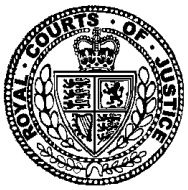

Neutral Citation Number: [2022] EWCA Civ 334

Case No: CA-2021-000495 (formerly B3/2021/0493)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Lane
[2021] EWHC 331 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2022

Before:

DAME VICTORIA SHARP,
PRESIDENT OF THE QUEEN'S BENCH DIVISION
LADY JUSTICE THIRLWALL
and
LORD JUSTICE MALES

- -

Between:

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

- -
- -

Richard Hermer QC, Ben Jaffey QC & Edward Craven (instructed by **Bhatt Murphy**) for the **Appellant/Claimant**
David Blundell QC, Melanie Cumberland & Andrew Byass (instructed by the **Government Legal Department**) for the **Respondents/Defendants**

Hearing date: 1 March 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Wednesday 16th March 2022

Lord Justice Males:

1. This appeal is concerned with the law which is applicable to torts allegedly committed by the Security Service and the Secret Intelligence Service (together "the Services") against a detainee subjected to so-called "enhanced interrogation techniques" by the United States Central Intelligence Agency ("the CIA"). The essence of the claimant's claim is that the Services were aware that the claimant was being subjected to extreme mistreatment and torture at secret CIA "black sites" in six different countries, but nevertheless sent numerous questions with a view to the CIA eliciting information from him, expecting and intending (or at any rate not caring) that the claimant would be subject to such mistreatment and torture at interrogation sessions conducted for the purpose of attempting to obtain this information.

2. The claimant contends that by acting in this way the Services committed the torts of misfeasance in public office, conspiracy to injure, trespass to the person, false imprisonment and negligence; and that the defendants are vicariously liable for their conduct.

3. The question is whether the law applicable to these tort claims is English law or the law of the various countries where the claimant's ill-treatment occurred, namely Thailand, Lithuania, Poland, the United States Base at Guantánamo Bay, Cuba, Afghanistan and Morocco ("the Six Countries"). Mr Richard Hermer QC for the claimant contends for English law, while Mr David Blundell QC for the defendants contends that the applicable law is the law of the place where the mistreatment occurred: that is to say, that Thai law applies to conduct resulting in mistreatment in Thailand, Polish law applies to conduct resulting in mistreatment in Poland, and so on. The judge, Mr Justice Lane, accepted the defendants' position and the claimant now appeals.

4. The events in issue took place between 2002 and 2006, which means that the question of the applicable law depends upon the application of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act").

Factual background

5. The claimant, known as Abu Zubaydah, is held by the United States as a detainee in Guantánamo Bay, Cuba. He was captured in March 2002 in Pakistan. The claimant says that between 2002 and 2006 he was unlawfully rendered by agents of the United States to the Six Countries. In 2006 he was rendered again to Guantánamo Bay, where he has been held without trial ever since. It appears that at an early stage the CIA determined that the claimant should be held incommunicado for the rest of his life and, so far, that is what has happened.

6. The claimant's case is that in each of the Six Countries he was arbitrarily detained at a CIA "black site". According to a 2014 report by the United States Senate Committee on Intelligence ("the Senate Report"), these were secret detention facilities around the world, outside the US legal system, where there were no visits by international welfare organisations and treatment standards were not monitored. The claimant's case is that at each of these locations he was subjected to extreme mistreatment and torture. This included waterboarding on some 83 occasions, extreme sleep deprivation, confinement inside boxes (including boxes said to simulate a coffin and boxes which required him to adopt a stress position), beatings, death threats, starvation and denial of medical care.

For extended periods he was kept naked or "diapered", with no access to sanitation facilities.

7. According to the Senate Report, the claimant was the first person to be detained at such a site. Although the United States denied the existence of these facilities at the time and, even after admitting the "black sites" programme in 2006, has never confirmed their location, the European Court of Human Rights in *Al-Nashiri v Poland/Husayn v Poland* (2015) 60 EHRR 16 found that such a site existed in Poland and that the claimant had been held in it, during which time he suffered grave breaches of his human rights. Similar findings were made in respect of Lithuania in *Abu Zubaydah v Lithuania* (Application No. 46454/11) (31st May 2018).

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

9. The claimant says that from 27th March 2004 until February 2005 he was detained at a "black site" facility in Morocco. On 17th or 18th February 2005 he was removed by CIA aircraft from Morocco to Lithuania, where he was detained at a "black site" facility until 25th March 2006, when he was removed by CIA aircraft to Afghanistan. He was detained in Afghanistan, again at a "black site" facility, from 25th March 2006 until a date in September 2006. In that month, the claimant was removed by CIA aircraft from Afghanistan to Guantánamo Bay, where he remains. It is contended in the Particulars of Claim that the claimant suffered arbitrary detention, torture and mistreatment in each of the "black site" facilities at which he was held.

