Nor, however, is there any allegation or evidence of any such action being taken after that time. According to the MOD's case, SM remained in UK detention, not because any proceedings were in progress or because action of any other kind was being taken to secure his transfer, but simply because there was no room to accommodate him at NDS Lashkar Gar. In these circumstances there does not seem to me to be any scope for justifying his detention under Article 5(1)(f).

349. In any event, it is a requirement of detention under Article 5(1)(f), as it is under all the sub-paragraphs of Article 5(1), that the detention must be lawful, which includes the requirement discussed above that the detention must be compatible with the purpose of protecting the individual from arbitrary deprivation of liberty: see e.g. Chahal v United Kingdom at para 118; A v United Kingdom at para 164. For the reasons already given, I have found that the detention of SM after 96 hours was unlawful and that his detention from 6 May 2010 onwards was not in accordance with ISAF or UK standard operating procedures (or any other articulated policy) and was therefore also arbitrary for this reason.

Article 5(2)

350. Article 5(2) states that:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

351. The MOD say that, on his arrival at Camp Bastion following his arrest, SM was informed, with the aid of an interpreter, that he had been detained because he was considered to pose a threat to the accomplishment of the ISAF mission and that he

would either be released or transferred to the Afghan authorities as soon as possible. On this basis Article 5(2) was complied with.

Article 5(4): *habeas corpus*

352. Article 5(4) provides that:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

353. Article 5(4) operates independently of Article 5(1). Hence, even if SM's detention was lawful under Article 5(1), there was still an obligation to comply with Article 5(4).

354. While the "court" referred to in Article 5(4) does not have to be a court of law of the classic kind integrated within the judicial machinery of the state, it must be a body of a judicial character which is independent of the executive and of the parties: see Benjamin and Wilson v United Kingdom (2003) 36 EHRR 1 at para 33. Furthermore, the proceedings must comply with basic requirements of procedural fairness, including at a minimum an opportunity to make representations, if not an oral hearing: see A v United Kingdom (2009) 49 EHRR 29 at paras 203-204. As stated in Stephens v Malta (No 1) (2010) 5 EHRR 8, para 95:

> "The possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty."

355. For similar reasons as establish a breach of Article 5(3), there was also a clear breach of SM's rights under Article 5(4). In particular, although the term "speedily" indicates a lesser urgency than "promptly", it is impossible to say that this requirement was complied with when SM was given no opportunity to have the lawfulness of his detention decided by a court throughout the entire period of his detention by the UK. Such reviews as took place were insufficient for at least two reasons:

i) The reviewing bodies were not independent of the executive. All reviews were conducted by Ministers, senior government officials or a military detention review committee; and

ii) Not only was there no hearing but SM was given no opportunity to make representations of any kind, either himself or through a representative.

Conclusions

356. I conclude that the arrest of SM and his detention by UK armed forces for the first 96 hours of his captivity were in accordance with Article 5. However, his subsequent detention after 96 hours violated Article 5 because:

i) there was no lawful basis for his detention either under the national law of Afghanistan or under international law;

ii) in so far as the purpose of his detention was to bring him before the competent legal authority on reasonable suspicion of having committed an offence, that was not done promptly;

iii) SM's detention for 25 days for the purposes of interrogation was not for a purpose permitted by Article 5(1);

iv) his further detention from 6 May until 25 July 2010 was not in accordance with any policy for detention adopted by ISAF or the UK and was therefore arbitrary;

v) SM was denied the right of *habeas corpus* guaranteed by Article 5(4).

357. It follows from these conclusions that SM has an "enforceable right to compensation" under Article 5(5).

XI. ACT OF STATE

358. Although I have found that SM's detention was unlawful such that he is entitled to compensation under the law of Afghanistan and Article 5 of the Convention, the MOD does not accept that these rights are enforceable in the English courts. It is the MOD's case that the detention of SM in Afghanistan falls within a class of protected governmental acts known as 'acts of state' and that in these circumstances the court has no jurisdiction to entertain a claim for damages against the UK government whether it is based on Afghan law or on the Human Rights Act and Article 5 of the Convention.

Meaning of 'act of state'

359. There is no clear or agreed definition of what constitutes an 'act of state'. A distinction is, however, generally drawn between acts of foreign states and acts of the British state (often referred to as 'Crown acts of state').

360. The branch of the doctrine concerned with acts of foreign states is the subject of a substantial body of case law and the basic principle is well established. In Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883 at para 135, Lord Hope said:

> "There is no doubt as to the general effect of the rule which is known as the Act of State rule. It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts."

The precise scope and limits of the foreign act of state doctrine are much less certain, and have recently been the subject of detailed examination by the Court of Appeal in Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2) [2013] 3 WLR 1329.

361. By contrast, there have been very few cases in modern times concerned with Crown acts of state. Nor is there any consensus as to the principle or principles which underpin this branch of the doctrine. In Nissan v Attorney General [1970] AC 179, the leading case in the twentieth century concerned with Crown acts of state, Lord Wilberforce cited the following definition (at p.231):[12]

> "An act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown."

However, Lord Wilberforce continued:

> "This is less a definition than a construction put together from what has been decided in various cases; it covers as much ground as they do, no less, no more. It carries with it the warning that the doctrine cannot be stated in terms of a principle but developed from case to case …"

The second Al-Jedda case

362. The most recent and for present purposes most relevant case in which the doctrine of Crown act of state has been considered is Al-Jedda v Secretary of State for Defence [2009] EWHC 397 (QB) and [2011] QB 773 (Court of Appeal). This action followed on from the first Al-Jedda case, discussed earlier, in which Mr Al-Jedda sought judicial review of his detention by UK armed forces in Iraq on the ground that it infringed his rights under Article 5 of the Convention. In the second action, he claimed damages in respect of the period from 20 May 2006 when Iraq's new Constitution came into force until his release in December 2007 on the ground that he had been unlawfully detained during this period and had a right to damages under Iraqi law.