The claim in this action

10. The claimant does not suggest that United Kingdom forces played any part in his capture or that United Kingdom authorities or personnel, including the Services, had any involvement in his rendition to any of the "black site" facilities or played any part in (or were present at) the treatment which he received. His case is that from at least May 2002 the Services were aware that he was being arbitrarily detained without trial at secret "black sites", where he was being subjected to extreme mistreatment and torture during interrogations conducted by the CIA. Notwithstanding that knowledge, from at least May 2002 until at least 2006, the Services sent numerous questions to the CIA, to be used in interrogations of the claimant for the purpose of attempting to elicit information of interest to them. They did so without seeking any assurances that the claimant would not be tortured or mistreated and no steps were taken to discourage or prevent such treatment during his interrogation sessions. It is, the claimant says, to be inferred that the Services sent the questions to the CIA in the knowledge and with the expectation and/or intention, or at the very least not caring, that the CIA would subject

him to torture and extreme mistreatment in order to obtain information from him in response to their questions.

11. The claimant contends that the defendants are vicariously liable for the torts thus committed by the Services, namely misfeasance in public office, conspiracy to injure, trespass to the person, false imprisonment, and negligence. The Particulars of Claim assert that the law applicable to the claim is the law of England and Wales, but plead in the alternative a case that the defendants are liable under the laws of each of the Six Countries where the mistreatment occurred, with particulars of the laws of each of those countries being set out.

12. The defendants' OPEN Defence (we have not seen any CLOSED material) asserts that they are unable to respond openly to all of the allegations made in the Particulars of Claim for reasons of national security. Their position, in summary, is that they do not plead to allegations made against the United States authorities (in particular the allegations concerning rendition and torture) and that they neither confirm nor deny the matters relied on by the claimant to establish their liability.

13. While it is difficult to be categorical without seeing any CLOSED Defence which may have been served, the availability of material in the public domain suggests that there is unlikely to be any serious dispute about the fact of the claimant's rendition to the various countries listed above, his detention at CIA "black sites", and that he was subject to treatment in those countries at the hands of the CIA which, in this jurisdiction, would be regarded as torture. The critical issue in the case seems likely to be whether the claimant will be able to prove his allegations that the Services were aware of the treatment to which he had been and was likely to be subjected when requests for questions to be asked were passed to the CIA.

14. The defendants have neither admitted nor denied either that they knew where the claimant was being held from time to time or that they knew how he was being treated. They say that they are unable to do so for reasons of national security. As we did not hear argument on whether this is a proper stance, I should not be taken as expressing any view about it. The result, however, is that there is no evidence from the Services, or even any assertion on their behalf, that they knew or cared in which country the claimant was being held from time to time when requests for information to be elicited from him were allegedly passed to the CIA. In these circumstances I would accept Mr Hermer's submission that there is no reason to think that the Services did know where the claimant was being held or, at the very least, if they did know, it was a matter of indifference to them.

The application for a preliminary issue

15. On 19th November 2020 the claimant's solicitors wrote to the Government Legal Department proposing that the issue of applicable law be determined as a preliminary issue prior to both sides incurring the substantial costs associated with instruction of relevant experts. This was agreed and in due course an order was made by consent that "the issue of the law applicable to the claimant's claim be determined as a preliminary issue …" That was the issue which came before the judge.

The provisions of the 1995 Act

16. The 1995 Act was passed following a Report from the Law Commissions (Law Com. No. 193, Scot. Law Com. No. 129) laid before Parliament on 11th December 1990.[1] It abolished the double actionability rule at common law and provided rules for determining the law applicable to claims in tort (or in Scotland, delict). Section 11 sets out the general rule:

> "11. **Choice of applicable law: the general rule.**
>
> (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
>
> (3) In this section "*personal injury*" includes disease or any impairment of physical or mental condition."

17. It is common ground that the claimant's claim is in respect of personal injury so that, unless displaced, section 11(2)(a) means that the applicable law is the law of each of the Six Countries. There may be an issue whether the law applicable in respect of treatment at Guantánamo Bay is the law of the United States or Cuba, but that does not matter for present purposes.

18. The claimant contends, however, that the effect of section 12 of the 1995 Act is to displace the law of the Six Countries in favour of the law of England and Wales. Section 12 provides:

> "12. **Choice of applicable law: displacement of general rule.**
>
> (1) If it appears, in all the circumstances, from a comparison of—

[1] The English commissioners were Mr Justice Peter Gibson, Mr Trevor Aldridge, Mr Jack Beatson, Mr Richard Buxton QC and Professor Brenda Hoggett QC.

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

19. There is also an issue relating to section 14 of the 1995 Act, to which I will return later in this judgment.

The approach to section 12

20. The approach to be adopted when considering whether the general rule is displaced pursuant to section 12 has been considered in a number of cases. It is sufficient at this stage to refer to the decision of the Supreme Court in *VTB Capital Plc v Nutritek International Corpn* [2013] UKSC 5, [2013] 2 AC 337. The fullest treatment of the issue is contained in the judgment of Lord Clarke, who said:

> "203. I turn to section 12. At para 149 the Court of Appeal identified these further four principles:
>
> '(7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule.[2] (8) At this stage there has to be a comparison between the significance of those factors with the significance of any factors connecting the tort or delict with any other country. The question is whether, on that comparison, it is 'substantially more appropriate' for the applicable law to be the law of the other country so as to displace the applicable law as determined under the 'general rule'. (9) The factors which may be taken into account as connecting a tort or delict

[2] I note that this will be so when the general rule is derived from section 11(2)(c) ("the law of the country in which the most significant element or elements of those events occurred"), as was the position in *VTB Capital v Nutritek*. It will not be so in the case of personal injury, death or damage to property, when section 11(2)(a) or (b) applies, so that ascertainment of the general rule requires nothing more than identification of the location of the individual or property concerned: no determination of the significance of connecting factors is required at that stage.

> with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the 'elements of the events constituting the tort' in section 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict. (10) In particular the factors can include (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict.'

204. In every case to which the 1995 Act applies in which the court has considered the general rule under section 11, the court must consider whether the general rule is displaced under section 12. There is an illuminating discussion of the general approach in *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed, para 35-148. The editors say that the application of the displacement rule in section 12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the *tort*[3] with the country the law of which would be applicable under the general rule (in this case English law) and the significance of any factors connecting the *tort* with another country (here Russia). The word *tort* is italicised in the text in *Dicey*. The editors say that secondly, it then has to be asked, in the light of the comparison, whether it is 'substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues,' to be the law of that other country.

205. The editors note that the general rule has been displaced on very few occasions. They further observe that, although section 12 applies in all cases to which section 11 applies, it would seem that the case for displacement is likely to be most difficult to establish in the case of section 11(2)(c) because the application of that provision itself requires the court to identify the country in which the most significant element or elements of the tort are located. Importantly they stress the use of the word 'substantially', which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of

[3] Lord Clarke's emphasis, although the italics do not appear in the Official Law Report. The emphasis is important.

> factors declared relevant by section 12(2) which point to the law of the other country.
>
> 206. That approach is borne out by the cases. The idea that 'substantially' was the key word was derived from the judgment of Waller LJ in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 WLR 2304, at para 12(v). The principles were considered in more detail by Brooke LJ in *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621 at paras 103 and 104, where he noted that the 1995 Act derived from a report of the Law Commission, from which he quoted. He added that Lord Wilberforce, who was a member of the House of Lords Committee which considered the Bill, had expressed the view that it would be a 'very rare case' in which the general rule under section 11 would be displaced: 'Prima facie there has to be a strong case'."

21. In *VTB Capital v Nutritek* the error which the Court of Appeal had made was to hold that the general rule (which pointed to English law under section 11(2)(c) as the law of the country in which the most significant elements of the events constituting the tort had occurred) was displaced by the fact that the "centre of gravity" of the dispute was Russia, thus pointing to Russian law. However, the Supreme Court held that the question of applicable law raised narrower considerations than would apply when considering issues of *forum conveniens*. In particular, it was essential to focus on the conduct which constituted the particular tort in issue. Accordingly the Supreme Court held that English law applied: the claimant was an English entity, induced to enter into a facility agreement in England, which suffered loss in England when it discharged its obligations under the facility. The Russian connections were insufficient to displace the general rule. It must in any event be very unusual, as *Dicey* points out, for a general rule ascertained under section 11(2)(c), as distinct from section 11(2)(a) or (b), to be displaced by reason of section 12.

22. It is apparent from the Report of the Law Commissions that one of the principles on which the 1995 Act is founded is that the law applicable to a claim in tort should, so far as possible, accord with the parties' reasonable expectations. Indeed this is a principle which underpins private international law generally, as *Dicey* explains (15th ed, para 1-005):

> "**Justification**. What justification is there for the existence of the conflict of laws? Why should we depart from the rules of their own law and apply those of another system? This is a vital matter on which it is necessary to be clear before we proceed any further. The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence. …"

23. Thus the Law Commission Report explains the essential rationale for the proposals which were enacted in the 1995 Act as being to give effect to the parties' reasonable expectations:

> "3.2 … It is built upon part of our existing law and accords with the law throughout much of the rest of Europe. It would promote uniformity and discourage forum shopping. To the extent that the parties have any expectations at all, a general rule based on the applicability of the *lex loci delicti* probably accords with them. Where, as will often happen, one of the parties is connected with the place of the wrong, as where he is habitually resident there, it is right that he should be able to rely on his local law. As for the person who acts in a country with which he has no lasting connection, he can expect that if he commits a wrong he will be liable to the extent that the law in question stipulates. Similarly if he has a wrong committed against him, he can expect to have no more preferential treatment than if the wrong had been committed against somebody habitually resident there."