[12] The definition was formulated by Professor Wade.

363. At the trial of this second action Underhill J found that Mr Al-Jedda's detention had been lawful under Iraqi law. He therefore dismissed the claim. This decision was affirmed by the Court of Appeal (Dyson JSC and Elias LJ, Arden LJ dissenting on this issue).

364. In the light of his conclusion that Mr Al-Jedda's detention was lawful, it was not strictly necessary for the judge to deal with alternative grounds of defence relied on by the Secretary of State, one of which was based on the doctrine of Crown act of state. Underhill J nevertheless considered these arguments and concluded that, even if the claimant's detention was unlawful as a matter of Iraqi law, it was an act of state and was not justiciable in the English courts.

365. In considering this issue, Underhill J focused on the decision of the House of Lords in Nissan v Attorney General, *supra*. In that case the plaintiff was a British subject who ran a hotel in Cyprus which was taken over by British troops who were part of a peace-keeping mission. Initially the troops were part of a truce force operating in Cyprus under an agreement between the governments of Cyprus and the United Kingdom. Subsequently they became part of a United Nations peace-keeping force. The plaintiff brought an action in the English High Court claiming compensation for the occupation of his hotel and damage allegedly done to his property by the British troops billeted there. Preliminary issues were tried which included the question whether the alleged actions of the British troops were acts of state so that no claim lay against the UK government.

366. The House of Lords held that a defence of act of state was not available. Lord Reid reached that conclusion on the basis that the plaintiff was a British subject. The other four members of the appellate committee left open the question whether a defence of act of state can ever be relied on against a British subject, holding that the acts alleged did not in any event come within the scope of the doctrine. They all gave separate speeches which differed in some respects in their analysis. However, all four members of the committee agreed that, while the making of the treaty (agreement) between the Cyprus government and the British, Greek and Turkish governments was an act of state and some acts done in performance of the treaty might be acts of state, the occupation of the hotel and the damage allegedly done to it were not sufficiently closely connected to the making of the treaty to fall within the scope of the doctrine.

367. Applying this approach in the Al-Jedda case, Underhill J (at para 76) started from the position that the decision to contribute British forces to the Multi National Force in Iraq was plainly an act of state. That was because, although not undertaken pursuant to a specific prior treaty obligation, it was "quintessentially a policy decision in the field of foreign affairs". The judge then identified the relevant question as being whether the claimant's internment by British forces had a sufficiently close link with that decision. He concluded that it did. This was because:

> "internment where necessary for imperative reasons of security constituted a positive obligation on the United Kingdom (once it accepted the invitation to contribute to the MNF): although the act of state rule might apply even in the absence of such an obligation, its justification is clearer in such a case. In my

> judgment it must follow that individual acts of internment were, in Lord Morris's phrase, done 'in performance of' the original decision to contribute forces, or, in Lord Wilberforce's, had a sufficiently 'close' link with that decision. In Lord Pearce's language, acts of internment were not a 'subsidiary matter', any more than straightforward military operations were: they were part of the obligation which the United Kingdom government had accepted. Put as simply as possible, it had been asked by the Iraqi government (and the United Nations) to intern people on its territory in certain specified circumstances."

368. As Mr Al-Jedda was a British citizen, Underhill J went on to consider the question left open in the Nissan case as to whether act of state is available as a defence to a claim brought by a British citizen in relation to Crown acts done abroad. He held (at para 80) that it is, essentially for the reason that:

> "If the true basis of the rule … is that acts done by the Crown abroad in the conduct of foreign relations are of their nature not cognisable in the English court, I can see no reason of principle why the position should be any different where the person injured happens to be a British citizen: the nature of the act is the same."

369. As mentioned, the Court of Appeal affirmed the decision of Underhill J that Mr Al-Jedda's detention was lawful. Arden LJ dissented on that issue but agreed with the judge's conclusions and reasoning on the issue of act of state: see [2011] QB 773, 803 at para 107. She referred to the decision of the House of Lords in the Al-Jedda case, discussed in part VIII of this judgment, that the UK was entitled and bound by obligations under Article 103 of the UN Charter to intern persons where this was necessary for the internal security of Iraq. She said (at para 108):

> "Internment for this purpose would clearly qualify as an act of state. My conclusion that act of state as a defence here does not go wider than this. It applies, in my judgment, because of the overriding force of UNSCR 1546. If courts hold states liable in damages when they comply with resolutions of the UN designed to secure international peace and security, the likelihood is that states will be less ready to assist the UN to achieve its role in this regard, and this would be detrimental to the long-term interests of the states."

Arden LJ distinguished the Nissan case (at para 110) on the ground that:

> "It was no part of the peace keeping function of the troops to take property without paying for it. In the present case, internment was part of the role which the British contingent of the MNF were specifically required to carry out. The acceptance and carrying out of those obligations was an exercise of sovereign power. It is inevitable that a detainee would suffer the loss of his liberty while he was detained."

370. Dyson JSC did not deal with the act of state defence in circumstances where it was not necessary to do so and the court had not heard full argument on the issue, though he made the point (at para 127) that "the act of state defence raises points of very considerable difficulty".

371. Elias LJ similarly observed (at para 193) that the act of state defence "raises issues of some considerable complexity" and that the court had heard highly truncated argument about it. He expressed considerable doubt about whether it was legitimate for the Secretary of State to rely on the defence when it had not been raised in the earlier Al-Jedda proceedings on the footing that it might have had a bearing on the issue, decided in those proceedings, that the applicable law was the law of Iraq and not English law. With those reservations, Elias LJ expressed the view (at para 195) that the internment of Mr Al-Jedda was an act of state, essentially for the reasons given by Underhill J. He was not persuaded, however, that this meant that the jurisdiction of the English courts to question the lawfulness of the claimant's detention was entirely excluded in circumstances where the claimant was a British citizen.