24. Elsewhere the Report refers to the fact that "Most people are familiar with the idea of the territoriality of law, so that, if they commit a wrong abroad they can expect the particular country's law to govern their liability" (para 3.17). Although the context of this paragraph was the law which should apply to torts committed within the United Kingdom, it is apparent that here too the governing principle is the parties' reasonable expectations. Accordingly when considering the open textured language of section 12 ("substantially more appropriate"), it is relevant to ask to what extent the law which would apply under the general rule in section 11 gives effect to the parties' reasonable expectations. The same paragraph of the Report refers to another principle of the conflict of laws, namely "that justice is done to a person if his own law is applied".

25. Drawing the threads together, it is apparent that the court must approach section 12 in a structured way. First, it must identify the factors which connect a tort with the country whose law would be applicable under the general rule (in this case, the laws of the Six Countries) and assess their significance. This requires the court to focus on the conduct of the defendant which is alleged to be wrongful (i.e. the tort). It is their significance in connection with that conduct which matters. The court must then undertake the same exercise for the country whose law is suggested to displace the general rule. Having assessed the significance of the factors connecting the tort with each of the competing candidates, the court must decide whether it is *substantially* more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, thereby displacing the general rule. In considering this question, the parties' reasonable expectation as to the law which will apply is likely to be an important factor. This is a fact specific evaluation, but it is not a typical balancing exercise in which the scales are equally balanced at the outset. Rather, they are heavily weighted in favour of the general rule, which will only be displaced in a clear case. An appellate court will not interfere with the judge's evaluation unless he has gone wrong in law or has reached a conclusion not reasonably open to him.

The judgment

26. After stating the facts and reviewing the case law (to which I shall come), Mr Justice Lane began by addressing the factors that connected the tort with the Six Countries. He identified two such factors, the first being that this is where the injuries sustained by the claimant occurred, which the judge said was significant in the sense that it was the reason why the general rule in section 11(2)(a) applied. The judge's second factor was

that those causing the injury to the claimant, his CIA gaolers and interrogators, were physically present with him when the injuries were caused, although on the facts of this case this was in reality the inevitable corollary of the judge's first factor.

27. The judge then identified three points which the claimant contended should reduce the significance of those factors. The first was that the "black sites" within each of the Six Countries were deliberately chosen by the CIA in order to be free to act with impunity, irrespective of the laws of the country in question. The judge accepted that, leaving aside Guantánamo Bay, "it seems the sites were selected because the CIA had reason to believe that, in particular because of its relationship with the Security Services of the country concerned, the interrogations of the claimant could take place clandestinely, without the laws of that country being invoked in practice in respect of the claimant". However, the judge considered that this made no difference: even though the CIA had selected the "black sites" in the knowledge and expectation that the laws of the country concerned would not be invoked against it, the laws of those countries had still applied to its activities and had not "in some way ceased to exist". The treatment of the claimant had not taken place in a legal "black hole".

28. The claimant's second argument was that the significance of the injuries occurring in the Six Countries was reduced because the claimant had no control over his presence in those countries: unlike the traveller who goes abroad voluntarily and would expect that his conduct abroad and those of others whom he encounters will be governed by the laws of the country concerned, the claimant had been taken to the Six Countries against his will. The judge said that there was "some force" in this point, but it did not "serve to reduce to any material extent the significance of the claimant's injuries being sustained in the Six Countries, against the background of the pleaded laws of those countries". He did not explain why not.

29. Finally, the claimant contended that it was unclear whether the Services were aware of the places where the claimant was being interrogated. The judge appears to have accepted that the Services were indifferent to the countries chosen by the CIA for the "black sites" but said that this point had no material impact. He added:

> "60. … The locations to which the CIA took the claimant were not 'incidental', as far as that agency was concerned; and it was the CIA that caused the injuries to the claimant."

30. The judge then turned to the factors connecting the tort with England and Wales. He said that the claimant had no expectation that any claim would be governed by the law of England and Wales. He identified three factors on which the claimant relied. These were (1) the actions of the Services said to give rise to liability on the part of the defendants (i.e. submitting questions to the CIA) were more likely than not to have taken place in England, (2) the Services' actions were undertaken for the perceived benefit of the United Kingdom, and (3) the defendants were all "emanations of the UK state". The judge said that he was prepared to accept that all of this was so. However, it was of limited significance. This is an important aspect of the judge's reasoning, so I set it out:

> "62. For present purposes, I am prepared to accept that all of this is so. Its significance for the determination of the applicable law is, however, in my view limited. Any provision of information

> to be used in interrogation by the CIA was a component in the overall exercise undertaken by the CIA. It was the methods adopted by the CIA in putting the questions to the claimant that are said to have occasioned the physical and psychological harm to him."