The present case

372. Although not binding authority, the view of Underhill J, endorsed by Arden and Elias LJJ, in the second Al-Jedda case that the detention of the claimant in that case by UK armed forces in Iraq was an act of state is entitled to the greatest respect, and I see no reason to dissent from it. An integral part of Underhill J's reasoning, however, was that internment where necessary for imperative reasons of security was a positive obligation undertaken by the UK government under international law when it agreed to contribute British forces to the Multi National Force in Iraq. On the view I take, the situation in the present case is different. I have concluded, for reasons given in part VIII of this judgment, that the detention of SM after 96 hours was not authorised, let alone required, by the resolutions of the United Nations Security Council under which UK forces have been operating in Afghanistan. In the light of that conclusion, I must address the question which Underhill J did not need to consider as to whether the act of state rule applies even in the absence of an obligation under international law to exercise powers of internment.

Separation of powers

373. To attempt to make sense of this difficult area of the law and to identify how far the doctrine of Crown act of state extends, it is necessary to look for the rationale of the doctrine. I adopt the observation of Elias LJ in the Al-Jedda case at para 197 that:

> "Lying at the heart of this question is the relationship between the Crown (more accurately now, executive government) and the courts. To what extent and in what circumstances should the courts refuse to hold the executive to account in its dealings with foreign states or its handling of foreign relations?"

I also respectfully adopt the suggestion of Mr Philip Sales (now Sales J) in a published article that the conceptual normative basis of the act of state doctrine lies in the notion of separation of powers and, in particular, the division of responsibility between the executive arm of the state on the one hand and the judicial arm of the state on the other.[13]

374. Thus, the general principle underlying the Crown act of state doctrine, as I perceive it, is the constitutional principle that the conduct of foreign affairs is the province of the executive arm of the state and that the judiciary should not involve itself in (or bring into jeopardy) the conduct of such affairs.

375. At one time the position in this regard was simple. The powers of the executive in the area of foreign affairs and control of the armed forces are 'prerogative' powers, recognised by the common law of England and Wales and not derived from statute. It was long considered that, whereas statutory powers could be subject to judicial review, prerogative powers were absolute and their exercise unreviewable by the courts. That view was, however, rejected by the House of Lords in the landmark case of Council of Civil Service Unions v Minister for Civil Service [1985] AC 374 ("the GCHQ case"). The GCHQ case established that the mere fact that a power derives from the prerogative does not exclude it from the scope of judicial review, and that what matters is not the source of the power but its subject matter. The House of Lords did nevertheless accept that the subject matter of certain powers of the executive made their exercise unsuitable for judicial review. Amongst examples given, Lord Fraser referred (at p.398) to the prerogative powers concerned with control of the armed forces and with foreign policy.

376. In subsequent cases, the courts have asserted a willingness in principle to review the exercise of executive powers even in these areas. Thus, in R (Bancoult) v Secretary of State for Foreign Affairs [2009] 1 AC 453, the House of Lords held that two Orders in Council made under the prerogative which had the effect of preventing former inhabitants of the Chagos Islands from returning to their homes were subject to judicial review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action. The courts have nevertheless continued to exercise considerable restraint when invited to review executive decisions involving matters of foreign policy. Such restraint, however, no longer rests on a rule that certain areas of decision-making by the executive such as foreign policy are 'no-go' areas for the courts but on a consideration of whether or to what extent the particular decision of the executive with which the case is concerned is or is not 'justiciable'.

Justiciability

377. Justiciability is a complex notion. In the present context it includes at least the following considerations:

[13] See Sales, '*Act of State and the Separation of Powers'* [2006] JR 94.

i) The absence in relation to certain questions of policy of what Lord Wilberforce described as "judicial or manageable standards": see Buttes Gas and Oil Co v Hammer [1982] AC 888 at p.938.

ii) Considerations of relative institutional competence – i.e. a recognition that the executive and not the courts have the relevant expertise.

iii) Considerations of political legitimacy and the recognition that in our system of democracy the conduct of state policy is entrusted to ministers who are accountable to Parliament, to public opinion and ultimately to the electorate, and not to the courts.

See in this regard *De Smith, Judicial Review* (7th Edn, 2013) at paras 1-032 – 1-045; and the helpful discussion in the judgment of Cranston J in R (Al-Haq) v Secretary of State for Foreign Affairs [2009] EWHC 1910 (Admin) at paras 53–59.

378. Such considerations of justiciability preclude, or at least severely restrict, judicial review of what may be called matters of high policy. For example, in 2000 the Court of Appeal refused permission to proceed with a claim for judicial review of an order of the Secretary of State for Defence to the Royal Air Force to fly over Iraqi territory and attack targets inside Iraq: see R (Thring) v Secretary of State for Defence (unreported but available on www.isrc.org website). Similarly, in R (Campaign for Nuclear Disarmament) v Prime Minister and others [2002] EWHC 2777 (Admin) the High Court declined to entertain a claim for a declaration that the UK government would be acting in breach of customary international law if it were to take military action against Iraq without a further Security Council resolution. Questions, however, concerning UK policy for detaining individuals in Afghanistan are of a very different order and are clearly justiciable. Indeed in R (Maya Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin), the Divisional Court reviewed the UK policy and practice in relation to the transfer to the Afghan authorities of suspected insurgents detained in Afghanistan by UK armed forces.

379. The doctrine of Crown act of state does not operate in the field of public law to bar a claim for judicial review. It operates in the field of private law to preclude a claim in tort against the UK government. However, in so far as it is based on a principle of non-justiciability, the Crown act of state doctrine is similar if not identical to the rule that acts of the Crown which are done under the prerogative in the sphere of foreign affairs are unreviewable. As Lord Pearson said in the Nissan case (at p.237):

> "An act of state is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim. In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it.

> This is a very unusual situation and strong evidence is required to prove that it exists in a particular case."

380. Once it is accepted that the act in question is justiciable in the sense that it is cognisable and capable of being reviewed by the courts, I do not see how this version of the Crown act of state doctrine can apply. As Mr Hermer QC put the point succinctly in argument, if and insofar as the act of state doctrine is a principle of non-justiciability, based on the nature of the act, then the nature of the remedy is irrelevant.

381. The question whether UK armed forces acted lawfully under Afghan law in detaining SM is plainly justiciable. It does not require determination of any matter which a court is unsuited to deal with. Quite the opposite. Determining whether an individual has been unlawfully deprived of their liberty is quintessentially a matter for a court. Nor is there any absence of "judicial or manageable standards". The Afghan legal system contains a set of relevant standards which a court can interpret – an exercise which I have undertaken in part IV of this judgment.

382. Lord Morris said in the Nissan case (at p.217) that the acts in question in that case (of feeding and housing troops in the hotel) were "far removed from the category of transactions which by reason of being a part of or in performance of an agreement between states are withdrawn from the jurisdiction of the municipal courts." Exactly the same, in my view, is true here. Assuming for the sake of argument that the decision to send UK troops to Afghanistan as part of ISAF was a Crown act of state not justiciable in the English courts, a decision to detain a particular individual captured by UK troops in Afghanistan falls into a very different category. It is not necessary to question the legality of the decision to send troops in order to judge the legality of detention applying Afghan law. The latter does not depend on the former. Nor in order to judge the legality of detention under Afghan law is it necessary to determine whether the detention policy operated by the UK was authorised, or mandated, as a matter of international law. I have reached my conclusions on the issues of Afghan law without taking any view on that question.

383. For these reasons, I consider that in so far as the Crown act of state doctrine rests on a principle of justiciability, the doctrine has no application in the present case.

384. In his thoughtful judgment in the Al-Jedda case, Elias LJ wrestled with the dilemma that either the act of state doctrine applies, in which case the court cannot exercise jurisdiction to determine the claim, or it does not apply, in which case the court must hear the case as a tort action to which the usual conflict of laws rules apply: see para 217. Elias LJ suggested as a "possible solution" to this problem, albeit one which "begins to trespass into the field of speculation", that the courts can review an act of state according to British principles of public law as with other prerogative powers, but have no jurisdiction to determine any other issue: see paras 222–224. With great respect, I cannot see any conceptual room for this suggested solution insofar as the Crown act of state doctrine rests on the notion that some acts of the executive in the field of foreign affairs are not justiciable by the courts.

Defence to a claim in tort

385. In his International Law Opinions (1956), vol I, pp.111-117, Lord McNair drew a distinction between two different rules or conceptions of the act of state doctrine. On one conception 'act of state' "can be raised as a defence to an act, otherwise tortious or criminal, committed abroad by a servant of the Crown against a subject of a foreign state or his property, provided that the act was authorised or subsequently ratified by the Crown." In addition:

> "The term 'act of state' is used, not only narrowly to describe the defence explained above, but also, perhaps somewhat loosely, to denote a rule which is wider and more fundamental, namely, that 'those acts of the Crown which are done under the prerogative in the sphere of foreign affairs' … for instance, the making of peace and war, the annexation or abandonment of territory, the recognition of a new state or a new government of an old state, etc, cannot form the basis of an action brought against the Crown, or its agents or servants, by any person, British or alien, or by any foreign state, in British municipal tribunals. Such acts are not justiciable in British courts …"

Lord McNair commented that "[m]uch confusion has resulted from failure to perceive the distinction between the two meanings", while confessing that "the scope both of the defence 'act of state' and of the rule of non-justiciability of certain 'acts' or 'matters of state' is still obscure."

386. In Nissan v Attorney General [1970] AC 179 at 231, Lord Wilberforce endorsed this distinction between act of state (i) as a defence to an otherwise tortious act and (ii) as a rule of non-justiciability.

387. I have so far been considering act of state conceived as a rule excluding certain acts of the Crown from justiciability. As understood by Lord Wilberforce, it was that aspect of the doctrine which was relied on in the Nissan case. It remains to consider, however, the other conception of act of state as a defence to an action in tort.

388. A similar distinction to that drawn by Lord McNair and adopted by Lord Wilberforce is drawn in *Dicey, Morris & Collins, The Conflict of Laws* (15th Ed). The authors identify (at para 5-043) as one principle that "the courts will not investigate the propriety of an act of the Crown performed in the course of its relations with a foreign State, or enforce any right alleged to have been created by such an act unless that right has been incorporated into English domestic law." This is act of state conceived as a rule of non-justiciability. However, the authors go on to say (at para 5-044) that:

> "The expression 'act of state' is also used to describe executive acts which are authorised or ratified by the Crown in the exercise of sovereign power. The victim of such an act is in some circumstances denied any redress against the actor because the act, once it has been identified as an act of state, is one which the court has no jurisdiction to examine. The

> defence can be raised in regard to an act performed outside the United Kingdom and its colonies against a person or property of an alien …"

389. The classic example of this act of state defence is the old case of Buron v Denman (1848) 2 Exch 167. The plaintiff in that case was a Spanish slave trader, operating in a part of West Africa where at the time it was lawful to possess slaves. The defendant was a British naval commander stationed on the coast of West Africa with instructions to suppress the slave trade. Commander Denman took his instructions seriously. He set fire to the plaintiff's barracoons, carried the slaves to Sierra Leone where they were liberated and seized or destroyed the plaintiff's stores which were intended to be used for buying more slaves. Commander Denman's actions were subsequently greeted with approval by the British government.