31. The judge added that the claimant was not a British citizen; he had never had leave to enter or remain in the United Kingdom and there was no indication that he had ever been to the United Kingdom or been under the physical control of any United Kingdom force or entity.

32. The judge then turned to the comparison between the significance of the factors pointing in each direction. In view of his conclusions thus far (1) that the significance of the factors pointing to the Six Countries was not reduced to any material extent by the arguments advanced by the claimant, and (2) that the factors relied on by the claimant as pointing to England were of only limited significance, the comparative exercise which the judge had to undertake almost answered itself. The judge concluded, therefore, that the general rule in favour of the Six Countries was not displaced. However, it is worth setting out part of his reasoning because it illustrates his overall approach:

> "69. Whilst I accept the information allegedly provided to the CIA is more likely than not to have come from officials of SIS/SyS who were, at the time, in England, the significance of this imparting of information in the context of the present claim is limited because it is only an element of the overall treatment of the claimant by the CIA in the Six Countries. …"

Submissions

33. For the claimant Mr Hermer submitted that the judge had failed to focus on the tort allegedly committed by the Services. That consisted of the supply of questions to the CIA in the knowledge and expectation that the CIA would subject the claimant to torture and extreme mistreatment in order to obtain the information sought. Instead the judge had focused on the conduct of the CIA, describing the actions of the Services as no more than one "component in the overall exercise undertaken by the CIA" (at [62]) or "an element of the overall treatment of the claimant by the CIA in the Six Countries" (at [69]). This, submitted Mr Hermer, was the judge's "overarching" error. Further, in assessing the significance of the various factors, the judge was wrong in law to reject the submissions made by the claimant as reducing the significance of the factors connecting the tort to the Six Countries and as demonstrating the significance of the factors connecting the tort to England and Wales.

34. For the defendants Mr Blundell reminded us that we are concerned with a question as to the applicable law to claims in tort, not with the trial of the action. He submitted that the application of section 12 of the 1995 Act requires a broad evaluative assessment by the first instance judge in which a wide range of factors can be taken into account. The judge had considered all the factors on which the claimant relied and had determined what weight if any to give them. This was a matter for him. The requirement that it must be "substantially" more appropriate for a law other than that determined by the general rule to apply means that the scales are heavily weighted in favour of the general

rule. Mr Blundell supported the judge's reasoning and pointed to cases which, he said, were similar on the facts, in none of which had the general rule been displaced, albeit he recognised that each case depended on its own facts. These were *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621, *Belhaj v Straw* [2013] EWHC 4111 (QB), [2014] EWCA Civ 1394, [2017] AC 964, *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), and *Rahmatullah v Ministry of Defence* [2019] EWHC 3172 (QB).

35. Neither party drew any distinction for the purpose of the debate about the applicable law between the different torts on which the claimant relies. For example, nobody suggested on the facts of this case that one applicable law might apply to the tort of misfeasance in public office and another to the tort of false imprisonment. Both parties proceeded on the basis that the law applicable to the claimant's claims as a whole was either English law or the law of the Six Countries. I shall do the same. I would add that different considerations might have arisen if this were simply a claim in false imprisonment. However, it is clear that the gravamen of this claim is that the Services requested the CIA to obtain information from the claimant, with knowledge (as he alleges) of the treatment to which he was likely to be subjected as a result.

Analysis

36. Approaching the section 12 exercise as a matter of principle, I accept Mr Hermer's submission that the judge made three important errors of law which vitiate his conclusion.

37. First, the judge did not focus on the wrongful conduct allegedly committed by the Services. The alleged tortious conduct consisted of the sending of requests to the CIA in the knowledge or expectation that this would result in the torture or extreme mistreatment of the claimant. Instead, the judge viewed the Services' conduct as no more than one component "in the overall exercise undertaken by the CIA" (at [62]) or as "only an element of the overall treatment of the claimant by the CIA in the Six Countries" (at [69]). That may be a valid way of looking overall at what happened to the claimant, but this is not a claim against the CIA. What section 12 requires is a focus on the tort committed by the defendants (or those for whom they are responsible). In this respect the judge's error was similar to the error which the Supreme Court in *VTB Capital v Nutritek* held to have been made by the Court of Appeal.

38. Second, the judge was wrong to discount the reasons advanced by the claimant for saying that the factors connecting the tort with the Six Countries were of reduced significance. There are three points here:

    (1) The claimant had no control whatever over his location and in all probability no knowledge of it either. The case is as far as it is possible to be from the scenarios contemplated by the 1995 Act (and the Law Commission Report which led to it) where a claimant travels voluntarily to a foreign country, thereby submitting himself to its laws, and suffers personal injuries there.