390. The slave trader brought an action for trespass against Commander Denman in England. Baron Parke in summing up the case for the jury directed them to find that in circumstances where the possession of slaves was lawful under the local law both the slaves and the goods were the property of the plaintiff. As Lord Morris said in the Nissan case (at p.219C);

> "Whatever abhorrence may be felt in regard to the slave trade, the actions of Captain Denman were held by the court to be actions in violation of the plaintiff's rights."

Nevertheless, Baron Parke further directed the jury that, if Commander Denman's acts had been ratified by the Crown, then they were acts of state (just as they would have been if authorised in advance) and the claim could not be maintained. The jury found that the Crown had ratified the defendant's acts with full knowledge of what he had done, and judgment was therefore given for the defendant.

391. The actual decision in Buron v Denman is susceptible of more than one interpretation. Mr Hermer QC submitted that all that the case decided was that as a matter of English law the defendant's liability in tort was extinguished when his act was ratified by the Crown. If that was all that Buron v Denman decided, the case would no longer be of any relevance since the 'double actionability' rule has been abolished under which foreign torts were actionable in England only if the defendant's conduct was also wrongful as a matter of English law. I accept that this is one possible interpretation of the case. However, Buron v Denman is still treated in well known text books as a relevant authority. For example, *Clerk & Lindsell on Torts* (20th Ed) at para 5-17 cites the case as authority for the proposition that an injury inflicted upon a foreigner, elsewhere than in British territory, if done by the authority of (or ratified by) the Crown, cannot give rise to a cause of action either against the Crown or against the person who caused the injury. *Wade & Forsyth on Administrative Law* (10th Ed) at p.714 cites the case as an example of the proposition that "acts of force committed by the Crown in foreign countries are of no concern of the English courts". *Dicey, Morris & Collins, The Conflict of Laws* (15th Ed) at para 5-057 gives the following description of the case as an illustration of an act of state:

> "X, an officer of the Crown, duly authorised, destroys property of A, a Spanish subject at a place outside the United Kingdom and Colonies. Spain and the United Kingdom are at peace, and X's act is tortious by the law of the place where it is committed. X's act is an act of state, and the court will not entertain an action by A against X."

392. In the Al-Jedda case at para 212, Elias LJ referred to Buron v Denman as a case where act of state was successfully claimed to bar the claim even though determining the legality of the act was obviously within the court's competence. He then asked:

> "Why does the court defer to the executive even in areas where the issue in dispute would be amenable to judicial review? The basis for this appears to be a recognition that where the state through the executive government asserts that its actions are intended to protect interests of state, and the court accepts that this is so, the courts ought not thereafter to undermine that executive action by questioning further its legality. Court and Crown should speak with one voice."

393. The 'one voice' principle in the field of foreign relations was most famously stated by Lord Atkin in Government of the Republic of Spain v SS "Arantzazu Mendi" [1939] AC 256, 264, where he said:

> "Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another."

To similar effect in British Airways Board v Laker Airways Ltd [1994] 1 QB 142, 193, Lord Donaldson MR said that "it would be strange if in this field [of foreign policy] the courts and the executive spoke with different voices and they should not do so."

394. The force and scope of the one voice principle are necessarily limited. But I accept the submission of Mr Eadie QC that it provides the rationale for the Crown act of state doctrine, in its aspect as a defence to a claim in tort which I am now considering. Clearly the principle has no application to acts done within UK territory, which explains why this act of state rule does not apply to such acts (except in relation to enemy aliens): see Johnstone v Pedlar [1921] 2 AC 262. Within the realm it is a vital function of the courts to protect the rights of liberties of the individual against the state. But in the field of foreign affairs and particularly where UK forces are involved in armed conflict abroad, different considerations apply. Like Underhill J, I see a material difference between acts done within the jurisdiction of the Crown, where the subject is indeed entitled to expect to be protected by the courts of this country against unlawful executive action, and the position as regards acts abroad, where no such expectation arises: see Al-Jedda v Secretary of State for Defence [2009] EWHC 397 (QB) at para 81.

395. As described in part III of this judgment, in the context of operations in Afghanistan, the UK government, in common with other nations contributing forces to ISAF, has

taken a policy decision that in order to maintain security it is necessary to capture and detain suspected insurgents for up to 96 hours in order to transfer them into the custody of the Afghan authorities. The UK government has also taken a considered decision to authorise the detention of individuals beyond 96 hours in exceptional circumstances, where it is judged that such detention may yield vital intelligence that would help protect UK forces and the local population – potentially saving lives. In addition, the UK has chosen to detain individuals whom the Afghan authorities wish to investigate and potentially to prosecute beyond 96 hours until they can be transferred to the Afghan authorities. This and other aspects of UK detention policy and practice in Afghanistan can be reviewed by the English courts in accordance with established principles of public law. But if and insofar as acts done in Afghanistan by agents of the UK state in carrying out its policy infringe Afghan domestic law, that in my opinion is a matter for which redress must be sought in the courts of Afghanistan. It is not the business of the English courts to enforce against the UK state rights of foreign nationals arising under Afghan law for acts done on the authority of the UK government abroad, where to do so would undercut the policy of the executive arm of the UK state in conducting foreign military operations.

396. I would thus adopt the interpretation of Buron v Denman given by *Dicey, Collins & Morris* and quoted in paragraph 391 above. In its character, this act of state rule seems to me to be analogous to the conflict of laws rule that English courts will not enforce a right arising under the law of a foreign country if to do so would be contrary to English public policy, and to the rule that English courts will not enforce the penal, revenue or other public law of a foreign state.[14] Thus understood, the Crown act of state doctrine operates, like those other rules, as an exception to the general principle that proceedings may be brought in this country founded on a tort which is actionable under the law of a foreign country where the law of that country is the applicable law. Seen in this way, there is no inconsistency between the MOD's acceptance that the law applicable to SM's claim in tort is the law of Afghanistan and its reliance on the Crown act of state doctrine as a defence to the claim. The act of state rule is not a choice of law rule. It does not displace Afghan law in favour of English law as the law applicable to the tort claim. Rather, its effect is to preclude the enforcement of that tort claim in the courts of this country.

397. It is important to emphasise how narrow this act of state rule is. As indicated, leaving aside the position of enemy aliens in time of war, it applies only to executive acts done abroad pursuant to deliberate UK foreign policy. It may well be confined to acts involving the use of military force. It is unnecessary for me to decide whether it can be relied on against a British citizen, although (like Underhill J) I find it difficult to see how the nationality of the claimant can in principle be relevant. Importantly, it applies only to acts which are directly authorised or ratified by the UK government. Thus, this act of state defence could not have been invoked in the Nissan case, where there was no suggestion that it was UK government policy to occupy the hotel. Nor, manifestly, could it have been invoked in a case such as that of Mr Mousa in the Al-Skeini case, if a claim against the UK government arising from his death had been brought in England based on Iraqi law.

[14] See *Dicey, Morris & Collins, The Conflict of Laws* (15th Ed) at paras 5R-001 and 5R-019.

Colour of law

398. Mr Hermer QC submitted that this act of state rule is not applicable if the acts are done "under the colour of law". In support of this contention, he referred to the speech of Lord Reid in the Nissan case, who said (at p.212G):

> "It is true that the court must determine, on such facts as are available, whether the act was done in purported exercise of a legal right: if it was it cannot be regarded as an act of state. But if it was not done in purported exercise of any legal right and was done by an officer of the Crown apparently in the course of duty, then it appears to me that it must be for the Crown to say whether it claims that the act was an act of state. "

In addition, Lord Pearson (at p.238A) expressed the view that whether a governmental act is an act of state depends upon the nature of the act and the intention (objectively inferred) with which it is done. In support of that view, Lord Pearson cited Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 13 MooPCC 22.

399. The facts of the Kamachee case were that the Raja of Tanjore, nominally at least an independent sovereign state in India, died without male issue, whereupon the East India company exercising powers conferred by the government of India seized the Raj including all the Raja's private estate and property. The Raja's widow sued the Company for the recovery of his private property, and was successful before the Supreme Court of Madras. However, the Company appealed to the Privy Council, who allowed the appeal. They found that the "real character of the acts done" was not "a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore", but rather was "a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law". In these circumstances the Privy Council held that the seizure was an act of state over which the Supreme Court of Madras had no jurisdiction. Lord Kingsdown concluded the judgment of the Board by stating (p.86):

> "Of the propriety or justice of that act, neither the Court below nor the Judicial Committee has the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy."

400. From a modern perspective, that answer is wholly insufficient. It is a perverse doctrine under which the executive can be held to account if it purports to act legally, but not if it openly flouts the law. The decision was based, however, on a principle of non-justiciability whereby the conduct of the East India Company was treated as an exercise of power on the international stage between sovereign states which was not

reviewable by the domestic courts. The Kamachee case is thus an instance, indeed the genesis,[15] of the act of state doctrine as a rule of non-justiciability. It did not involve an attempt to enforce rights claimed under a system of foreign law.

401. The notion that the justiciability of executive action depends on whether the act in question is performed under colour of law is not one which has any place in modern case law. But in any event I can see no principled reason why it should be relevant to the act of state doctrine as a defence to a claim in tort. Accordingly, whether the court will enforce rights arising under Afghan law does not in my opinion depend upon whether the UK government was or was not purporting to comply with Afghan law in operating its detention policy. I have, however, seen nothing to indicate that it was. There is no evidence which suggests that the UK government in formulating its detention policy had any regard to whether UK policy complied with Afghan law. If (contrary to my view) this is a requirement of the rule, I would therefore find that, in detaining SM UK armed forces, were not in the relevant sense acting "under the colour of law".

Habeas corpus

402. Both sides sought to support their arguments on the scope of the act of state doctrine by referring to cases concerned with applications for *habeas corpus.* On behalf of the MOD, Mr Eadie QC submitted that the writ of *habeas corpus* is not available in respect of persons detained in a foreign territory not forming part of Her Majesty's Dominions, nor in respect of enemy aliens. He submitted that these limits on the availability of *habeas corpus* mirror the scope of the act of state doctrine. On this basis he argued that the act of state doctrine applies to SM's claim that he was unlawfully detained both because (a) he was detained on foreign territory and (b) he was allegedly an enemy alien.

403. On behalf of SM, Mr Hermer QC responded that *habeas corpus* is potentially available to any person, wherever in the world that person is held, who is under the *de facto* control of a respondent who is within the jurisdiction of the English courts. He further submitted that being an enemy alien is not a 'jurisdictional bar' to *habeas corpus* but rather a ground for arguing that under English law detention is lawful. In any event he submitted that SM is not an enemy alien. Mr Hermer for his part sought to rely on his argument that the remedy of *habeas corpus* would have been available to SM at the time of his detention to support an inference that SM's detention does not fall within the act of state doctrine.

404. In so far as the question is relevant, I accept Mr Hermer's submissions as to the scope of the remedy of *habeas corpus*. In particular, I accept that the decision of the Supreme Court in Rahmatullah v Secretary of State for Defence [2013] 1 AC 614 is authority for the proposition that a person within the jurisdiction of the English courts who has actual control (or even a reasonable prospect of being able to exert control) over the custody of a person detained on foreign territory is answerable to the writ of *habeas corpus*. I also accept that the authorities concerning enemy aliens are

[15] See Perreau-Saussine, '*British Acts of State in English Courts'* (2008) BYBIL 176 at 192-3.

accurately analysed in *Farbey, The Law of Habeas Corpus* (3rd Ed, 2010) at pp.119-120, where the author states:

> "While some cases ostensibly support the proposition that prisoners of war lack capacity to apply [for the writ of habeas corpus], a close reading indicates that the courts do not really decide the cases on that basis. The Crown has the power, quite apart from statute, to detain prisoners of war (including non-combatant alien enemies) as part of the prerogative under which it wages war. This means that if an applicant is detained in a prisoner-of-war camp, and is properly considered a prisoner of war, he or she will have no right to be liberated. This is the rule the courts have applied, not that a prisoner of war lacks capacity to apply for the writ."