    (2) So far as the Services were concerned, the claimant's location from time to time was irrelevant and may well have been unknown. There is no evidence or even assertion that the Services ever took steps to find out where the claimant was. It is fanciful (and has not been alleged) that the Services ever considered that they were

submitting themselves successively to the laws of Thailand, Poland, the United States (or possibly Cuba), Morocco, Lithuania and Afghanistan or that they ever expected or intended their conduct to be judged by reference to those laws.

(3) There is no reason to doubt that the claimant was rendered to the Six Countries precisely because this would enable him to be detained and tortured outside the laws and legal systems of those countries. This is starkly illustrated by the claimant's rendition from Guantánamo Bay to Morocco in March 2004, allegedly in order to avoid an expected ruling by the United States Supreme Court which would have enabled detainees to challenge the legality of their detention at Guantánamo Bay. (In this connection I note that the Senate Report found that the United States Supreme Court decision in the case of *Rasul v Bush* 542 U.S. 466 (2004) prompted the CIA to move a number of detainees out of Guantánamo Bay). The claimant was for all practical purposes detained throughout in a series of legal "black holes", beyond the reach of any legal system. It can reasonably be assumed for the purpose of this appeal, and in any event is an element of the tort alleged against the defendants, that the Services were aware that the claimant was being held in this way even if they did not know where he was being held at any given time. The fact that, in theory, the claimant's treatment may have been contrary to the laws of the Six Countries in which he was detained does not detract from this analysis.

39. In these circumstances, when proper regard is had to the principles on which the 1995 Act is based, the *significance* of the factors connecting the tort with the Six Countries is minimal. The judge did not have proper regard to those principles and, as a result, his assessment was wrong in law.

40. Third, as already explained, the judge's dismissal of the factors connecting the tort with England and Wales was largely the result of his view that the Services' conduct was merely one component "in the overall exercise undertaken by the CIA". But when those connecting factors are viewed in the context of the tortious conduct alleged against the Services, they cannot be so easily dismissed. The judge accepted that the Services' conduct in requesting information from the CIA was more likely than not to have taken place in England. It would therefore be in accordance with the principle of territoriality for the legality of that conduct to be determined in accordance with English law. He accepted that the actions taken by the Services were undertaken "for the perceived benefit of the UK", that is to say in the interests of this country's national security. That is or at least may be an important consideration in assessing their conduct. And they were taken by United Kingdom executive agencies acting in their official capacity in the exercise of powers conferred under United Kingdom law. The Services were undoubtedly subject to UK criminal and public law, and the fact that executive bodies are subject to English tort law has for centuries been a recognised means of holding the executive to account, controlling abuse of power and ensuring the rule of law (e.g. *Entick v Carrington* (1765) 2 Wils KB 275).

41. These are strong connections connecting the tortious conduct with England and Wales. They reflect also the parties' reasonable expectations. While it is true that the claimant himself had no connection with this country, he could reasonably have expected, if he had thought about it during the 20 years in which he has been detained, that the conduct of any country's security services having to do with him would be governed by the law of the country concerned. As for the Services, they would reasonably have expected

that their conduct here would be subject to English law. That seems obvious, but the judge did not mention it.

42. Because of the three errors which I have identified, the judge's comparative exercise was undertaken on a mistaken basis. The judge ought to have concluded that, so far as the torts allegedly committed by the Services were concerned, the significance of the factors connecting the torts with the Six Countries was minimal, while the significance of the factors connecting the torts with England and Wales was very substantial. In my judgment, once the comparison is approached from the correct perspective, the only possible conclusion, even after giving considerable weight to the general rule in section 11, is that it is substantially more appropriate for the applicable law in this case to be the law of England and Wales than the laws of the Six Countries. This conclusion gives effect to the principles on which the 1995 Act is founded, including the reasonable expectations of the parties, and to the general principle of private international law identified by the Law Commission "that justice is done to a person if his own law is applied". In contrast with the position in some of the cases which I shall now consider, the Services can hardly say that it would be unfair (or to use the statutory term, inappropriate) for their conduct to be judged by the standards of English law, as distinct from (for example) Lithuanian or Moroccan law.

The cases

43. I must next consider whether the cases relied on by Mr Blundell call this conclusion into question. Mr Blundell did not go so far as to suggest that they dictate a different conclusion, recognising as he did that each case depends on its own facts, but did nevertheless rely on them as pointing to the application of the laws of the Six Countries in this case.