405. I further agree with Mr Hermer's submission that an "enemy alien" in this context means someone who is a citizen of a state at war with the United Kingdom: see e.g. *Halsbury's Laws of England, Armed Conflict and Emergency*, vol 3, para 195, and Porter v Freundenberg [1915] 1 KB 857. It does not seem to me that the definition of an "enemy" in section 374 of the Armed Forces Act 2006, which is concerned with matters of military discipline, is relevant in this context. As the United Kingdom is not at war with Afghanistan which is a friendly foreign state to which the UK is providing assistance, SM who is an Afghan national is not an "enemy alien".

406. None of these matters, however, in my view assists in identifying the scope of the act of state doctrine. As I have analysed it, the doctrine does not prevent a person detained by agents of the UK state abroad from bringing a claim alleging that their detention is unlawful though it may prevent such a person from asserting such a claim in so far as it is based on foreign law. I can see nothing in the law relating to *habeas corpus* which is inconsistent with that analysis.

Is there a human rights exception?

407. Mr Hermer QC also argued that, even if the Crown act of state doctrine would otherwise apply so as to prevent SM from pursuing a claim for damages for unlawful detention under Afghan law in the English courts, there is an exception to the doctrine in cases involving a serious infringement of human rights, and that exception applies here. In support of this argument, Mr Hermer sought to draw an analogy with the foreign act of state doctrine, which has been held not to preclude a claim in tort arising from an act which involves a grave infringement of human rights: see Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5) [2002] 2 AC 883; Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2) [2013] 3 WLR 1329 at paas 68-72. Mr Hermer submitted that the same principle must apply to the Crown act of state doctrine since the courts must hold the Crown to at least the same standards as a foreign state.

408. I am not persuaded by this argument. I do not consider, first of all, that there is a relevant analogy between the Crown act of state defence which I interpret as a rule of the conflict of laws, and the foreign act of state doctrine, which rests on principles of

sovereignty, comity between nations and judicial restraint. Furthermore, most tort claims can be characterised as involving infringements of human rights; and I find it difficult to see a coherent basis for allowing some such claims founded on foreign law which fall within the general scope of the rule to be enforced when others cannot be. Moreover, if an exception were to be made for claims founded on "grave" or "gross" infringements of human rights, it is far from obvious that the present case would fall within that exception. In any event, in the light of my conclusion below, I consider that the need which might otherwise be felt to seek to fashion a common law 'human rights exception' to the Crown act of state doctrine is negated by the protection for human rights afforded by the Human Rights Act.

Act of state: the Article 5 claim

409. As mentioned, the MOD contends that the act of state doctrine not only bars SM's claim under Afghan law, but also precludes his claim under the Human Rights Act. However, I do not regard this further contention as tenable.

410. I have rejected the suggestion that the question whether SM's detention was lawful is not justiciable and therefore falls within the act of state doctrine understood as a rule of non-justiciability. The logic of that conclusion applies equally whether the lawfulness of the detention is judged in accordance with Afghan law or English law. The act of state rule which I have held to be relevant precludes SM from enforcing a claim based on the Afghan law of tort. That rule, as I have analysed it, is a rule of the conflict of laws which, when it applies, prevents the enforcement of rights arising under a foreign system of law. The rule does not apply to a claim under the Human Rights Act, which is a claim in English law.

411. Moreover, even if my analysis is wrong and SM's claim under Afghan law is precluded by the act of state doctrine understood as a rule of non-justiciability, the doctrine still can have no application to his claim under the Human Rights Act. That is because, where a claim under the Human Rights Act arises, it is *ipso facto* justiciable.

412. The act of state doctrine is a doctrine of the common law. The common law can of course be overridden by an Act of Parliament, and it has been overridden by Parliament when it enacted the Human Rights Act. Section 6(1) of the Human Rights Act states that:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

Section 7(1) then provides that;

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal …"

413. Section 7(1) is in unqualified terms and does not make any exception for acts of a public authority which are acts of state. Mr Eadie submitted that such an exception is to be implied, but I can see no basis for any such implication. Indeed, as Mr Hermer and Mr Fordham both submitted, to imply such an exception would be inconsistent with the central purpose of the Human Rights Act. As discussed earlier in this judgment (at paragraph 126 above), that purpose is to provide a domestic remedy for breaches of Convention rights which previously could only be pursued in Strasbourg. The act of state rule is on any view not part of the Convention; it is a purely domestic doctrine. As Mr Eadie accepted, if a claim for breach of a Convention right was not actionable under the Human Rights Act on the basis that it was an act of state, that would not prevent a claimant from seeking a remedy in Strasbourg. A gap would therefore exist between the remedies available in the English courts and in the European Court of precisely the kind which it is the purpose of the Human Rights Act to avoid. That is a compelling reason, if there were otherwise any doubt about the matter, for interpreting the Act as overriding the common law act of state doctrine.

414. The point is illustrated by the case of R (Gentle) v Prime Minister [2008] 1 AC 1356, in which the relatives of two British soldiers killed in Iraq wanted an inquiry into the circumstances of their deaths which would investigate the question whether the UK government had taken reasonable steps to ensure that the invasion of Iraq was lawful before sending them to face the risk of death. It was argued that an obligation to conduct such an investigation arose under article 2 of the Convention. According to Lord Sumption, who was counsel for the government:[16]

> "The Court of Appeal was mustard keen to deal with the case on the ground that being a question of foreign policy, the matter lay within the special domain of executive discretion, a point which they referred to, not wholly accurately, as a question of justiciability. This had been a source of some embarrassment to me as Counsel for the Government, for although it was a point in my favour, I could see no respectable basis for it. If Article 2 was engaged by the decision to deploy troops to Iraq, that decision was necessarily justiciable because the Human Rights Act said so. If it was not engaged, then since the argument was wholly based on it there was nothing to be decided at all."

415. In the House of Lords, the appeal was heard by a committee of nine. Although they held that article 2 did not impose an obligation of the kind alleged, the committee accepted that the issue was justiciable. As Baroness Hale put it (at para 60):

> "it is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate we must."

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[16] '*Foreign Affairs in the English Courts since 9/11*', Lecture at the London School of Economics (14 May 2012).

416. In the same way, if agents of the UK have acted in breach of Convention rights, the fact that this was done in the exercise of government policy in conducting military operations abroad cannot preclude the court from adjudicating upon the claim because the Human Rights Act requires it to do so.

XII. CONCLUSION

417. For the reasons given in this judgment, I have found that, on the facts alleged by the MOD, the arrest of SM on 7 April 2010 and his initial detention by UK armed forces operating in Afghanistan was lawful.

418. However, ISAF policy permitted detention for a maximum of 96 hours after which time the detainee had either to be released or handed into the custody of the Afghan authorities. I have found that SM's continued detention on UK military bases for a further 106 days after that period had elapsed was unlawful. That is because:

i) Such detention was illegal under Afghan law;

ii) Such detention was also unlawful under international law as it was not authorised by the UN Security Council Resolution which provided the mandate for the UK and other national forces participating in ISAF, nor was there a legal basis for such detention under international humanitarian law;

iii) SM's detention solely for the purpose of interrogation from 11 April until 6 May 2010 was not for a purpose permitted by Article 5 of the Convention;

iv) SM's further detention from 6 May until 25 July 2010 was not in accordance with any written policy for detention adopted by ISAF or the UK and was therefore arbitrary;

v) For these reasons, and because SM was held in custody on the decision of Ministers and officials without being brought before a judge, and without being given any opportunity to challenge the lawfulness of his detention, his detention after 96 hours was contrary to Article 5 of the Convention and section 6 of the Human Rights Act.

419. The conclusion that SM's detention after 96 hours was unlawful will not come as a surprise to the MOD. It is apparent from documents to which I have referred in Part III of this judgment (at paragraphs 40-44 above) that the MOD formed the view at an early stage that there was no legal basis on which UK armed forces could detain individuals in Afghanistan for longer than the maximum period of 96 hours authorised by ISAF. Legal advice also confirmed that there was no basis upon which UK forces could legitimately detain individuals for longer periods in the interest of interrogating them because they were believed to have information of intelligence value. As was recognised in a memorandum in 2006 (see paragraph 42 above):

> "The reality of the legal basis for our presence in Afghanistan is such that available powers may fall short of that which military commanders on the ground might wish …"

Nothing happened subsequently to alter that reality.

420. The UK explored the possibility of obtaining the agreement of NATO and other nations participating in ISAF to extending the 96 hour detention period authorised by ISAF and concluded that such agreement was not achievable (see paragraphs 45-46 above). The approach adopted in November 2009 was for the UK to adopt its own policy permitting detention beyond 96 hours for intelligence purposes but without obtaining any additional powers to provide a legal basis for doing so.

421. In April 2010, while SM was being held in custody for an extended period for the purposes of interrogation, the MOD set out its position to the Divisional Court in the case of R (Maya Evans) v Secretary of State for Defence [2010] EWHC 1445 (Admin) as being that the UK did not have the power to intern suspected insurgents captured in Afghanistan but only had power to detain them temporarily for a period of up to 96 hours. That position is reflected in the judgment of the Divisional Court (at para 17):

> "The power to capture insurgents extends to a power to detain them temporarily. In the absence of any express authorisation in the UN Security Council resolutions, however, the Secretary of State takes the view that the UK has no power of indefinite internment. That is why the issue of transfer to the Afghan authorities is of such importance."

422. The transfer issue raised in the Maya Evans case was whether transfers to three Afghan prisons should be stopped because there was a real risk that those transferred would be tortured or seriously mistreated. The claimant alleged that there was such a risk and applied to the Court for an injunction to prevent further transfers. The MOD opposed the application denying that there was such a risk. The MOD also raised the spectre that, if an injunction was granted, individuals captured by UK forces would have to be released because the UK had no power to detain them for longer than 96 hours. As stated in the judgment of the Divisional Court (at para 23):

> "If it were not possible to transfer detainees to Afghan custody, the consequences would be very serious. Detainees would have to be released after a short time, leaving them free to renew their attacks and cause further death and injury. The opportunity to prosecute them and to gain intelligence would be lost."

423. It is now apparent that when push came to shove and detainees could not be transferred to Afghan custody within 96 hours – either because there was considered to be a real risk of ill treatment or, as in the present case, because there was not enough room in the Afghan prison – detainees were not released as the MOD had said would be necessary (because the UK had no legal power to detain them). Instead,

they were imprisoned indefinitely on British military bases until transfer became possible. Moreover, that was done even though the MOD's own policy and procedures for detention did not authorise long term detention in such circumstances (see paragraphs 307-309 above). In SM's case the total period spent in UK detention was 110 days; in the case of the three PIL claimants, the period was even longer – being around 290 days in each case.

424. Decisions were thus made to adopt a detention policy and practices in pursuit of military objectives which went beyond the legal powers available to the UK. The consequence of those decisions is that the MOD has incurred liabilities to those who have been unlawfully detained.