44. The first case was *Al-Jedda*. The claimant, a dual British and Iraqi national, travelled to Iraq where he was arrested and interned in a detention centre operated by British forces. He sought judicial review of his detention, on the ground that it was contrary to his right to liberty under Article 5 ECHR. His claim failed on the ground that even though the European Convention applied to a person detained by British forces operating in Iraq, the United Kingdom's obligations under the applicable United Nations Security Council Resolution prevailed over its obligations under the European Convention. Iraqi law was held to be the law applicable to the claimant's common law claim. That was the applicable law under section 11(2)(c) (there was no claim for personal injury or damage to property) and the general rule was not displaced. The critical reason was that the British troops operating in Iraq were operating under Iraqi law which had been specially adapted to give the multi-national force operating there the necessary powers to intern suspects in accordance with the Security Council resolutions. In those circumstances, said Lord Justice Brooke at [106], "it would be very odd if the legality of Mr Al-Jedda's detention was to be governed by the law of England and not the law of Iraq". The context for this statement is important: the application of Iraqi law to the conduct of British forces operating in Iraq in accordance with the Security Council resolutions gave effect to the reasonable expectations of the parties; to have applied English law, thereby depriving British forces of the specific protections which the incorporation of the Security Council resolutions into Iraqi law was designed to give them, would have defeated their reasonable expectations. In the House of Lords ([2007] UKHL 58, [2008] AC 332) it was held at [40] to [43] that the Court of Appeal had made no error of law in dealing with this issue.

45. *Belhaj v Straw* is on its facts the case most similar to the present case. The claimant, a Libyan national, was abducted in Thailand by United States agents and rendered to Libya on a jet aircraft owned by a CIA front company. He was mistreated during the flight, on arrival in Tripoli and during a period of four years while he was held in prison in Libya. The claim against the defendants was that they had participated in his unlawful abduction and removal to Libya and had colluded in his mistreatment. Mr Justice Simon held that the applicable law under section 11 was the law of the countries where the claimant had been detained and mistreated. That law was not displaced by section 12: the conduct alleged against the defendants was complicity in unlawful detention, rendition and mistreatment which, even though the defendants were acting in purported exercise of state authority, occurred in locations which were not under United Kingdom control. The Court of Appeal dealt with this issue shortly, saying at [144] to [148] that the judge had made no error in applying the relevant sections of the 1995 Act. Two points are important for an understanding of this case. The first is that the allegation against the defendants was of complicity in what had happened to the claimant, that allegation being supported by a letter from Sir Mark Allen CMG, said to the Director of Counter-Terrorism of the Secret Intelligence Service to the head of the Libyan External Security Organisation congratulating him on the successful rendition of the claimant to Libya and, in effect, claiming part of the credit for delivering him to the Libyan authorities ("the least we could do for you"). That is an important distinction from the present case, where no such complicity is alleged. The second is that the context in which the issue arose was largely concerned with who had the burden of pleading the applicable provisions of foreign law, a point which does not arise here. The case subsequently went to the Supreme Court ([2017] UKSC 3, [2017] AC 964), but not on the issue of applicable law.

46. In *Serdar Mohammed* the claimant was captured by British forces in Afghanistan and was imprisoned on British military bases. He claimed that his detention was unlawful under the Human Rights Act 1998 and under the law of Afghanistan. It was common ground that the applicable law was the law of Afghanistan, the issue being whether the claim was unenforceable on the ground that the claimant's detention was an act of state. This common ground is not surprising: British forces were operating in Afghanistan pursuant to UN Security Council resolutions under a broadly equivalent regime to that which had applied in Iraq. Again therefore, the application of the law of Afghanistan gave effect to the parties' reasonable expectations.

47. Finally, in *Rahmatullah* the claimants were Pakistani nationals captured by British forces in Iraq who were subsequently handed over to United States control and, thereafter, taken to Afghanistan where they contended that they were subjected to prolonged detention, torture and mistreatment. It was common ground that as the loss and damage alleged to have been sustained by them had occurred in Iraq and Afghanistan, the applicable law under section 11 (i.e. the general rule) was the law of those countries, unless displaced by section 12. The claimants advanced similar arguments to those advanced by Mr Hermer in this case, including that the locations where they were detained were outwith the auspices of the authorities of Iraq and Afghanistan, that the claimants were not voluntarily in Afghanistan but were there as a result of extraordinary rendition (although this latter argument did not apply to their presence in Iraq), and that those in senior positions who were to be held accountable were based in England and were acting in the exercise of state authority. Mr Justice Turner held at [35] that these factors were not sufficient to displace the general rule. It

is, however, fair to say that beyond saying that he had given careful consideration to all of the factors relied upon by the claimants and that it would be disproportionate to list all of the factors in full, he did not explain why not.

48. These cases enabled Mr Blundell to submit that (1) the fact that the claimant was within United Kingdom jurisdiction for the purpose of the ECHR was not *in itself* (my emphasis) sufficient to displace the general rule (*Al-Jedda*); (2) nor was the fact that a claimant had been arrested by British forces (*Al-Jedda*, *Serdar Mohammed, Rahmatullah*); (3) nor was the fact that the claimant had been detained by British forces (*Al-Jedda*, *Serdar Mohammed*, *Rahmatullah*); (4) nor was the involvement of officers of the Services in the claimant's detention and rendition (*Belhaj*); and (5) nor was the passing of intelligence between United States and British intelligence services (*Belhaj*).

49. While this submission is in a sense correct, in that it reflects the outcome of the cases, I have explained why *Al-Jedda* and *Serdar Mohammed* accord with the principle that the applicable law should where possible accord with the parties' reasonable expectations; little weight can be given to *Rahmatullah* (where the judge's reasoning was, with respect, somewhat thin: in any event the case stands for no principle and is not binding on us); and despite some factual similarities with *Belhaj*, there are also important distinctions. More importantly, it is not helpful to reason that because the general rule was not displaced in those cases, it should not be displaced in the present case. Each case depends on its own facts and what matters are the principles according to which section 12 should be applied.

50. I have sought to set out the relevant principles earlier in this judgment and to explain why, in my view, they lead to the firm conclusion that the applicable law in this case is English law. In my judgment nothing in the cases to which we were referred calls that conclusion into question.

Section 14

51. In view of my conclusion that the general rule which would apply under section 11 is displaced as a result of section 12, the further issue whether the application of the laws of the Six Countries would be contrary to English public policy does not arise. Nevertheless we heard argument on this issue and I will deal with it briefly.

52. Section 14 of the 1995 Act provides so far as relevant as follows:

> "14. **Transitional provision and savings.**
>
> …
>
> (2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.
>
> (3) Without prejudice to the generality of subsection (2) above, nothing in this Part—
>
> (a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so—

(i) would conflict with principles of public policy…"

53. The judge held, and made a declaration accordingly, that none of the laws of the Six Countries which were applicable pursuant to section 11 of the 1995 Act fell to be disapplied under section 14 "on the basis that they are contrary to public policy".

54. Before the judge a number of points arose as to the impact of English public policy on the claim. One of those points arose because the defendants pleaded reliance on provisions of foreign law which, they said, afforded them immunity against the claimant's claim in this action. That plea has now been abandoned and it is therefore unnecessary, even if the laws of the Six Countries apply, to decide whether reliance on such immunity would be contrary to public policy.

55. However, Mr Hermer's main submission on section 14 in the court below, and his only submission in this court, was that it is premature to decide issues of public policy at this stage: that should await evidence as to the content of any applicable foreign law and a proper understanding of how that law affects the claimant's claim. He submitted, therefore, that the judge ought not to have determined any issues under section 14.

56. It appears that the parties were at cross purposes when agreeing that the issue of applicable law should be determined as a preliminary issue. Those advising the claimant understood that the issue to be determined would be whether the applicable law was English law or the law of the Six Countries pursuant to sections 11 and 12 of the 1995 Act. Those advising the defendant, however, understood that the issue would extend also to issues of public policy under section 14.

57. In my view there is some force in the submission that to decide these issues now is premature. Sometimes a foreign law may be inherently objectionable, so that its application in proceedings here will necessarily be contrary to public policy. The example commonly given is Nazi laws against Jewish citizens (*Oppenheimer v Cattermole* [1976] AC 249). However, section 14 is not limited to such inherently objectionable laws. It applies to any foreign law whose *application* would be contrary to English public policy, but only to the extent of such conflict. That is necessarily a fact sensitive question, although "conflict with principles of public policy" is a demanding test which should not be watered down. It should not become (as Mr Justice Turner said in *Rahmatullah* at [42]) a backdoor route to the application of English law when sections 11 and 12 point to the application of a foreign law. At times Mr Hermer's submission appeared to be that *any* provision of foreign law which would deprive the claimant of a remedy to which he would have been entitled if English law applied would necessarily be contrary to public policy. That, it seems to me, is far too wide a proposition.

58. In the present case, although the defendants have pleaded the provisions of the laws of the Six Countries on which they rely, the claimant has not yet served any Reply. That would be the place, in my judgment, for the claimant to set out any case that the application of those laws to the claimant's claim would be contrary to public policy ("If that is what foreign law says, its application in this case would be contrary to public policy because …"). Until that has been pleaded out, I would accept that it is premature to decide these issues. That said, in view of the order for the determination of a preliminary issue as to the applicable law, without addressing the question whether this

did or did not extend to issues of public policy under section 14, it is not surprising that the judge decided to deal with those issues as they stood at the hearing before him.

59. However, because I would hold that English law applies under section 12, it is unnecessary to say anything further about public policy under section 14.

Disposal

60. I would allow the appeal and set aside the order made by the judge. I would declare that the law applicable to the claimant's claim is the law of England and Wales.

Lady Justice Thirlwall:

61. I agree.

Dame Victoria Sharp PQBD:

62. I also agree.